Defining “Organ of a Foreign State” under the Foreign Sovereign Immunities Act of 1976

Michael A Granne, Seton Hall University School of Law
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Michael A. Granne

ABSTRACT

Many foreign states are active players in global commerce. When these states establish or control a global enterprise, those entities often seek special treatment available under the Foreign Sovereign Immunities Act. Courts only allow such special treatment to enterprises that are considered an “organ of a foreign state,” a murky term undefined in the statute and undertheorized in the literature. In this Article, I argue that the analysis of when a particular enterprise should be considered an “organ” must focus on whether the denial of sovereign status to the enterprise has the potential for interference with the United States’ diplomatic relationship with the relevant foreign state.

This issue arose in a recent case in which the Supreme Court granted certiorari in 2007 on whether a Canadian power company was an “organ,” but has remained unresolved for the short term since the Court dismissed the case on jurisdictional grounds. Its importance will only increase, however, as a result of the increasingly tight web of globalization and the concurrent explosion in the number and variety of entities with significant ties to foreign sovereigns, such as Public/Private Partnerships and Sovereign wealth funds, will only increase litigation of this issue.

To measure the potential for interference with the conduct of foreign relations, courts must look at the extent to which the sovereign would be justifiably affronted if the entity were not treated as its organ. In creating a workable standard by which to measure this risk, I borrow heavily from the conceptually similar doctrines of the “arm of the state” in Eleventh Amendment jurisprudence and “alter ego” veil piercing in Corporate Law. Ultimately, my proposal synthesizes the existing precedent with those inquiries and provides a coherent approach to resolving the confusion surrounding how far the sovereign’s cloak should be spread over related entities.

* Visiting Assistant Professor of Law, Seton Hall University School of Law; A.B. 1997, Duke University; J.D. 2002, Columbia Law School. This Article greatly benefited from comments and criticisms by Tim Glynn, Charles Sullivan, Kristen Boon, Angela Carmela, Dimitri Portnoi and David Oderbeck; from research assistance by Jason Brown; and irreplaceable training from the Honorable Walter K. Stapleton.
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DEFINING “ORGAN OF A FOREIGN STATE”

INTRODUCTION

The Foreign Sovereign Immunities Act of 1976 (FSIA) provides the exclusive vehicle for lawsuits against foreign sovereigns and their agencies and instrumentalities.\(^1\) It provides them with presumptive immunity,\(^2\) to be abrogated only if one of the statutory exceptions applies,\(^3\) and other valuable procedural protections\(^4\) that apply regardless of the ultimate decision on immunity.\(^5\) For entities that seek treatment as an agency or instrumentality, the key question is whether the entity is an “organ” of a foreign state.\(^6\) Congress left this term undefined in the statute and courts have struggled with it ever since.\(^7\)

The importance of this issue cannot be denied—the Supreme Court granted certiorari in 2007 on whether a Canadian power company was an “organ,”\(^8\) although it dismissed the case on jurisdictional grounds.\(^9\) Ever increasing globalization\(^10\) and the concurrent explosion in the number and variety of entities with

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\(^4\) See infra notes 51-61 and accompanying text. See generally Mary Kay Kane, Suing Foreign Sovereigns: A Procedural Compass, 34 STAN. L. REV. 386, 393-96 (1982).


\(^6\) The FSIA defines “agency or instrumentality” as a separate legal entity, that is either owned by or an organ of a foreign state or one of its political subdivisions and is not a citizen of the United States nor organized under the laws of a third country. See 28 U.S.C. § 1603(b). Because there is no distinction between the organ of a foreign state and the organ of a political subdivision thereof, I will henceforth refer only to organs of foreign states.

\(^7\) See USX Corp. v. Adriatic Ins. Co., 345 F.3d 190, 206 (3d Cir. 2003).

\(^8\) Powerex Corp. v. Reliant Energy Servs., ___ U.S. ___, 127 S. Ct. 1144 (2007) (granting certiorari on the question of whether Powerex was an organ of a political subdivision of Canada and directing the parties to brief the question of whether removal jurisdiction was properly exercised by the lower courts).


\(^10\) The legislative history notes that the increasing frequency of interactions and potential disputes between Americans and foreign state entities was one of the factual predicates for the codification of the FSIA. H. R. REP. NO. 94-1487, pp. 6-7 (1976) [Hereinafter, House Report]. See also Mark B. Feldman, The United States Foreign Sovereign Immunities Act of 1976 in Perspective: A Founder’s View, 35 INT’L & COMP. L.Q. 302, 202 (1986).
significant ties to foreign sovereigns, such as Public/Private Partnerships (PPPs) and Sovereign wealth funds, will only increase litigation of this issue.\footnote{It also bears noting that the “organ” question has taken on a more prominent role since the Supreme Court’s decision in \textit{Dole v. Patrickson} in 2003. In \textit{Dole}, the Court held that the other method of achieving agency or instrumentality status, showing majority ownership by a foreign government, required that the shares be directly held by the government. 538 U.S. 468, 480 (2003). This overturned the precedent in many circuits, which allowed interests to be traced back through the governments through other corporate (or other types of) separate entities. Before \textit{Dole}, the majority of entities argued that they were owned by the foreign state. \textit{See}, \textit{e.g.}, \textit{Kelly} v. Syria Shell Petro. \textit{Dev. B.V.}, 213 F.3d 841, 846 (5th Cir. 2000) (noting that most cases used “ownership” rather than “organ” to determine agency or instrumentality status).\footnote{\textit{See}, \textit{e.g.}, \textit{Yessenin-Volpin} v. Novosti Press Agency, 443 F. Supp. 849, 852 (S.D.N.Y. 1978) (noting that the definition of agency or instrumentality “is ill-suited to concepts which exist in socialist states such as the Soviet Union”).} Despite this, commentators have largely ignored the issue, passing over it without significant discussion if they even mentioned it. Some noted simply that Congress provided “organ” as an alternative to fill the gaps left by other parts of the definition of agency or instrumentality.\footnote{\textit{See EIE} Guam Corp. v. Long Term Credit Bank of Japan, Ltd., 322 F.3d 635, 640 (9th Cir. 2003).\footnote{\textit{Compare} Intercontinental Dictionary Series v. DeGruyter, 822 F. Supp 662 (C.D. Cal 1993) (holding that an Australian university was an organ of the foreign state), \textit{with} Supra Med. Corp. v. McGonigle, 955 F. Supp 374 (E.D. Pa. 1997) (holding that English medical and dental schools were not organs). \textit{See also infra} notes 136-46 and accompanying text.}} The most lengthy discussion simply

The lower courts have struggled to create a definition of “organ” that addresses the wide variety of structures and political and economic systems that spawn them.\footnote{\textit{See}, \textit{e.g.}, \textit{Filler} v. Hanvit Bank, 378 F.3d 213 (2d Cir. 2004), and \textit{Kelly}, 213 F.3d at 841.} The majority follow a multi-factor balancing test that focuses on the control that the foreign government can or does exert over the entity.\footnote{\textit{See} \textit{ infra} notes 136-46 and accompanying text.} Others apply the so-called “public activity” test, asking whether an entity performs some public function for the foreign state. However, they consider many of the same factors in practice.\footnote{\textit{See Working Group of the American Bar Association, Reforming the Foreign Sovereign Immunities Act}, 40 COLUM. J. TRANSNAT’L L. 489, 516 (2002) (Hereinafter, ABA Report).}

Each of these tests has lead to unpredictable and, occasionally, arbitrary results.\footnote{\textit{See} \textit{ infra} notes 136-46 and accompanying text.}
reformulated and reorganized the existing doctrines without providing any comprehensive review.\footnote{See Joseph W. Hardy, Jr., Note, Wipe Away the Tiers: Determining Agency or Instrumentality Status Under the Foreign Sovereign Immunities Act, 31 GA. L. REV. 1121, 1173-80 (1997); Abigail H. Wen, Note Suing the Sovereign’s Servant: the Implications of Privatization for the Scope of Foreign Sovereign Immunities, 103 COLUM. L. REV. 1538 (2003) (arguing that a statutory amendment is required to address many private actors’ ties to foreign states and the concurrent effects on foreign relations).}

This article will show that these approaches fail on a number of grounds. First, they have never considered the broader question of what characteristics should identify an organ. In arriving at the factors for the balancing and the public activity inquiries, the first courts simply described the entity they saw before them while making the organ finding.\footnote{See Corporacion Mexicana de Servicios Maritimos, S.A. v. M/T Respect, 89 F.3d 650, 654-55 (9th Cir. 1996); Intercontinental Dictionary Series, 822 F. Supp at 673.} The next set of courts generalized the specific characteristics that the first courts had chosen to mention to make up various factors to be balanced against each other. Those generalizations became the norms for organ status.\footnote{See Supra Med. Corp., 955 F. Supp, at 379.} This lack of any coherent foundation contributes to the contrary results that courts have reached on the organ question.

Second, these inquiries have an improper focus. In attempting to define what Congress left undefined, Congressional intent must be the goal. Congress’s two chief goals in enacting the FSIA were to reduce the interference with the conduct of foreign relations caused by litigation in United States courts against foreign sovereigns and to delegate the application of foreign sovereign immunity decisions to the judicial branch both to depoliticize them and to provide uniformity and predictability in judgment.\footnote{See House Report, supra note 10, pp. 6-7.} More specifically, the term “organ” is embedded in the definition of an agency or instrumentality of a foreign state and the legislative history shows that Congress intended it to cover a wide variety of entities, ranging from central banks to mining and shipping enterprises.\footnote{See id. at 15-16.} An inquiry based on either control or the public nature of the entity’s principal activity simply fails to address Congress’s intent properly.

Third, this article will show that the implications of the important procedural protections that the FSIA extends to foreign
states and their agencies and instrumentalities have been ignored. Each of these protections\textsuperscript{22} was intended to limit the potential annoyance to the foreign sovereign.\textsuperscript{23} For example, the broad grant of federal jurisdiction and absolute right to removal regardless of the nature of the claims or the consent of other defendants avoids local bias, whether real or imagined, in suits against foreign states.\textsuperscript{24} Similarly, the requirement of a bench trial allows for and addresses foreign states’ unfamiliarity and discomfort with and mistrust of the civil jury.\textsuperscript{25}

Finally, it is crucial to understand that the FSIA’s procedural protections apply \textit{regardless} of the ultimate decision on immunity.\textsuperscript{26} Once a court makes the threshold decision that there is a foreign state or agency or instrumentality present,\textsuperscript{27} the designated procedures apply and the court then considers whether an exception to the presumption of immunity applies.\textsuperscript{28} Indeed, many entities that would qualify as organs under my proposal would be largely commercial entities and, therefore, not entitled to immunity for the majority of their activities, due to the commercial activity exception.\textsuperscript{29} The separation of procedural protections from immunity emphasizes Congress’s concern with the effect of lawsuits on foreign relations.

My proposal seeks to remedy these failures. It addresses the purpose and the structure of the FSIA and their effect on the definition of “organ.” In so doing, it draws analogies from conceptually-related areas of the law that the courts have largely ignored; the “arm of the state” doctrine in the context of Eleventh

\begin{footnotes}
\item[22] See generally Kane, \textit{supra} note 4; \textsc{Joseph W. Dellapenna, Suing Foreign Governments and Their Corporations}, Ch. 4 (2d ed. 2003)
\item[23] See id. at 12-13, 25, 30, 32, 33 & 44.
\item[24] 28 U.S.C. § 1441(d) (200) (“Any civil action brought in a State court against a foreign state … may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending.”). \textit{See} Joseph W. Dellapenna, \textit{Refining the Foreign Sovereign Immunities Act}, 9 \textit{Williamette J. Int’l L. & Dis. Res.} 57, 73 (2001); Kane, \textit{supra} note 4, at 394.
\item[26] \textit{See} Verlinden, 461 U.S. at 489.
\item[27] \textit{See} Byrd v. Corporacion Forestal y Indus. de Olancho S.A., 182 F.3d 380, 388 (5th Cir. 1999).
\item[28] \textit{See} Verlinden, 461 U.S. at 489; Byrd, 182 F.3d at 388.
\end{footnotes}
Amendment immunity and “alter ego” veil piercing. The “arm of the state” doctrine allows an entity with a sufficiently tight relationship to the state to use the state’s Eleventh Amendment immunity if it serves the twin purposes of the Eleventh Amendment.30 “Alter ego” veil piercing ignores the legal separation between a corporation and its shareholders or parent corporation to pass on the subsidiary’s debts if they exercise sufficient control so as to be considered the same entity. While the analogies are not perfect, both of these doctrines perform the same conceptual function as “organ of a foreign state” within the FSIA’s structure; they ignore the legal separateness of an entity and its parent corporation/state and pass on certain legal rights and responsibilities.

I submit that, in order to determine “organ” status, courts must ask whether the failure to grant such status to the entity in question would cause justifiable offense to its host foreign state. The focus on whether the foreign government would be affronted directly addresses the FSIA’s chief purpose to reduce friction with foreign governments, as stated by Congress and as emphasized by its structure. However, while subjective affront to the relevant government would no doubt result in the least interference with foreign relations, that inquiry cannot be the benchmark. China is, no doubt, affronted at each and every exercise of jurisdiction by United States courts in any context. But it cannot be that every Chinese entity, no matter how attenuated the connection to the government, is an organ thereof.31 In deciding to assign the decision to the courts, Congress meant to leave the winds of politics out of the picture.32 Thus, the question must be whether there would be justifiable affront—that is, if the failure to afford the entity FSIA protections could be expected to interfere with the conduct of foreign relations with the reasonable foreign sovereign, the entity must be considered an organ.

In order to flesh out this concept of justifiable affront, my proposal applies principles gleaned from the existing organ tests and the “arm of the state” and alter ego inquiries. Adapting those sources, I propose five key questions. First, has the foreign state ceded any of its core and traditional sovereign powers to the entity? Second, are there sufficient financial ties between the foreign state and the entity such that any award would be paid out of the public treasury? Third, how does the foreign state treat the entity under local law and is that treatment significantly different than its treatment of other similar entities? Fourth, are similar entities in the United States and other foreign states given agency or instrumentality status? Finally, does the foreign state control how the entity conducts its business beyond what is customary in that state and, if not, can it exercise such extreme control? A strong affirmative answer to any of these questions means that the failure to extend FSIA protections to the entity would affront a reasonable foreign government. Thus, the entity should be considered an organ.

This process entails two important comparative inquiries. The foreign state/entity relationship can be compared to the relationships between that same government and other similar entities and it can be compared to those between other similar entities in different foreign states and their respective governments. The domestic comparison will reveal whether the government treats the entity in a notably different manner from other similar entities. If those entities are undoubtedly private and the government has a special relationship with the entity in question, denying that entity the benefits of the FSIA has a greater risk of justifiable affront. The international comparison posits that an inference can be draw from the manner in which other foreign states treat this type of entity (i.e., would be justifiably affronted). It also avoids the potential problem of disparate treatment between the otherwise similar entities of two foreign sovereigns, which would significantly and justifiably impede foreign relations.

My proposal has significant advantages. Most importantly, it addresses congressional intent to avoid unnecessary friction with foreign governments. It approaches this question in different manners and from different angles so as to achieve the necessary flexibility and breadth intended by Congress. It will be equally effective at

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analyzing institutions established by socialist governments in the past century as democratic PPPs in the next. It also assures as much uniformity as possible not only by explicitly requiring a comparative analysis across countries, but also by providing a structured framework.

Part I begins with a brief history and an investigation into the structure and purposes of the FSIA. I then critique both current organ tests by looking at the history of their development, how they are applied and at how well they serve the purposes of the FSIA. Part II briefly summarizes the two doctrinal sources that I apply to the “organ” inquiry: the “arm of the state” inquiry under the Eleventh Amendment and “alter ego” veil piercing. In Part III, I lay out my proposal for determining whether an entity is an “organ” of a foreign state. I first explain why the relationship between the entity and the foreign state must be considered in its entirety to best achieve Congress’s goals of avoiding justifiable affront. I then discuss the extent to which “the “arm of the state” and “alter ego” doctrines are applicable to an “organ of a foreign state.” I conclude by fleshing out my proposal for the framework that should replace the current rubric.

I. THE FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976 AND THE DEFINITION OF “ORGAN”

A. An Overview of the FSIA

Foreign sovereign immunity enjoys a long and well-documented history in the United States. 34 Beginning with its first incarnation in the Schooner Exchange v. M’Faddon 35 in 1812 until the Tate Letter in 1952, 36 foreign sovereigns enjoyed “virtually absolute immunity” in United States courts. 37 The Tate Letter represented a watershed in foreign sovereign immunity in the United States. With

35 7 Cranch 116, 11 U.S. 116 (1812).
37 See Verlinden, 461 U.S. at 486-87.
its adoption of the theory of “restrictive immunity,” foreign sovereigns would benefit from immunity only for their “public acts” and not for their “commercial” ones.

The application of the Tate Letter was problematic, however. The Executive Branch, rather than the courts, decided when it should be granted. Generally, the State Department would make a “suggestion of immunity,” and the courts would almost universally grant immunity. However, the State Department’s actions were often not objective considerations; foreign sovereigns would exert political pressure, which would lead to suggestions of immunity for acts that did not pass muster under the restrictive theory. Additionally, when the State Department did not express an opinion on the entitlement to immunity, the courts had to determine, using past State Department “suggestions” as a guide, whether immunity should be granted in any given instance. The morass that resulted from alternating branches of government making the immunity decision, the political considerations that were involved and the lack of any uniform standards condemned the Tate Letter to an early grave. It was against this backdrop that Congress enacted the FSIA in 1976.

Congress stated the FSIA’s purposes succinctly: “to facilitate and depoliticize litigation against foreign states and to minimize

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38 For a discussion of the history of the theory of restrictive immunity, see Michael Singer, Abandoning Restrictive Sovereign Immunity: An Analysis in Terms of Jurisdiction to Prescribe, 26 Harv. Int’l L.J. 1, 4-17 (1985).
39 The Tate Letter and the American adoption of restrictive immunity were prompted by the entry of government agencies into the global marketplace. See Mark B. Feldman, supra note 10, at 303 (1986).
41 See, e.g., Republic of Mexico v. Hoffman, 324 U.S. 30, 35 (1945) (“It is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize.”). See also Feldman, supra note 10, at 304.
42 See Verlinden, 461 U.S. at 487.
43 Id.
44 Id. at 488 (“Thus, sovereign immunity determinations were made in two different branches, subject to a variety of factors, sometimes including diplomatic considerations. Not surprisingly, the governing standards were neither clear nor uniformly applied.”).
45 See generally von Mehren, supra note 40, at 43-48.
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irritations in foreign relations arising out of such litigation.”\textsuperscript{46} The FSIA codified the theory of “restrictive immunity” into a comprehensive jurisdictional and procedural scheme that “provide[d] when and how parties could maintain a lawsuit against a foreign state or its entities in the courts of the United States and to provide when a foreign state is entitled to immunity.”\textsuperscript{47} Unsurprisingly, Congress’s principal purpose of avoiding offense to foreign states and the procedures established by the FSIA (the “when and how”) for suits against a foreign state are closely linked; in fact, the desire to avoid friction pervades the procedural protections offered to foreign states.\textsuperscript{48}

First and foremost, the FSIA applies not only to the foreign state \textit{qua} state, but also to any “agency or instrumentality” of that state.\textsuperscript{49} Congress recognized that, in the modern world, sovereigns delegate some of their core functions to subsidiary entities for a variety of reasons; the reasonable sovereign would be no less affronted by suits against those entities than against the sovereign itself.\textsuperscript{50} Next, the FSIA provides jurisdiction in federal court without regard to the amount in controversy\textsuperscript{51} and an absolute right of removal from state court,\textsuperscript{52} pursuant to which the entire action is removed to federal court regardless of the consent of co-defendants.\textsuperscript{53} These grants emphasize Congress’s preoccupation with foreign relations. Encouraging uniformity in decision and avoiding local bias are important because they avoid the possibility of disparate treatment, which might negatively affect the relationship with the slighted

\textsuperscript{46} House Report, \textit{supra} note 10, p. 44.

\textsuperscript{47} \textit{Id.} at 6.

\textsuperscript{48} \textit{Id.} at 44.


\textsuperscript{50} Indeed, some courts and commentators consider entities that exercise core functions part of the foreign state itself. \textit{See} Transaero v. La Fuerza Area Boliviana, 30 F.3d 148 (D.C. Cir. 1994); ABA Report, \textit{supra} note 16, at 409.


\textsuperscript{52} 28 U.S.C. §1441(d) (“Any civil action brought in a State court against a foreign state ... may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending.”). \textit{See}, e.g., Suter v. Munich Reinsurance Co., 223 F.3d 150, 157 (3d Cir. 2000). \textit{See also} Dellapenna, \textit{supra} note 24, at 73; Kane, \textit{supra} note 4, at 394.

government.\textsuperscript{54} Similarly, any trial under the FSIA is to a judge, rather than a jury.\textsuperscript{55} In addition to intending to avoid local bias yet again, Congress here recognized that most foreign sovereigns are unfamiliar with the common law system and our tradition of the civil jury and intended to avoid any friction or lack of faith in the proceedings that such a trial might cause. Finally, the FSIA provides restrictions on the pre-judgment attachment of foreign state assets,\textsuperscript{56} the post-judgment procedures for satisfying a judgment\textsuperscript{57} and particularized service\textsuperscript{58} and venue\textsuperscript{59} requirements, among other things.\textsuperscript{60} Congress intended all of these procedural protections to make it difficult to sue foreign states in United States courts and further minimize any possibility of friction that those suits might cause.\textsuperscript{61}

These procedural protections apply to a foreign state and any “agency or instrumentality” even if immunity is not granted.\textsuperscript{62} Indeed, the FSIA only grants presumptive immunity; a plaintiff can

\textsuperscript{54} House Report, \textit{supra} note 10, p. 13 ("disparate treatment may have adverse foreign relations consequences").

\textsuperscript{55} \textit{See} 28 U.S.C. §§ 1330(a) (2000) ("The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state….”) & 1441(d) (2000) ("Upon removal the action shall be tried by the court without jury."); Rex v. Cia. Pervana de Vapores S.A., 660 F.2d 61, 64 (3d Cir. 1981). There is no conflict between the FSIA’s provision for bench trials for suits against foreign sovereigns and the Seventh Amendment. \textit{See}, e.g., Ruggiero v. Compania Peruana de Vapores “Inca Capac Yupanqui”, 639 F.2d 872, 878-81, (2d Cir. 1981). Courts have uniformly held that suits at common law did not include the right to sue a sovereign. \textit{Id}.

\textsuperscript{56} 28 U.S.C. § 1610(d) (2000) (requiring a waiver from the foreign state for pre-judgment attachment of its property).


\textsuperscript{59} 28 U.S.C. § 1391(f) (2000); Kane, \textit{supra} note 4.

\textsuperscript{60} While the right of removal is available equally to foreign states and their agencies and instrumentalities, the restrictions on attachment, the service and the venue requirements differ based on whether it is the state itself or one of its entities. \textit{See generally} \textit{BORN, supra} note 34, ch. 3.; Dellapenna, \textit{supra} note 58, at 66. For a discussion of many of the procedural issues raised by the FSIA, \textit{see} Kane, \textit{supra} note 4.

\textsuperscript{61} \textit{See} \textit{USX Corp.}, 345 F.3d at 207.

\textsuperscript{62} \textit{See} \textit{Verlinden}, 461 U.S. at 465; ABA Working Group, \textit{supra} note 16, at 506.
rebut that presumption by establishing that one of the various exceptions to immunity exists. If so, there is federal subject matter jurisdiction over the plaintiff’s claims and they continue in federal court subject to the procedures of the FSIA. If not, then the state or entity is immune and the case is dismissed. The fact that Congress decided to allow foreign states and their agencies and instrumentalities to retain the procedural protections in cases where immunity is not appropriate further emphasizes Congress’s goal to minimize the potential annoyance to foreign sovereigns.

It also reveals the intentional balance that Congress struck. It had to weigh the potential for interference with foreign relations against the expectations of private parties that may have contracted with foreign entities without knowledge of the foreign state connection. The result was that any lawsuit against a foreign state or one of its organs would proceed in federal court with various procedural protections designed to minimize the impact of the lawsuit on the conduct of foreign relations. The federal judge would then consider whether immunity should be granted or one of the exceptions applied. Since the relationship of the affected private

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63 See Dellapenna, supra note 24, at 68. The FSIA also changed the application of personal jurisdiction over foreign states and their agencies and instrumentalities. See 28 U.S.C. § 1330(b) (2000); House Report, supra note 10, pp. 13-14. Under the FSIA, subject matter jurisdiction (i.e., an exception from immunity) equals personal jurisdiction; a plaintiff need not inquire into the contacts that a defendant might have with the forum. Id. Thus, plaintiffs sometimes have an interest in arguing that a defendant is a foreign state, subject to the FSIA though not immune, where it is otherwise difficult, or impossible, to obtain personal jurisdiction over the defendant. See Dellapenna, supra note 24, at 68-70. Aside from the statutory implications, it remains unclear whether foreign states are constitutional “persons” entitled to the Due Process rights established in International Shoe and its progeny. See, e.g., Price v. Socialist People’s Libyan Arab Jamahiriya, 294 F.3d 82, 96 (D.C. Cir. 2002).
64 FSIA cases can also proceed in state court, as the grant of jurisdiction is not exclusive. See House Report, supra note 10, pp. 13-14; Kane, supra note 4, at 388. However, the vast majority of FSIA cases are litigated in the federal courts.
65 The case is dismissed for lack of subject matter jurisdiction. This does not, however, mean that the case gets remanded to state court as it would with most other dismissals under Fed. R. Civ. P. 12(b)(1). A dismissal for lack of subject matter jurisdiction because of FSIA immunity ends the action entirely and is entitled to collateral estoppel effect. See, e.g., Gupta v. Thai Airways Int’l, Ltd., 487 F.3d 759, 767 (9th Cir. 2007).
66 See USX Corp., 345 F.3d at 208.
parties to the entities would most often be commercial, there would be no immunity due to the commercial activity exception.\textsuperscript{68} The aggrieved plaintiff could then proceed with its lawsuit, suffering only the harms caused by the various other protections of the FSIA. Even though the possibly misled counterparty would, no doubt, usually prefer a jury trial in state court, Congress’s balance preserves their right to proceed against the foreign government or agency. It simply must be in the manner that Congress has deemed least likely to interfere with the conduct of foreign relations.

Aside from their influence on the procedural protections, Congressional purpose must play and has played a role in the interpretation of the FSIA’s other terms.\textsuperscript{69} For this reason, courts have held that “agency or instrumentality” must be interpreted broadly.\textsuperscript{70} In other contexts, the courts have held that the FSIA provides immunity from suit, not just from liability, which entitles a foreign sovereign to interlocutory review of any denial of immunity.\textsuperscript{71} Not only have the courts granted an immediate appeal of any denial of immunity, but they also often stay discovery and other pre-trial procedures pending the resolution of the immunity appeal to minimize the potential for foreign relations interference.

\textbf{B. The Structure of the FSIA}

The FSIA applies whenever one of the parties qualifies as a “foreign state.”\textsuperscript{72} The definition of “foreign state” is, like much of the FSIA, opaque—a foreign state includes “a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b),” except for the service provisions where an

\begin{itemize}
\item \textsuperscript{68} See 28 U.S.C. § 1605 (a)(2) (2000).
\item \textsuperscript{69} See Permanent Mission of India to the UN v. City of New York, ___ U.S. ___, 127 S. Ct. 2352, 2356 (2007) (looking to Congressional purpose to determine a tax lien was an immovable right to property).
\item \textsuperscript{70} See In re Air Crash Disaster Near Roselawn, 96 F.3d 932, 940 (7th Cir. 1996) (analyzing the text of the FSIA and the legislative history to conclude that Congress intended a foreign state and agency or instrumentality to be ample concepts).
\item \textsuperscript{71} See, e.g., Rush-Presbyterian-St. Luke’s Med. Ctr. v. Hellenic Republic, 877 F.2d 574, 576 & n.2 (7th Cir. 1989); Compania Mexicana de Aviacion, S.A. v. United States Dist. Court, 859 F.2d 1354, 1358 (9th Cir. 1988) (per curiam); Segni v. Commercial Office of Spain, 816 F.2d 344, 347 (7th Cir. 1987).
\item \textsuperscript{72} See Byrd, \textit{supra} note 27, at 388.
\end{itemize}
“agency or instrumentality” is not included. An “agency or instrumentality” of a foreign state is, in turn, defined as “any entity:

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (e) of this title [28 USCS § 1332(c) and (e)] nor created under the laws of any third country.

Almost all litigation about whether an entity meets the threshold criteria of “foreign state” revolves around § 1603(b)(2). Until the Supreme Court’s decision in Dole v. Patrickson, most entities sought to qualify under the ownership requirements of § 1603(b)(2), which were easy to show, rather than rely on an unpredictable analysis of a term left undefined by Congress. Dole, however, prohibited the consideration of “tiered” ownership, meaning that only an entity whose equity was held by the state itself was an agency or instrumentality under the ownership requirements. Since many entities were subsidiaries of agencies or instrumentalities, rather than directly of the state, they were forced to rely on the “organ” portion of § 1603(b)(2) in order to make use of the FSIA.

75 There is some litigation about §§ 1603(b)(1) and (3), see, e.g., Proctor & Gamble Cellulose Co. v. Viskoza-Loznica, 33 F. Supp. 2d 644, 655 (D. Tenn. 1998) (litigating § 1603(b)(1)); Gardiner Stone Hunter Int’l v. Iberia Lineas Aereas de Espana, S.A., 896 F. Supp. 125, 129 (S.D.N.Y. 1995) (litigating §§ 1603(b)(2) & (3)), but there is usually little litigation about what is the foreign state qua state and most opposing parties concede the legal separateness and citizenship/legal creation prongs of the agency or instrumentality test, see, e.g., URS Corp. v. Lebanese Co. for the Dev. & Reconstruction of Beirut Cent. Dist. SAL, 512 F. Supp. 2d 199, 211 n.11 (D. Del. 2007).
76 See Kelly, 213 F.3d at 845.
77 See Dole, 538 U.S. at 480.
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1. The “Organ” Prong of § 1603(b)

The “organ” portion of § 1602(b)(2) is integral to the FSIA, despite its having languished in obscurity for much of its early history.\(^78\) Only by a definition of “organ” that fills in the gaps among the agencies and instrumentalities that a foreign government owns directly can § 1603(b)(2) properly reflect the Congressional belief that federal foreign relations interests would be best served by avoiding state courts.\(^79\) The legislative history of the FSIA reveals that Congress intended “agency or instrumentality” to be interpreted broadly and encompass a diverse variety of institutions.\(^80\) Congress noted that:

entities which meet the definition of an “agency or instrumentality of a foreign state” could assume a variety of forms, including a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, an export association, a governmental procurement agency or a department or ministry which acts and is suable in its own name.\(^81\)

Because “organ” is the only term in the definition of “agency or instrumentality” subject to interpretation, especially in light of Dole, it must be flexible\(^82\) enough to encompass the breadth of types of organizations and governmental systems Congress meant to cover.\(^83\)

\(^78\) Before 1990, there were only five cases that even used the “organ” prong, let alone discussed its more general application. See infra note 84. By contrast, more than thirty cases have been litigated based on the ownership prong since 2003.

\(^79\) See Fid. & Cas. Co. v. Tex. E. Transmission Corp. (In re Tex. E. Transmission Corp.), 15 F.3d 1230, 1239 (3d Cir. 1994) (“Congress’ deliberate intent to circumvent much of the potential for interference with the federal government’s foreign relations caused by lack of uniformity and local bias in civil caselaw involving foreign states as defendants by channeling private actions against foreign sovereigns away from state forums and into federal courts.”).


\(^81\) Id.


\(^83\) See House Report, supra note 10, pp. 15-16.
a) The Early Cases

The first cases that required interpretation of “organ” did not give it much thought. Some punted entirely, noting without discussion that the entity in question was an “organ” of the foreign state. Others considered whether the entity was a proper agency or instrumentality of a foreign state, without considering the specific characteristics of an organ or its ownership structure.

Yessenin-Volpin v. Novosti Press Agency demonstrates the difficulty that courts initially had in applying § 1603(b). In Yessenin-Volpin, Defendants TASS Agency (TASS) and Novosti Press Agency (Novosti) argued that they were entitled to immunity under the FSIA. Regarding TASS, the court relied on an affidavit of the Soviet ambassador to the United States stating that TASS was “the organ of the Soviet State” to hold that TASS came within the definition of a “foreign state.” Novosti presented a more difficult question. After quoting the statutory language, the court noted that the definition in § 1602(b)(2) “seem[ed] designed to establish the degree of the foreign state’s identification with the entity under consideration,” but complained that “it is ill-suited to concepts which exist in socialist states such as the Soviet Union.” The court

86 Id at 852.
87 The full name of TASS is the “Telegraph Agency of the Soviet Union of the USSR Council of Ministers.” Id. at 851.
88 Id.
89 And apparently the plaintiff agreed, as he conceded the point. Id. Regardless, “the court appears to have concluded independently that TASS was immune to its jurisdiction and does not rely exclusively on defendant’s admission. Indeed, since the issue of sovereign immunity goes to the court’s subject matter jurisdiction, the court must make an independent examination because a defendant’s admission on the issue can in no way relieve the court of its duty to determine whether it has subject matter jurisdiction.” Mueller, supra note 84, at *6, n.8 (S.D.N.Y. 1983).
90 The plaintiff conceded that Novosti was a separate entity and that it was neither a citizen of the United States nor was it organized under the laws of a third country, see 28 U.S.C. §§ 1603(b)(1), (3), so only its “organ” or ownership status remained at issue, see Yessenin-Volpin, 443 F. Supp at 852.
91 Id.
continued with a lengthy discussion of the oversight that the Soviet government exercised,92 the stated purposes of Novosti,93 the financial support that the government provided,94 and the level of financial and operational independence that Novosti enjoyed.95

While this would seem, at first glance, to be an attempt at providing a definition to “organ,”96 the court undertook these measures only to measure the Soviet state’s ownership interest in Novosti.97 It then concluded that Novosti was an instrumentality of the Soviet state and, therefore, was entitled to be treated as a foreign state under the FSIA.98 What appears to have driven the difference between TASS and Novosti for the court was the characterization by the ambassador, in his affidavit, of TASS as an “organ” and his failure to do so for Novosti.99 This reveals the confusion that the layered definitions of “foreign state” and “agency or instrumentality of a foreign state” within § 1603 and the failure to define “organ” created for the courts, as well as demonstrating the institutional reluctance of courts to interfere with a foreign sovereign’s characterization of one of its own entities.

Yessenin-Volpin and other similar cases100 reveal that the first courts to consider the question did not closely investigate the statutory language of § 1603(b) in order to determine “agency or

92 Id. at 852-53.
93 Id. at 852.
94 Id.
95 Id. at 852-54.
96 And as we will see, infra, these are relevant considerations.
97 See Yessenin-Volpin, 443 F. Supp at 854.
98 The court eventually concluded that none of the exceptions applied so TASS and Novosti were immune and it lacked jurisdiction over the matter. Id. at 856.
99 Compare id. at 852 with id. at 854.
100 The other cases from the year shortly after the passage of the FSIA do not discuss, in any depth, the requirements of § 1603(b)(2). Jet Line Services, Inc., 462 F. Supp at 1172, also relies upon affidavits of embassy officials to hold that a ship was a Libyan “organ” in an in rem action without further discussion. S & S Machinery Co., 706 F.2d 416, assigned agency and instrumentality status to a Romanian bank that was “but a cat’s paw of the Romanian government” based largely on affidavits attesting to ownership and “its position as a state foreign trade organ.” Id. at 414. The court did not consider, however, what characteristics might render an entity an “organ” beyond a statement that it “serves the foreign trade goals of the state.” Id. Finally, National Expositions, Inc., 605 F. Supp at 1211, and Mueller, 1983 U.S. Dist. LEXIS at *1, simply assigned organ status to the Venezuelan National Institute of Ports and a Swiss court, respectively, without notable discussion.
in instrumentality” status. Rather, they looked at the circumstances presented to them, and either compared them to the legislative history or their own standards of what might constitute an agency or instrumentality of a foreign state. They never extracted generalized conclusions about the nature of agencies or instrumentalities or organs from those facts. Nor did they focus on the language of §1603(b), or on the definition of “organ.”

b) The Current Confused State of the Law

The next set of cases to confront entities that laid claim to being organs of foreign states laid the groundwork for the current state of the law. Those cases, *Intercontinental Dictionary Series v. DeGruyter*,101 *Gates v. Victor Fine Foods*,102 *Corporacion Mexicana de Servicios Maritimos, S.A. de C.V. v. M/T Respect (Corporacion Mexicana)*,103 suffered from a similar flaw to those that came before them. While they were the first to separate out the definition of organ from the ownership requirements of § 1602(b)(2), these courts followed the example from the early cases and looked only at the relevant characteristics of the entities before them. They never considered the more general question of what might be the characteristics of organs generally. That might not have been a problem, except that subsequent cases looked to the recitation of the factors upon which each of those cases based their decisions to make more universal assertions about the nature of organs of foreign states.104

(1) The Balancing Factors

Most courts today follow some sort of balancing test to determine whether an entity is an organ of a foreign state.105 The factors that make up this balancing test derive principally from two cases: *Intercontinental Dictionary Series* and *Corporacion Mexicana*. These cases isolated the specific characteristics of the entities in front of them that supported their status as “organs,” and

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101 822 F. Supp at 622.
102 54 F.3d 1457 (9th Cir. 1995).
103 89 F.3d 650 (9th Cir. 1996).
105 See, e.g., Bd. of Regents of the Univ. of Tex. Sys. v. Nippon Tel. & Tel. Corp., 478 F.3d 274, 280 (5th Cir. 2007); Alpha Therapeutic Corp. v. Nippon Hoso Kyokai, 199 F.3d 1078 (9th Cir. 1999), withdrawn on other grounds sub nom. Alpha Therapeutic Corp. v. Kyokai, 237 F.3d 1007 (9th Cir. 2001).
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thereby “agencies or instrumentalities,” of a foreign state. From those characteristics that the courts decided to mention was born the balancing test that currently applies broadly.\footnote{\textit{Supra Med. Corp.}, 955 F. Supp at 379.}

In \textit{Intercontinental Dictionary Series}, the court considered whether the Australian National University (ANU) could be sued for copyright infringement regarding the development of a linguistic dictionary. The court looked at the evidence presented by the ANU and concluded that the ANU was an organ of the Australian government because:

- the ANU [was] formed by the Australian government to further academic interests of national importance;
- the salaries of its employees (including the named individual Australian defendants) are paid by the Australian government; the ANU must submit Annual Reports and is subject to funding by the Australian government; and the ANU [is] treated as [an] “agency[ ]” in other legislation. Despite their relative academic independence, the ANU defendants should be considered “organs” of the Australian government.\footnote{\textit{Id. at 673-74.}}

Interestingly, the court also found that the considerations that determine Eleventh Amendment immunity are analogous to those for FSIA “agency or instrumentality.”\footnote{\textit{Id. at 672-74.}} Therefore, the fact that California’s public universities are entitled to state immunity supports the conclusion that the ANU should be entitled to Australia’s FSIA immunity.\footnote{\textit{Id.}} This reference to the Eleventh Amendment considerations was ignored by later cases, despite those cases having based their tests on \textit{Intercontinental Dictionary Series}.\footnote{\textit{Int. Dictionary Series}, 822 F. Supp at 673.}

\textit{Corporacion Mexicana} considered the applicability of the FSIA to the refining subsidiary of PEMEX, the Mexican oil and gas company (itself an “agency or instrumentality” of the Mexican state).\footnote{\textit{Id. at 673-74.}} The court first considered whether being the majority-owned subsidiary of an “agency or instrumentality” meant the same

\footnote{\textit{See infra} notes 116-19 and accompanying text.}

\footnote{\textit{Corporacion Mexicana}, 89 F.3d at 652.}
as being that of the state itself (i.e., the question of tiering sovereign ownership interests).\textsuperscript{112} Relying on its previous holding in \textit{Gates}, the court held that tiering was inappropriate, which left only the “organ” prong on which to rely.\textsuperscript{113} In a strikingly similar description to that in \textit{Intercontinental Dictionary Series}, the court noted that PEMEX-refining was:

an integral part of the United Mexican States[; it] was created by the Mexican Constitution, Federal Organic Law, and Presidential Proclamation; it [wa]s entirely owned by the Mexican Government; [it wa]s controlled entirely by government appointees; [it] employ[ed] only public servants; and [wa]s charged with the exclusive responsibility of refining and distributing Mexican government property.\textsuperscript{114}

This description of PEMEX-refining was quoted from the district court’s opinion and was unopposed by plaintiffs; according to the Ninth Circuit, an entity with those characteristics is an organ of the government of Mexico.\textsuperscript{115}

These two \textit{descriptions} of the “organs” in their respective cases formed the basis for the balancing equation, first codified into various factors by a district court in the Eastern District of Pennsylvania. In \textit{Supra Medical Corporation v. McGonigle}, the court held that to determine whether an entity was an “organ of a foreign state,” the relevant criteria were:

(1) whether the foreign state created the entity for a national purpose; (2) whether the foreign state actively supervises the entity; (3) whether the foreign state requires the hiring of public employees and pays their salaries; (4) whether the entity holds exclusive rights to some right in the country; and (5) how the entity is treated under foreign state law.\textsuperscript{116}

\begin{itemize}
\item \textsuperscript{112} \textit{Id.} at 654.
\item \textsuperscript{113} \textit{Id.}
\item \textsuperscript{114} \textit{Id.} at 655.
\item \textsuperscript{115} \textit{Id.}
\item \textsuperscript{116} \textit{Supra Med. Corp.}, 955 F. Supp at 379.
\end{itemize}
These factors were applied by various courts with little question or investigation into their provenance. In fact, since Supra Medical codified them, these factors have only been changed once. The Third Circuit, in USX Corp. v. Adriatic Ins. Co., separated the first factor into two separate ones (“(1) the circumstances surrounding the entity’s creation; (2) the purpose of its activities”) and added an additional one: the ownership structure of the entity. These two formulations of the balancing factors (either the Supra Medical five or the USX seven) are widely applied. All this from simple descriptions of an Australian university and a Mexican refining subsidiary.

These factors are, quite simply, inadequate. Although they mouth the mantra that the factors do not constitute a test to be rigorously applied and that the absence of any one characteristic does not necessarily foreclose “organ” status, courts have almost exclusively used the Supra/USX factors to determine the level of control that the foreign state exercises over the entity. Control and the multi-factor test have become the reigning standard by which to determine whether an entity that is not majority-owned by a foreign state is entitled to FSIA protection. However, as this examination into their heritage has revealed, little or no consideration went into their development. They simply sprung into being from the description that two courts provided of the “organs” that they saw before them. As an example of what was missed, if the foreign state had agreed to indemnify the entity, the suit would effectively be against the foreign state itself, but the entity in question would not be an organ under the application of these factors.

A close examination of the factors themselves reveals further problems. As an initial matter, they overlap. For example, the

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117 See Peninsula Asset Mgmt. (Cayman) v. Hankook Tire Co., 476 F.3d 140, 143 (2d Cir. 2007); Nippon Tel. & Tel. Corp., 478 F.3d at 279; Filler, 378 F.3d at 217; Kelly, 213 F.3d at 846-47;
118 USX Corp., 345 F.3d at 209.
121 See, e.g., id.; Filler, 378 F.3d at 217; Kelly, 213 F.3d at 845.
122 Id.
123 See supra notes 105 to 119 and accompanying text.
entity’s treatment under foreign law, the foreign state’s oversight of that entity and the employment of civil servants are likely to be intermingled. When a court is mustering up all the relevant facts with which to support its holding it makes sense that they may overlap to some degree, but indistinct factors do not lend themselves to a test that purports to describe all possible organs under any possible circumstance.

Most crucially, these factors do not properly address Congressional intent. Applying these factors, to the exclusion of others, would allow or even force courts to ignore significant areas in which the entity might be tied to the foreign state governments. This risks potentially justifiable offense to those governments. The potential for interference with the relations with those governments could be avoided by a broader-based approach to the “organ” question.

Finally, while Congressional intent requires flexibility in order to address its foreign relations concerns, it also requires predictability and uniformity of outcomes. This secondary purpose serves to assuage foreign governments’ concerns with disparate results from local bias and the civil jury system as well as to allow parties to enter into contractual and other relationships with government-related entities with their eyes open to the possible consequences. The ad hoc nature of the development of these factors has meant that the result cannot be predicted with any clarity ex ante. Developing a test by reaching into more developed areas of precedent will allow greater uniformity and predictability going forward.

A closer look at the facts of Supra Medical demonstrates the potential problems with the application of the balancing test. Supra Medical held that the United Medical and Dental Schools of Guy’s and St. Thomas’s Hospitals (UMDS), created by acts of the English

125 See, e.g., URS Corp., 512 F. Supp. 2d at 203-10 (noting the reconstruction of war-torn Beirut was the backdrop for the supposed organ’s creation, but never mentioning that fact in the discussion of organ status).
126 See House Report, supra note 10, p. 11.
127 Id.
parliament and receiving 70 percent of its funding from the English government, were not organs of the English state.\textsuperscript{129} The only distinguishing factors from \textit{Intercontinental Dictionary Series}, which held that the ANU was an organ, were that it held training and teaching doctors and dentists and medical and dental research served no national or governmental purpose and that in the hundreds of years since their founding by Parliament, there was not one example in England or the United States of the UMDS’ being entitled to sovereign immunity.\textsuperscript{130} A United States court’s determination of England’s national purpose in funding certain medical and dental schools and the absence of examples of the UMDS’ having been granted sovereign immunity (as opposed to examples of its having been denied such immunity)\textsuperscript{131} cannot support the disparate treatment of the entities when the purpose is to avoid foreign relations frictions. England could have been justifiably affronted that the ANU received the protections of the FSIA as part of the Australian government when those protections were denied UMDS.

(2) The Public Activity Gloss

The Ninth Circuit has followed a different path in the “organ” inquiry.\textsuperscript{132} Based on one of its two early forays into this arena, it has focused on the question of whether an entity performs “a public activity on behalf of the foreign government” as a proxy for “organ” status.\textsuperscript{133} In answering this question, it focuses on similar criteria to the balancing factors discussed above.\textsuperscript{134} These factors and the “public activity” inquiry itself derived from the description of what the court saw before it in \textit{Corporacion Mexicana} and \textit{Gates}, rather than a studied exegesis of a foreign state organ.\textsuperscript{135} Moreover, this gloss only serves to muddy the waters further. The Ninth Circuit does

\textsuperscript{129} \textit{Id.} at 379.

\textsuperscript{130} \textit{Compare id.} at 375-380 with \textit{Intercontinental Dictionary Series.}, 822 F. Supp at 673.

\textsuperscript{131} \textit{Supra Med. Corp.}, 955 F. Supp at 379 (relying on the lack of such examples).

\textsuperscript{132} \textit{See, e.g.}, \textit{Patrickson v. Dole Food Co.}, 251 F.3d 795, 807 (9th Cir. 2001), \textit{aff’d on other grounds}, 538 U.S. 468 (2003).

\textsuperscript{133} \textit{See, e.g.}, \textit{EOTT Energy Operating Ltd. P’ship. v. Winterthur Swiss Ins. Co.}, 257 F.3d 992, 997 (9th Cir. 2001).

\textsuperscript{134} “In making this determination, courts examine the circumstances surrounding the entity's creation, the purpose of its activities, its independence from the government, the level of government financial support, its employment policies, and its obligations and privileges under state law.” \textit{Patrickson}, 251 F.3d at 807-808.

\textsuperscript{135} \textit{Id.}
not defined “public activity” and it has arrived at wildly divergent results in its application. Two examples demonstrate its schizophrenia.

In *EIE Guam Corp. v. Long Term Credit Bank of Japan, Ltd.*, an entity in question was created by the Japanese government to “purchase, administer, collect and dispose of non-performing loans purchased from failed financial institutions.” Based on its findings that (i) the entity was created by statute to revitalize the Japanese economy, (ii) it was funded by the Japanese government, (iii) its losses would be borne by the Japanese government, and (iv) that many of its activities were assigned exclusively to the entity by the government, the court held that it was an organ of the Japanese state. It reached this conclusion despite finding that the bank was “a private company that is engaged in a primarily commercial concern,” that many other companies were similarly authorized to collect distressed debts and assets, that its employees were not civil servants, and that it is not designated as a “public corporation” under Japanese law.

Israeli chemical companies that had been created by Israel to exploit the resources owned by the government of Israel in the Dead Sea received different treatment in *Patrickson v. Dole Food Co., Inc.* Ignoring its findings that (i) the entities were classified as “government companies” under Israeli law, (ii) the government had the right to veto the appointment of directors and officers and any changes in their capital structure, (iii) the companies had to show their annual budgets and financial statements to various ministries, (iv) the government had some control over the use of company profits as well as officer and director salaries, and (v) the government also exercised control over the entities by means of its ownership of the natural resources with which the companies worked, the court focused, instead, on the fact that the entities acted to maximize profits rather than “pursue public objectives.” The court held that the companies

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136 322 F.3d at 640.
137 *Id.* at 640-41.
138 *Id.*
139 251 F.3d at 807.
140 *Id.* at 808.
141 *Id.*
were not “engaged in a public activity on behalf of” Israel and, therefore, not “organs” of Israel.\textsuperscript{142}

This dichotomy demonstrates the flaws in the “public activity” inquiry. As an initial matter, this patent lack of uniformity runs directly contrary to the purposes of the FSIA.\textsuperscript{143} More fundamentally, the for-profit nature of the Israeli companies should not be important to the determination of whether it is an “agency or instrumentality” of a foreign state, as the EIE court found and the legislative history makes clear.\textsuperscript{144} While it is crucial to the ultimate decision about its entitlement to immunity, entities engaged in commercial enterprises are appropriate “agencies and instrumentalities” and, therefore, “organs.”\textsuperscript{145} While the question of whether the entity “pursue[s] public objectives” remains relevant, it cannot be the litmus test that the Ninth Circuit made it.

Even if one accepted that the “public activity” inquiry was the proper theory, it simply creates a new problem to solve the old one. The Ninth Circuit has never defined what “public” means in this context, as it relied on “non-commercial” in one case and not in the other.\textsuperscript{146} If a foreign government sees fit to develop its natural resources though a given entity and sell them to raise funds for public roads, instead of establishing a different entity to increase and collect taxes for the same purpose, how could one be an organ due to its “public” activity, and the other not? Would a foreign government’s explicit statement that an otherwise commercial company was undertaking a public activity by raising revenue for the state be

\textsuperscript{142} Id.
\textsuperscript{143} See supra notes 20 and 61 and accompanying text.
\textsuperscript{144} 322 F.3d at 641.
\textsuperscript{145} See House Report, supra note 10, p. 16. But see Hardy, supra note 17, at 1144. Hardy states that Congress intended to exclude presumptively commercial entities from agency and instrumentality status. He bases this conclusion, however, on a statement in the legislative history from a different context. Id. at 1144 & n.96. Congress noted that § 1603(b)(3) required that, to be an agency or instrumentality, an entity must not be United States citizens or entities formed under the laws of a third country because such entities are presumptively commercial or private. Id. This is not to say that such a requirement is in place for “organs” under § 1603(b)(3). Moreover, the list of possible entities that immediately follows the comment to which Hardy refers includes entities that are obviously commercial in nature, such as a trading company and a shipping and airline. House Report, supra note 10, pp. 15-16.
\textsuperscript{146} House Report, supra note 10, pp. 15-16.
\textsuperscript{147} See supra notes 136-142 and accompanying text.
sufficient? Allowing FSIA protections to one entity as an organ of the foreign state and denying them to the other could reasonably irritate that state.

This is especially true given the incredible variety of vehicles that states use to pursue their goals. PPPs have dramatically increased in recent years.148 Sovereign wealth funds provide an alternative to taxation for some governments. Various governments have entered into project finance arrangements with private entities to develop airports, toll roads, and other public goods inextricably link private entities to governments.149 Other states have nationalized industries in their attempts to provide for their population.150 In each foreign jurisdiction, the government and its legal and economic system may create myriad public, private, corporate and other structures to fulfill diverse and wide-ranging purposes; it is not the place of a United States court to substitute its judgment for that of the state in question as to whether a given activity is public. Especially when Congress intended to minimize friction with foreign governments and the “public activity” inquiry can only heighten it, we must look elsewhere for the organ inquiry.

Finally, the courts have not been consistent in how they think about public activities. The Patrickson court, for example, focused on the similarity between the control that Israel exerted on the companies and that which a majority shareholder might exercise.151 It is thoroughly unclear how the control that a government has exercised or might exercise over an entity determines whether that entity undertakes a “public activity.”152 Although it might be relevant to the question of whether the public activity was “on behalf of” the government, the court does not appear to have been making that point. Indeed, as discussed previously, control is the other key to the

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148 See URS Corp., 512 F. Supp. 2d at 203-10 (describing a public/private partnership in all but name).
151 251 F.3d at 808.
152 Id.
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gateway to “organ” status, when one is not following the “public activity” test.\footnote{153 See Proctor & Gamble Cellulose Co. v. Viskoza-Loznica, 33 F. Supp. 2d 644, 654 (D. Tenn. 1998) (“organ” can loosely be defined as an entity that either performs a government function or which is ultimately controlled by the state) (emphasis added).}

Even assuming control is relevant to the “public activity” test, the Ninth Circuit in \textit{Patrickson} was incorrect to imply that something more than majority ownership would be needed.\footnote{154 251 F.3d at 808.} Majority ownership is one of the harbingers of an “agency or instrumentality” and would be sufficient under direct ownership.\footnote{155 See 28 U.S.C. § 1603(b)(2); \textit{Dole Food Co.}, 538 U.S. at 480.} There is nothing to suggest that anything approaching a veil piercing level of control would be needed under the “organ” criteria. Indeed, courts have also repeatedly made this point clear—that something less than a veil-piercing level of control is needed to bring an entity within the ambit of the government’s FSIA immunity.\footnote{156 See, e.g., \textit{Trans Chem. Ltd. v. China Nat’l Mach. Imp. \\& Exp. Corp.}, 978 F. Supp. 266, 276 n.37 (S.D. Tex. 1997).} In \textit{Gates}, the Ninth Circuit itself made that very point.\footnote{157 54 F.3d at 1460 n.1.} It focused on the control that the government of the province of Alberta exercised over a marketing board for pork products to hold that the board was an “organ” of a political subdivision.\footnote{158 Id. at 1460-61.} Referencing the “alter ego” doctrine from veil piercing, the court held that a party need not show such an extreme level of control; something less was necessary to show that the marketing board was an organ of the state.\footnote{159 \textit{Id.} Again, this reference to an existing body of law has been largely ignored.}

At the end of the day, some version of the public activity question is relevant to the organ question. There should be no doubt that an entity to which the government has ceded a significant amount of its sovereignty or which performs a core or traditional government functions should be an organ. Indeed, some courts consider those entities part of the foreign state itself.\footnote{160 See \textit{supra} note 50.} Such entities often enjoy immunity in addition to the procedural protections as their activities are likely not to fall within the commercial or other exceptions. The problem with using a public activity inquiry as the only question is that the converse is not true; there can very well be organs of foreign
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states that do not exercise sovereign power. The challenge for the organ inquiry is to address both possibilities competently.

(3) Powerex

In 2007, the Supreme Court granted certiorari in Powerex Corp. v. Reliant Energy Services on the question of whether, under the FSIA, “petitioner [wa]s an ‘organ of a foreign state or political subdivision thereof.’” Although the majority opinion dismissed for lack of removal jurisdiction, Justice Breyer, joined by Justice Souter, disagreed that jurisdiction was absent and reached the underlying FSIA question.

Justice Breyer too did not posit a test to determine organs of foreign states. Rather, he followed the path of the earlier cases and described the relevant factors that he saw before the court, rather than offering a comprehensive scheme to determine organ status. He considered the following facts important to his ultimate determination that Powerex was an organ of the Province of British Columbia (a decision that would have overturned the Ninth Circuit on the merits): (1) Powerex was government-owned; (2) it was government-operated; (3) it was not meaningfully different from the Tennessee Valley Authority or other foreign public power companies; (4) it was created by the written directive of the Province; (5) it conducts its business pursuant to the terms of various treaties between the United States and Canada governing their water resources; (6) it is

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161 ___ U.S. ___, 127 S. Ct. at 1144.
162 ___ U.S. at ___, 127 S. Ct. at 2421. The Supreme Court granted certiorari on one of the questions raised by the parties, “namely to decide whether, under [FSIA], petitioner is an ‘organ of a foreign state or political subdivision thereof.’” ___ U.S. ___, 127 S. Ct. at 1144. However, in the order granting the petition for certiorari, the Court directed the parties to address an additional question: whether the Ninth Circuit had properly exercised jurisdiction to review the district court’s decision to remand the case to state court. Id. This QUESTION was the basis for the majority’s ultimate dismissal of the action. ___ U.S. at ___, 127 S. Ct. at 2421.
163 Id. at 2421-24.
164 Id. at 2424-26.
165 Id.
166 Compare id. with supra notes 107-115 and accompanying text.
167 ___ U.S. at ___, 127 S. Ct. at 2424.
168 Id.
169 Id. at 2424-25, 26.
170 Id. at 2425.
171 Id.
owned by a governmental entity that is itself an agency or instrumentality of the provincial government; (7) its board members consist of individuals who overlap with that entity, and those board members fill the remaining seats by appointing others; (8) the government reviews its financial performance; (9) the government determines the manner in which it conducts its affairs; (10) provincial statutes refer to it as a “government body”; and (11) any profit that Powerex generates goes to the public coffers and is not distributed to private shareholders.

Justice Breyer also criticized the bases for the Ninth Circuit’s decision that Powerex was not an organ of British Columbia. He noted that the circuit court’s erred in relying on Powerex’s having earned a profit and not having been directly financed by the government to hold that it was not an organ of British Columbia. Indeed, if the entity is worth the government’s time, it should be profitable and be able to avoid government funding. The appropriate question was where the profits went after they were earned. If it goes to the public good, then it supports the conclusion that the entity is an organ. Less caustically, Justice Breyer noted that the fact that Powerex was not governed by all of the regulations that covered other governmental departments was not dispositive of a lack of “organ” status either. Again, he compared Powerex to the TVA and determined that the similarity supported its being considered an organ.

Justice Breyer’s final summary point is perhaps his most important observation for our purposes here. He notes that “Powerex is the kind of government entity that Congress had in mind when it wrote the FSIA’s ‘commercial activity’ provisions.”

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172 Id.
173 ___ U.S. at ___, 127 S. Ct. at 2425.
174 Id.
175 Id.
176 Id.
177 Id. at 2426.
178 Id.
179 ___ U.S. at ___, 127 S. Ct. at 2426.
180 Id.
181 Id.
182 Id.
183 Id.
184 Id.
statement hones in on the distinction between entitlement to FSIA protections as a foreign state and immunity from suit and the differences between their respective purposes. To paraphrase Justice Breyer, Powerex demonstrates that certain entities must be entitled to sovereign treatment because of their inextricable links with foreign states even though their activities are commercial and, therefore, subject to an exception from immunity. This basic point underlies much of my proposal.

II. THE ANALOGOUS DOCTRINES: THE ELEVENTH AMENDMENT AND VEIL PIERCING

Despite occasional references to other areas of the law, the tests for “organ of a foreign state” have been largely created out of whole cloth. These references, though ignored, were not arbitrary and offer the opportunity to provide additional ballast to the “organ” inquiry. Despite a reference to it in the first case to consider the meaning of “organ,” courts and commentators have never undertaken serious analysis of the extent to which Eleventh Amendment doctrine might inform the definition of “organ of a foreign state.” The parallel is clear; both doctrines seek to determine the extent to which immunity may cloak a separate entity.

The “alter ego” veil piercing doctrine provides another fecund source. Veil piercing is the equitable doctrine by which a court will ignore the corporate form and impose liability on a parent

185 See supra notes 108-10 and accompanying text. See also Gates, 54 F.3d at 1460, n.1.
187 Some courts refer to this doctrine as the “mere instrumentality” theory of veil piercing. See Timothy P. Glynn, Beyond “Unlimiting” Shareholder Liability: Vicarious Tort Liability for Corporate Officers, 57 VAND. L. REV. 329, 344-45 & n.65 (2004). See also, e.g., Gale Contractor Servs v. Wiltbank, 2007 Mont. Dist. LEXIS 429 (Mont. Dist. 2007). Glynn notes that some courts apply slightly different tests based on the label of “alter ego” or “mere instrumentality,” but they can be considered together because “they are premised on the lack of any de facto distinction between the shareholder and the corporation.” Glynn, at 345 n.65. Moreover, in terms of their use in analogizing to the FSIA and what entities should be considered organs, the distinctions are immaterial. In order to avoid confusion with the use of “instrumentality” in the text of the FSIA, I will refer to the amalgamation of “alter ego” and “mere instrumentality” theory tests as the “alter ego” doctrine.
corporation (or possibly the shareholders) of a subsidiary. Courts examine, among other things, whether a parent so dominates and controls a subsidiary that the subsidiary ceases to have a separate existence. While the extent of control necessary for veil piercing is significantly greater, this is a very similar inquiry to that which many courts have undertaken in the “organ” context. Some have even explicitly noted it.

A. “Arm of the State”

The Supreme Court has repeatedly held that the Eleventh Amendment extends protection to entities with sufficient connections to the state in addition to the state itself; the analogy to “organ” immunity under the FSIA is obvious. Determining whether an entity is an arm of the state requires an analysis of the relationship between the state and the entity, but the crucial inquiry is often whether a judgment against the entity in question would effectively be a judgment against the State itself. The Supreme Court has provided no specific test for these heavily fact-dependant inquiries. To fill that gap, the courts of appeals have each developed their own version of a multi-factor balancing test.

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188 See Stephen M. Bainbridge, *Abolishing Veil Piercing*, 43 CORP. PRAC. COMMENTATOR 517, 520. While veil piercing can be used between a corporation and its individual shareholders, for the purposes of this article, the parent/subsidiary relationship provides a better analogy. Therefore and for simplicity’s sake, I will refer only to the parent/subsidiary relationship and not to the possibility of individual shareholders.
189 Id. at 547-48.
190 See Gates, 54 F.3d at 1460.
193 See Regents of the Univ. of Cal., 519 U.S. at 429.
195 See Bladuell, supra note 30, at 838-42.
196 See Benning v. Bd. of Regents of Regency Univs., 928 F.2d 775, 777 (7th Cir. 1991).
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These tests have developed largely organically and, thus, contain differences in language, content and application. There are, however, trends and significant areas of overlap within those factors to allow a certain level of generalization, which is helpful to our purposes here.\textsuperscript{198} In general terms, courts consider the financial connection between the state and the entity, the level of control exercised by the state over the entity, the legal or formal relationship between the state and the entity, and the function to which the state has tasked the entity.\textsuperscript{199}

The financial connection between the entity and the state has long been one of the criteria for determining whether an entity is an arm of the state.\textsuperscript{200} In determining the financial connections, some

\textsuperscript{198} While the organic development of these tests suffers from the same flaw as the “organ” test, discussed \textit{supra}, it does not render the logic of that precedent inapposite to the “organ” question. Rather, the tests (and the specific examples that many of those tests represent) provide more data from which to construct a better picture of an “organ of a foreign state.”

\textsuperscript{199} \textit{See} 17A James Wm. Moore et al., Moore’s Federal Practice - Civil § 123.23 (3d ed. 2007). The question of whether an entity is an arm of the state often arises in the context of diversity jurisdiction, rather than a direct assertion of immunity. \textit{See}, e.g., Univ. of R.I. v. A. W. Chesterton Co., 2 F.3d 1200, 1202 (1st Cir. 1993) (noting that the inquiries under the Eleventh Amendment and diversity jurisdiction are substantially the same). Since a state is not a citizen for immunity purposes, \textit{see} Postal Tel. Cable Co. v. Ala., 155 U.S. 482, 487 (1894), parties seeking to defeat diversity jurisdiction and obtain remand to state court will often argue that an entity is an arm of the state and, thus, federal subject matter jurisdiction does not exist, \textit{see}, e.g., Miss. Veterans Home Purchase Bd. v. State Farm Fire & Cas. Co., 492 F. Supp. 2d 579, 582 (D. Miss. 2007). The recent case involving West Virginia University and their former football coach, Rich Rodriguez, is a well-publicized example. \textit{See} W. Va. Univ. Bd. of Governors ex rel. W. Va. Univ. v. Rodriguez, 2008 U.S. Dist. LEXIS 13137 (D. W. Va. 2008).

\textsuperscript{200} Some courts used to consider it a threshold question, such that if a judgment would come from the state treasury, it would largely end the inquiry. The Supreme Court subsequently relegated this question back to equal status along with other considerations, because “while state sovereign immunity serves the important function of shielding state treasuries… the doctrine’s central purpose is to accord the States the respect owed them as joint sovereigns.” FMC v. S.C. State Ports Auth., 535 U.S. 743, 765 (2002).
courts look to the connection between the state and the entity generally and all look to the effect of the potential judgment on the state treasury. At the state level, courts inquire into the entity’s funding sources and whether the state provides direct funding. At the transactional level, the inquiry does not involve merely tracing the potential payment back to the state, but rather investigates who will bear the ultimate legal and financial liability for the potential judgment. The question is whether the liability would be paid by the state, either directly, such as because of an indemnification arrangement, or because the legal liability could be traced to the state treasury. Similarly, courts ask whether the state might ultimately be left holding the tab because of their agreement to completely fund the entity.

The question of control shows itself in various incarnations and in various factors. They fall into two categories: how much control does the state exercise over the board of directors and how much does it exercise over the entity itself. To answer the former, courts often inquire whether the state controls board formation or appoints its members directly. The latter question is either approached head on (i.e., what is the degree of control that the state exercises over the state) or, conversely, by inquiring into the

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201 See Woods, 466 F.3d at 240; Md. Stadium Auth, 407 F.3d at 261; Takle, 402 F.3d at 770-71; Sturdevant v. Paulsen, 218 F.3d at 1164-65.
202 See Fresenius Med. Care Cardiovascular Res. Inc, 322 F.3d at 68-72; Woods, 466 F.3d at 240; Bowers, 475 F.3d at 546; Md. Stadium Auth., 407 F.3d at 261; Vogt, 294 F.3d at 689; Ernst, 427 F.3d at 359; Takle, 402 F.3d at 770-71; Hadley, 76 F.3d at 1439; Beentjes, 397 F.3d at 778; Sturdevant, 218 F.3d at 1167; Rosario, 506 F.3d at 1043-1044.
203 See Woods, 466 F.3d at 240; Md. Stadium Auth, 407 F.3d at 261; Takle, 402 F.3d at 770-71.
204 See Regents of the Univ. of Cal., 519 U.S at 431 (noting that the question of whether an entity should be considered an “arm of the state” for Eleventh Amendment immunity purposes is not a “formalist question of ultimate financial liability” such that “the presence or absence of a third party’s undertaking to indemnify the agency should determine” the question).
205 See Rosario, 506 F.3d at 1043-1044.
206 See Sturdevant, 218 F.3d at 1167.
207 See Ernst, 427 F.3d at 359-60.
208 See Woods, 466 F.3d at 240; Md. Stadium Auth, 407 F.3d at 261.
209 See Fresenius Med. Care Cardiovascular Research Inc, 322 F.3d at 68-72.
210 See Hadley, 76 F.3d at 1439; Beentjes, 397 F.3d at 778.
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entity’s autonomy from the state. Some circuits have further specified subsidiary questions, such as the extent to which the state can exercise control over the board’s actions, again by veto or direct control, or enlarge or contract the entity’s responsibilities.

The third area of connection between the state and the entity that courts explore is the legal and formal ties between them. This area sees the greatest divergence among the questions that the courts of appeals typically ask. But, almost all inquire, first, about the treatment of the entity under state law. This includes an examination of statutory references to the entity as well as how state courts and administrative agencies treat the entity. Additional questions relevant to the legal and formal ties between state and entity are whether the founding documents of the entity refer to its connection to the state, whether it can sue or be sued in its own name, is separately incorporated, is immune from taxation, can hold or use property, and its ability to tax or issue bonds.

Finally, some courts look to the function and purpose of the entity. The key here is whether the entity serves a state-wide or local purpose. The Eleventh Amendment only extends immunity to states and not to municipalities and other sub-divisions of the state. Thus, this distinction takes on prime importance—if the entity relates

211 See Bowers, 475 F.3d at 546; Md. Stadium Auth., 407 F.3d at 261; Vogt, 294 F.3d at 689; Ernst, 427 F.3d at 359; Hadley, 76 F.3d at 1439; Sturdevant, 218 F.3d at 1167.

212 See Fresenius Med. Care Cardiovascular Res. Inc, 322 F.3d at 68-72; Woods, 466 F.3d at 240; Md. Stadium Auth., 407 F.3d at 261.

213 See Vogt, 294 F.3d at 689; Ernst, 427 F.3d at 359.


215 See id.; Woods, 466 F.3d at 240; Bowers, 475 F.3d at 546; Md. Stadium Auth., 407 F.3d at 261; Vogt, 294 F.3d at 689; Ernst, 427 F.3d at 359; Hadley, 76 F.3d at 1439; Sturdevant, 218 F.3d at 1167; Rosario, 506 F.3d at 1043-1044.

216 Ibid.

217 See Woods, 466 F.3d at 240; Takle, 402 F.3d at 770-71.

218 See Bowers, 475 F.3d at 546; Vogt, 294 F.3d at 689; Beentjes, 397 F.3d at 778.

219 See Bowers, 475 F.3d at 546; Beentjes, 397 F.3d at 778.

220 See Bowers, 475 F.3d at 546.

221 See Vogt, 294 F.3d at 689; Beentjes, 397 F.3d at 778.

222 See Sturdevant, 218 F.3d at 1167.

223 See Fresenius Med. Care Cardiovascular Res. Inc, 322 F.3d at 68-72; Woods, 466 F.3d at 240; Md. Stadium Auth., 407 F.3d at 261; Vogt, 294 F.3d at 689; Ernst, 427 F.3d at 359; Takle, 402 F.3d at 770-71; Beentjes, 397 F.3d at 778; Sturdevant, 218 F.3d at 1167.

more to a county or other subdivision, it will not be entitled to immunity.

B. “Alter Ego” Veil Piercing

Veil piercing\textsuperscript{225} ignores the separate legal status of a corporation to impose liability on its parent corporation (or, less frequently, its shareholders)\textsuperscript{226} in much the same way that a finding of organ allows the entity to pierce the government’s “veil” and use its immunity. The “alter ego” test typically involves two inquiries: first, was there sufficient domination and control of the subsidiary corporation such that the separate legal existence of the parent and the subsidiary should be ignored\textsuperscript{227}; and, second, would an inequitable result follow from enforcing the separate legal status of the two entities.\textsuperscript{228} We focus here on the first question, because equity or the lack thereof is not relevant to the “organ” inquiry.\textsuperscript{229}

The factors that courts apply to determine domination and control can be placed in four categories that are similar to those discussed above regarding the Eleventh Amendment.\textsuperscript{230} They

\textsuperscript{225} While there are four traditional common-law piercing doctrines, see Glynn, supra note 187, at 344, I focus on the “alter ego” theory here. The fraud doctrine is inapposite to the organ/state relationship because the term “organ” is a statutory construct created without equitable considerations in mind. Similarly, the “enterprise” theory does not apply here because it does not focus on the vertical relationship with a parent corporation or entity. Rather, it focuses on horizontally arranged entities, relationships that are not analogous to the organ/foreign state alignment. See Glynn supra note 187, at 346-47. Finally, the “agency” theory is poorly articulated and courts that use it generally apply an “alter ego” analysis, only by another name, but without the requirement of shareholder misconduct. Id. at 347.

\textsuperscript{226} Although veil piercing has been occasionally applied to access the assets of individual shareholders in the context of a close corporation, it only rarely used to attack the assets of the shareholders of publicly held corporations. See Robert Thompson, Piercing the Corporate Veil: An Empirical Study, 76 CORNELL L. REV. 1036 (1991) (finding that veil piercing was limited to close corporations and inter-corporate relationships).

\textsuperscript{227} See Bainbridge, supra note 188, at 547-49 (discussing the various formulations of the alter ego/instrumentality test and determining that all require some unknown degree of control and domination of the subsidiary by the parent/shareholder).

\textsuperscript{228} Id. See also Glynn, supra note 187, at 345-46.

\textsuperscript{229} See supra note 225.

\textsuperscript{230} There are, quite simply, too many different versions of the factors that investigate unity of interest or ownership under the first prong of the “alter ego” test to list here. Moreover, each of those versions contains multiple factors. I will
measure the financial connections between the parent and subsidiary, \textsuperscript{231} the legal intermingling between the two, \textsuperscript{232} the day-to-day management control that the parent imposes on the subsidiary \textsuperscript{233} and the use that the parent makes of the subsidiary. \textsuperscript{234}

Courts test the financial separateness of the parent and subsidiary in a variety of different ways. The first major avenue is to focus on the flows of assets between the two entities. Typical factors here might examine the commingling of funds\textsuperscript{235} or the treatment of assets of one corporation as assets of the other.\textsuperscript{236} Many courts require that the corporation whose veil is to be pierced be undercapitalized.\textsuperscript{237} A second avenue of inquiry is the converse; courts focus on the debt of the corporation. Courts might ask whether the parent pays the salaries of the subsidiary’s employees\textsuperscript{238} or pays or guarantees the payment of the expenses or debts of the subsidiary.\textsuperscript{239} Finally, courts examine whether the parent directly finances the operations of the subsidiary.\textsuperscript{240}

In examining the legal or formal separateness of the two entities, courts look at the circumstances surrounding the subsidiary’s formation (or acquisition), its ownership structure, and its observance of corporate formalities. The first two are relatively self-explanatory, but the last warrants further discussion. Courts look at “picayune” areas in which corporate law mandates compliance.\textsuperscript{241} They ask (i)
whether the subsidiary keeps separate books; (ii) whether it holds regular shareholder or board meetings; (iii) whether an arm’s length relationship is maintained with the parent corporation; and (iv) whether the formalities for stock issuance are followed. These factors are often not important individually, but the underlying consideration of whether corporate formalities had been observed is almost a sine qua non of alter ego veil piercing.

Evaluating the operational control that the parent exercises involves a mainly structural analysis of the relationship between the two corporations. Courts look at whether the members of the boards of directors or employees overlap and whether the two companies use the same attorneys. The question is, fundamentally, whether the subsidiary is autonomous or a “puppet” of the parent.

Finally, courts look at the uses that the parent makes of the subsidiary. Here courts question the nature of the parent’s and subsidiary’s businesses, asking whether the subsidiary is treated “as an independent profit center,” whether it is used as a vehicle by which the parent arranges for its own needs (i.e., good, services or labor) and whether the subsidiary’s business exists solely as a result of its relationship with the parent. Another area of inquiry involves more incidental affairs, such as whether the two entities share office space or telephone numbers.

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246 See, e.g., id.
247 See Bainbridge, supra note 188, at 553.
251 Zaist v. Olson, 154 Conn. 563, 573 (Conn. 1967).
252 Am. Fuel Corp., 122 F.3d at 134.
254 See, e.g., United Steelworkers of Am., 855 F.2d at 1505.
255 See, e.g., Am. Fuel Corp., 122 F.3d at 134.
III. “ORGAN” REVISITED: HOW NOT TO REINVENT THE WHEEL

We have learned that courts have approached § 1603(b)(2) with blinders on. Most courts have been content to rely on the early cases as the path through the FSIA’s “statutory labyrinth” without giving the question its due consideration. The failure to analogize to the “arm of the state” doctrine under the Eleventh Amendment and to the “alter ego” theory of veil piercing, despite their occasional mention, is simply further evidence. The result is that courts may have borrowed the “mists of metaphor” from veil piercing, but little else. My proposal is for courts not to reinvent the wheel. Rather than attempting to invent metrics for an “organ of a foreign state,” they should look to the analogs of the “arm of the state” and veil piercing as guides and consider them in the precise milieu that the “organ” inquiry sits—the general context of the FSIA.

A. Analogizing and Distinguishing the “Arm of the State” and “Alter Ego” Doctrines

Our brief summary of the “arm of the state” doctrine and the “alter ego” theory of veil piercing have shown that one can look at their inquiries in similar manners. Both investigate, at some level, the control that the parent/state can or does exercise over the subsidiary/entity and the tasks to which the parent/state sets it. They both evaluate the legal and formal ties between the two and they both look at various indicia of their financial interdependence.

258 Compare, e.g., Steadfast Ins. Co. v. Agric. Ins. Co., 507 F.3d 1250, 1254 (10th Cir. 2007) (looking at control to determine whether an entity was an “arm of the state”), with, e.g., Messick v. Moring, 514 So. 2d 892, 894 (Ala. 1987) (requiring domination and control before piercing the corporate veil).
Finally, they both weigh the uses to which the parent/state puts the entity/subsidiary.

There is no good reason why courts should not approach the “organ” question in the same way. As the courts that follow the balancing test have held, the level of control is crucial in determining whether an entity should be considered an “organ.” Moreover, if the government surrenders some of its authority to a separately-incorporated entity, it would run contrary to the purposes of the FSIA not to extend sovereign immunity to it. What must govern this entire discussion is the extent to which a reasonable foreign government would be annoyed by the failure to afford the entity the benefits of the FSIA and viewing the relationship through these lenses will assist courts in so doing.

1. The “Arm of the State” Doctrine

It is hard to imagine why courts have not yet applied the “arm of the state” logic in some reasoned fashion to “organ of a foreign state.” The main thrust of the two inquiries is the same—will a failure to treat the entity as part of the state, be it foreign or domestic, impinge on that state’s sovereignty.\(^{261}\) Despite the similarity, there are a variety of connections between the state and the entity that courts examine in the Eleventh Amendment context, but ignore under the FSIA. Some of those missing inquiries are simply inapposite, but others analogize easily and their absence cannot be readily explained. I will first discuss those areas of Eleventh Amendment inquiry that would be useful to the “organ” consideration and then examine the justifiable absence of certain other criteria.

\(a\) How the “Arm of the State” Doctrine Can Help

The first lesson from the “arm of the state” doctrine is that courts considering whether an entity is an organ should investigate the effect of any adverse judgment on the public coffers of the foreign state, in addition to focusing on the general relationship between the

\(^{261}\) In re Ayers, 123 U.S. 443, 505 (1887) (“The very object and purpose of the 11th Amendment were to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.”); Monegasque de Reassurances S.A.M. (Monde Re) v. NAK Naftogaz of Ukr., 158 F. Supp. 2d 377, 382 (S.D.N.Y. 2001) (“a central purpose of the FSIA [is] to respect the sovereignty of foreign states”).
state and the entity. The Supreme Court has been clear that it is not necessarily the tracing of the funds used back to the state, but rather whether the state bears ultimate legal liability for the judgment. This explicitly derives directly from one of the twin purposes of the Eleventh Amendments, to protect the state treasuries from federal intrusion.

That same purpose is not directly relevant in the FSIA context. Despite this fact, the effect of an adverse judgment against the entity in question must be relevant to the FSIA’s purposes as well. The foreign state would be justifiably upset if the entity who it agreed to indemnify or on whose behalf it is expending public funds to pay an adverse judgment was not afforded the treatment due an organ of the foreign state. Thus, while the purposes of the FSIA do not explicitly call for this consideration in the same manner as those of the Eleventh Amendment, the effect of a lawsuit against an entity on the public treasury of the foreign state is certainly relevant to whether that entity is an “organ.”

The second and perhaps most important lesson that the comparison of these two doctrines reveals is that inquiry into the public character of the entity’s activities is ill-advised. Courts do not inquire into the commercial nature of the actions of the putative “arm of the state”; why should they do so with foreign state organs? The commercial activity exception is a red herring here. While the FSIA codified the doctrine of restrictive immunity that limits grants of immunity to sovereign acts, Congress granted certain benefits to foreign states regardless of whether immunity was ultimately granted. By this, Congress intended to limit interference with the Executive’s conduct of foreign relations even in those cases where immunity was

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262 Regents of the Univ. of Cal., 519 U.S. at 431.
263 Id.
264 See English v. Univ. of Haw., 2005 U.S. Dist. LEXIS 22661, 5-6 (D. Ky. 2005). There appears to have been some confusion in the interpretation of Moore’s Federal Practice’s note on this point. Moore’s notes that the question asked by the Supreme Court was “whether the entity performs functions typically performed by a state government.” See Moore’s Federal Practice, supra note 199, § 123.23. A closer analysis reveals that this question refers to the state-wide scope, as opposed to local scope, of the entity’s function, rather than its governmental as opposed to non-governmental character. Id. at n. 47. At least one court has misapplied this point. See Ammend v. BioPort, Inc., 322 F. Supp. 2d 848, 856 (D. Mich. 2004); Rivera Torres v. Junta de Retiro para Maestros, 502 F. Supp. 2d 242, 259 (D.P.R. 2007).
not appropriate. While it is crucial to the ultimate question of immunity under the FSIA, the commercial character of the entity is simply not relevant to its potential status as an “organ” and subsequent entitlement to the FSIA’s various procedural safeguards.

There is a final lesson that bears special mention. The “arm of the state” doctrine teaches us that, at the end of the day, the determination of the entitlement to sovereign protection must be made in consideration of the basic purposes of the Eleventh Amendment.\textsuperscript{265} To avoid arbitrary results, if the results of its “arm of the state” balancing test are ambiguous, the twin purposes of the Eleventh Amendment must guide the result.\textsuperscript{266} Similarly, courts seeking to determine whether an entity is an organ must always keep the potential effect on foreign relations in mind. Courts have rarely done so. While they have meticulously recited that it is a fact-intensive decision,\textsuperscript{267} not the mechanical application of a strict test,\textsuperscript{268} and that a certain factor’s presence or absence is not dispositive,\textsuperscript{269} they have been making arbitrary calls on “organ” status if their tests did not conclusively point one way or the other. Instead, when faced with an ambiguous result, the court must consider whether a contrary decision would justifiably affront a foreign government. This default inquiry will force these decisions to adhere to Congressional purpose as closely as possible and further its subsidiary goal of encouraging uniformity in decision.

\textit{b) The Limits on the “Arm of the State” Analogy}

There are two discrete differences between the “arm of the state” doctrine and the organ calculus. The first is that an “arm of the state” is considered part of the state itself and an “organ of a foreign state” is only an “agency or instrumentality” of a foreign state. The FSIA reflects this fundamental difference in the definition of an agency or instrumentality by requiring that it be a “separate legal person”\textsuperscript{270} and that it not be a citizen of a state of the United States.
nor formed under the laws of a third country.\textsuperscript{271} Thus, it is perfectly appropriate for courts listing criteria of what constitutes an “organ” under the FSIA to have left out or minimized the importance of an entity’s separate incorporation and its ability to sue or be sued or to hold and use property.\textsuperscript{272} Section 1603(b)(1) requires that an “agency or instrumentality” be a separate legal person and, thus, inquiries relating to that question should not be part of the “organ” inquiry.\textsuperscript{273} In the Eleventh Amendment context, however, their presence would demonstrate greater separation from the state and militate against the entity’s being considered an “arm of the state”\textsuperscript{274}

The second distinction is that the language of the FSIA extends its benefits, in some form, to foreign states and political subdivisions thereof, and agencies and instrumentalities of both.\textsuperscript{275} By contrast, the Eleventh Amendment limits itself to the state and its “arms.”\textsuperscript{276} For this reason, the “arm of the state” analysis often considers whether an entity is state-wide in function or limited to some subsection of the state.\textsuperscript{277} If the latter, the entity may more likely be related to a political subdivision, such as a municipality, and therefore not entitled to immunity.\textsuperscript{278} Inquiry into the functions of the putative organ may be appropriate, but the distinction between a state-wide entity and one that acts only on some sub-national level is irrelevant.

These distinctions must be considered when analogizing the “arm of the state” doctrine to the “organ” question. Despite the different contexts, we should still take away the relevance of the effect of an adverse judgment on the public treasury of the foreign state, the irrelevance of the public activity inquiry and the fundamental importance of using the purposes of the FSIA as the constant guidepost by which to measure “organ” decisions.

\textsuperscript{271} 28 U.S.C. § 1603(b)(3).
\textsuperscript{272} USX Corp., 345 F.3d at 209.
\textsuperscript{273} Id.
\textsuperscript{274} See, e.g., Febres v. Camden Bd. of Educ., 445 F.3d 227, 230 (3d Cir. 2006).
\textsuperscript{275} See 28 U.S.C § 1603(b)(2).
\textsuperscript{278} See, e.g., Woods v. Rondout Valley Cent. Sch. Dist. Bd. of Educ., 466 F.3d 232, 245 (2d Cir. 2006)
2. Applying the “Alter Ego” Lessons

The conceptual connection between veil piercing and organs is similarly clear; the former pierces the corporate veil and the latter the sovereign one. Unsurprisingly, to the extent control is a proper consideration for the “organ” question, both look at similar indicia of control that the greater entity exercises over its subordinate entity to determine whether the veil should be pierced or foreign state status extended. Thus, generally speaking, all of the veil piercing factors can be considered, though sometimes in modified form, in considering organs of foreign states.

There are, however, two distinct and fundamental differences between the two doctrines that must be kept in mind. Veil piercing is a common-law doctrine designed to do justice. It was developed to address inequitable results, most often fraud. Fraud is such a central concept that it is sometimes sufficient by itself; some courts will pierce the veil if a parent corporation misuses the corporate form to effect a fraud, mislead creditors, or fraudulently transfer assets out of the corporation. Even those courts that require more usually call for some fraudulent or inequitable consequence of the corporate form before veil piercing. The “organ” prong within the definition of a “foreign state” serves entirely different purposes. It was designed by Congress to address the broad spectrum of entities with which a foreign government might choose to associate itself. Fraud and its various appearances in veil piercing doctrine are not relevant to the FSIA’s concerns.

Second, veil piercing goes against the very purpose of separate incorporation, limited liability. Courts are, therefore, reluctant to pierce the corporate veil except in extreme cases. This prejudice should not apply to the “organ” analysis. Allowing an “organ” to pierce the sovereign veil and make use of its FSIA immunity does not

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279 For example, references to overlapping board members must become whether the board members are government employees or appointees.
280 See generally Maurice Wormser, Piercing the Veil of Corporate Entity, 12 COLUM. L. REV. 496 (1912).
281 See Glynn, supra note 187, at 345.
282 See id.
283 While some commentators have called for the abolition of the doctrine because of its haphazard application, see generally Bainbridge, supra note 188, at least in theory, veil piercing is the exception, rather than the rule, see United States v. Bestfoods, 524 U.S. 51, 61 (1998).
contradict the purposes of the doctrine itself; rather, Congress intended “agency or instrumentality” to be interpreted broadly and, thus, a broad definition of “organ” is very much in line with them.\textsuperscript{284}  For this reason, courts have noted that the level of control necessary to pierce the corporate veil is greater than that which implicates an organ of a foreign state; cases that decline to pierce a corporate veil might still present appropriate cases for an organ designation.

This second distinction also means that the failure to maintain corporate formalities does not have the same importance. In the veil-piercing context, such failure is a prerequisite because, if it were only control that was needed, almost any wholly-owned corporation, whether the subsidiary of a parent or the property of an individual, would be ripe for veil piercing. In the FSIA context, the failure to maintain the corporate separateness of the state and the entity in question may be strong evidence of organ status, but its absence does not mean that the entity is not an organ.

As an example of how specific factors might be adapted to the FSIA context, we need only look to undercapitalization, one of the most commonly required factors in veil piercing. In seeking to pierce, courts ask whether the relevant entity has maintained an appropriate level of capital. If not, courts often infer that the parent corporation was attempting to effect a fraud or improperly avoid liability by misusing the corporate form. For potential organs, however, undercapitalization has more limited significance. If, for example, the state was obligated to provide the entire operating budget for the entity, the failure to the entity to maintain capital reserve evinces the state’s liability for the judgment.

This example shows that the veil piercing factors cannot simply be applied by rote. They must be considered in the context of the FSIA and altered, if need be, to fit the contours of the state/entity relationship. Nevertheless, they remain useful in seeking to provide context to the “organ” question.

\textbf{B. A Cohesive Approach to the “Organ” Question}

The four lines of inquiry that both the “arm of the state” and alter ego doctrines follow analogize easily to the question of whether an entity is an organ of a foreign state. Courts must examine the tasks

\textsuperscript{284} See Gates, 54 F.3d at 1460.
to which the government puts the entity and the level of control it can and does exercise over the entity itself and its assigned tasks. They must also look at the legal relationship between the state and the entity, including how it is treated under local law, and whether and to what extent public funds are involved in the entity’s business and in the transaction that is the subject of the lawsuit.

To this end, I propose that courts ask the following questions. First, has the foreign state ceded any of its core and traditional sovereign powers to the entity? Second, are there sufficient financial ties between the foreign state and the entity such that any award would be paid out of the public treasury? Third, how does the foreign state treat the entity under local law and is that treatment significantly different than its treatment of other similar entities? Fourth, are similar entities in the United States and other foreign states given agency or instrumentality status? Finally, does the foreign state control how the entity conducts its business beyond what is customary in that state and, if not, can it exercise such extreme control?

I submit that affirmative answers to any of these questions, in most cases, will justify the entity’s being treated as an organ of the foreign state for FSIA purposes. The treatment of an entity that exercises sovereign power as a run-of-the-mill foreign corporation could reasonably be expected to annoy the foreign government. Similarly, if Australia decides that, under Australian law, an entity is cloaked in sovereign immunity, it would be justifiably affronted with a contrary decision by a United States court. The fact that an affirmative answer leads to organ status is not surprising; after all, each question was designed to get at whether justifiable affront would result, which as we have seen is the organ lynchpin.

A negative answer to any one question, on the other hand, is not necessarily a bar. As we have seen, entities that do not exercise core sovereign power may still be entitled to treatment as an organ. If, for example, the foreign state has provided a blanket indemnity to the entity, then an adverse judgment would be paid out of the public treasury, leading to justifiable affront. Similarly, even if a commercial entity with limited financial ties to France is not considered part of the sovereign under French law, treatment of a similar German entity as an organ might require the same treatment for the French company to avoid reasonable foreign relations friction.
That international comparative inquiry in combination with the comparison of the entity to other similarly situated domestic entities will assist in providing limits to my approach. If, for example, a socialist state considers itself the owner of every entity within its boundaries, the comparative inquiry will reveal that the entity in question is treated just like any other entity—a fact that militates against organ status. Likewise, if no foreign sovereign thinks of its wineries as organs of the state, then France should not be offended if a United States court gave its wineries the same treatment.

It is again important to remember that even if an entity is assigned organ status, that does not mean that it will be necessarily entitled to immunity. Many of the entities that would qualify for organ treatment under this proposal will be largely commercial enterprises, whose business would fall under the “commercial activity” exception to immunity.\textsuperscript{285} Other suits will fall under the non-commercial tort exception, similarly stripping the entity of immunity.\textsuperscript{286} The point is that the best way to fulfill the purposes of the FSIA is to extend its precepts, both procedural and substantive, to entities whose ties to the government are sufficiently close so that the lawsuit might risk offending a reasonable government. Put in another way, the FSIA provides that the foreign state does not lose all of its procedural protections and its entitlement to immunity as a result of its decision to order its internal affairs in any given manner.

1. Has the Foreign State Ceded any of its Core and Traditional Sovereign Powers to the Entity?

We first ask the question that the public activity test purports to ask, albeit in a more limited and direct manner.\textsuperscript{287} Rather than looking at the presence or lack of a public activity, we must look at whether the entity exercises a traditional sovereign function. Why this consideration is crucial is almost self-explanatory. If a foreign state has ceded some of its sovereign powers to an entity, it is almost


\textsuperscript{286} See 28 U.S.C. § 1605(a)(5).

\textsuperscript{287} This factor could also be analogized to the considerations in veil piercing regarding whether the parent uses the subsidiary to carry out its own affairs, rather than the subsidiary’s having its own business.
certain that the foreign state will be annoyed if that entity is not considered its organ. Nothing could be closer to the purposes of the FSIA than to ascribe “organ” status to entities that are acting in place of the foreign government itself.

The legislative history provides an example of this type of entity in its list of typical agencies and instrumentalities: a central bank. If a foreign government sees fit to establish a central bank to manage its currency as a separate legal entity, there is no reason why such an entity should not be entitled to FSIA immunity to the same extent as the state itself. Other examples include those entities tasked with regulating natural resources, such as an oil company, or with making investments to assist in the regulation of the financial markets or development the economy, such as a development bank, or the managing the security of the state, such as the armed forces, if they should be organized as separate legal persons. Whenever the government has delegated to a separate entity one of its core functions, extending the cloak of immunity over that entity is appropriate.

2. Are there sufficient financial ties between the foreign state and the entity such that any award would be paid out of the public treasury?

The “arm of the state” doctrine teaches us that nothing is more sacred to a sovereign than its purse strings. Thus, although the FSIA does not share the Eleventh Amendment’s explicit concern, it is entirely appropriate to consider whether the judgment will ultimately be paid out of the foreign state’s public treasury. Just as in the Eleventh Amendment context, this does not mean that an entity would have to show a guarantee from the government or trace any negative judgment directly to the state coffers. Indeed, it is perhaps even more important in the foreign state context, where governments and economies take on so many shapes and sizes, that courts investigate

289 See Peninsula Asset Mgmt. (Cayman) v. Hankook Tire Co., 476 F.3d 140, 143 (2d Cir. 2007).
291 Id.
292 See supra note 50.
293 See Hess, 513 U.S. at 48 (citing cases).
the practical effect of the judgment on the public treasury in making this determination.

The legislative history provides additional support to the relevance of this question by its reference to a state trading company as an example of a typical instrumentality. Congress clearly anticipated that entities whose purpose is commercial in nature, but whose profits revert to the foreign state, would be entitled to FSIA protection. Justice Breyer’s dissent in Powerex provides further support for this proposition and another example of an entity that might qualify as an organ under this question, a power company. Other examples might include a sovereign wealth fund or a state pension fund.

A variety of subsidiary factors can be imported from the “arm of the state” doctrine along with the overarching question. The first and simplest is whether the foreign state has guaranteed the debt of the subsidiary or agreed to indemnify it. Courts have already recognized the importance of this fact in determining organ status. If there is no guarantee, the focus must turn whether the practical effect of the judgment would be to draw money from the state treasury. Indeed, Powerex has told us that it is crucial to determine whether an entity’s profits go to the government. Thus, the government’s ownership interest, whether direct or tiered, must be considered here. Finally, the court must consider the source of the entity’s funding: does it come from the government’s coffers, via disbursements, a tax or some other method? If the court determines that a contrary judgment would be paid from the public treasury, either directly or as a practical matter, it would be the rare case that would justify a court’s failure to extend the FSIA’s procedural protections to the entity in question.

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295 See Powerex, ___ U.S. at ___, 127 S. Ct. at 2424-26.
296 See USX, 345 F.3d at 210, 212.
297 See supra notes 267-68 and accompanying text.
298 See Powerex, ___ U.S. at ___, 127 S. Ct. at 2425.
299 See USX, 345 F.3d at 209.
3. How Does the Foreign State Treat the Entity under Local Law and Is That Treatment Significantly Different than its Treatment of Other Similar Entities?

This question too derives largely from the lessons of the “arm of the state” analysis. But it also makes good sense. If a foreign state’s law and legal system treat an entity as part of the foreign state itself, there would be an extremely high risk of offense to that foreign state by contradicting its treatment of that entity. Moreover, while the organ question is one of federal law, the domestic law of the foreign state is better able to address the specific economic and corporate structures that are prevalent and the specific state/entity relationships that are peculiar to that state.

Aside from those instances in which local law has a similar criterion to “organ” under the FSIA, there are a variety of questions that we can borrow from the Eleventh Amendment analysis and add to those that the courts already consider. Courts should begin by determining whether the government created the entity and, if so, examine the act(s) that created it. Or, if the entity was initially private but later nationalized, the relevant inquiry will be the circumstances surrounding its acquisition. Courts should turn to other statutory, judicial and administrative treatment of the entity. For example, if the entity is deemed a “public corporation” or is immune from taxation, those facts would argue for its sovereign character. Similarly, if the entity is granted special privileges or exclusive rights, it is likely an organ of the state. The court could also look at whether the entity’s founding documents note its quasi-governmental character or refer to its connection to the state.

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300 See supra notes 218-25 and accompanying text.
301 Though as discussed supra, we sometimes need to adapt those factors to the changed factual circumstances.
302 See, e.g., Filler, 378 F.3d at 217 (listing this as one of the factors in the FSIA context); Lambert v. Kenner City, 2005 U.S. Dist. LEXIS 357 (D. La. 2005) (looking at the foundation state statute in the “arm of the state” context).
303 See USX, 345 F.3d at 209-10.
305 See, e.g., Bd. of Regents of the Univ. of Tex. Sys., 478 F.3d at 279 (citing Kelly, 213 F.3d at 845).
This potentially broad grant of sovereign status is checked by comparative analysis. Once the court determines how local law handles the entity, it should compare and contrast its treatment with the treatment of any other similar entities in the foreign state. If the domestic law treats all similar entities as part of the state, this fact may have little weight in determining whether a reasonable state would be affronted. For example, in a socialist state, the fact that the state is deemed to own all of a particular type of entity does not mean that those entities are, without more, organs of the state.  

Conversely, the foreign state’s treatment of an entity as a part of the government or a statutory reference to the entity as a “public corporation,” if these characterizations are not true of other similarly situated entities, is strong evidence that the entity in question should be considered an organ. If the foreign state treats the entity in a significantly different manner than other public entities, this too might be evidence that it need not be granted sovereign status. The backdrop consideration is whether the foreign state would be justifiably offended by a United States court’s failure to spread the cloak of sovereign immunity over the entity and this is one method to ascertain that likelihood.

4. Are similar entities in the United States and other foreign states given agency or instrumentality status?

The justification for this line of inquiry should also be readily apparent. Here, we address the possibility for interference with foreign relations by the appearance of favorable treatment for entities in the United States itself or with specific other countries. Powerex provides an apt example. The Canadian power company at issue was “not meaningfully different from ordinary municipal electricity distributors, the [TVA], or any foreign “nationalized” power producers and distributors, such as Britain’s former Central Electricity Generating Board or Electricite de Franc,” in the words of Justice Breyer. It is not hard to imagine that Canada would be justifiably offended that the entity to which it assigned its interest under a treaty with the United States would be treated as a run-of-the-mill for-profit corporation, where similar entities within and without the United States would be considered part of the government.

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307 Powerex, ___ U.S. at ___, 127 S. Ct. at 2426.
It is also difficult to fault Justice Breyer’s implicit reasoning that the vagaries of a foreign state’s arrangement with an entity, perhaps as required by the political necessities of the moment, should not be dispositive of its entitlement to agency or instrumentality status. If other similar entities in other states are afforded the special treatment that the FSIA allows, why should it not be extended to the entity in question? For instance, Justice Breyer took issue with the Ninth Circuit’s emphasis on Powerex’s not being subject to all of the provincial regulations that regulated other governmental departments. By implication, it is the broad picture of the entity and how it fits into the foreign state’s political and regulatory scheme that is important when one engages in this type of comparative analysis.

5. Does the foreign state control how the entity conducts its business beyond what is customary in that state and, if not, can it?

The final and most complicated and varied inquiry delves into the level of the control that the foreign state can and does exercise over the corporation. While this was supposedly the purpose of the balancing test, we have seen that those factors have been peeled off, layer by layer, in the previous questions. We therefore borrow heavily from the alter ego theory of veil piercing—after all, control is its lodestar, albeit at a much higher level than we would find desirable under the FSIA. The legislative history mentions various entities that might only qualify as “organs” under this prong, including a shipping line, an airline, a steel company or a government procurement agency, all of which might seem ordinary businesses by other measures.

Courts could look at any of the various criteria developed in the extensive “alter ego” precedent and literature. While there are too many to list here, the following factors are particularly relevant to the question of control in these circumstances.

- Does the government treat the entity’s assets as its own?

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308 Id. at 2427.
309 See Gates, 54 F.3d at 1460 n.1.
310 See House Report, supra note 10, p. 16
311 See Bainbridge, supra note 188, at 551; Assoc. Vendors, Inc., 26 Cal. Rptr. at 814.
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- Are the employees of the entity civil servants? 312
- Does the government appoint or have the right to veto board members? 313
- Does the government supervise the day-to-day operations of the entity? 314
- Can the government circumscribe the activities of the entity? 315
- Does the government deal at arm’s length with the entity? 316
- Is the government the only source of business for the entity? 317
- Was the activity that provides the basis for the lawsuit undertaken on behalf of the government or at its insistence? 318

At its core, this open-ended analysis must determine whether the foreign government is sufficiently involved in and responsible for the activities of one of its citizen entities to jeopardize American foreign relations with that state, if a court were not to extend the FSI A’s protections to the entity in question.

Consider the following entity: it was initially owned by the government directly, but it was later transferred to a holding company as part of a restructuring of all governmental holdings; all profits

312 See, e.g., USX, 345 F.3d at 213-14.
313 See, e.g., Powerex, ___ U.S. at ___, 127 S. Ct. at 2423; Fresenius Med. Care Cardiovascular Res. Inc., 322 F.3d at 74.
315 See Bainbridge, supra note 188; Fresenius Med. Care Cardiovascular Res. Inc., 322 F.3d at 74.
revert directly to the government treasury; all property owned by the entity is held on behalf of and for the benefit of the state; the entity can enter into contracts on behalf of the state; the government appoints all board members; and the employees of the entity are paid directly out of state coffers. Perhaps this level of control is insufficient to find that the entity is the “alter ego” of the government, but that government would be justifiably affronted were a United States court to fail to afford FSIA protections to it.

6. Courts must always default to the purposes of the FSIA

There will be a case where these inquiries do not reveal a clear answer. Then, just as in the Eleventh Amendment context, courts must default to the underlying purpose of the FSIA: to prevent interference with foreign relations by making it difficult to sue foreign governments and foreign government agencies and instrumentalities. When faced with these closer calls, courts must carefully consider the effect that decision will have on the conduct of foreign relations and determine whether that effect will be sufficient to justify extending the foreign state’s cloak over that entity in question.

IV. CONCLUSION

Courts have been and will continue to be faced with an increasingly wide variety of entities that assert entitlements to the protections of the FSIA. Those entities and the governments to which they profess a connection, as well as the parties who do business with them, have a strong interest in the development of a more robust organ framework. The tests that the courts have created have paid little attention to the purposes of the FSIA. They have been codified from descriptions of specific examples that do not necessarily translate easily to all factual situations. To make matters worse, the results of the application of these tests have been arbitrary.

The problem has always been how to achieve the flexibility that Congress requires in its definition of “agency or instrumentality” and, therefore, “organ” without sacrificing the interests of uniformity and the concerns for predictability. Adapting the “arm of the state” and “alter ego” doctrines to the “organ” calculus addresses that

320 As the Ninth Circuit notes that it was in Dole, before denying “organ” status. See Patrickson, 251 F.3d at 808.
conflict. It replaces an *ad hoc*, organic list of factors with various lines of inquiry that help ascertain whether Congress’s interest in flexibility will be served under the facts of a given case. In order to better follow those lines, it provides hundreds of cases that have considered situations arising in myriad circumstances, which will both inform the court’s resolution of the claim before it and insure as great an attention to uniformity as possible. Only by capturing the broadest possible picture of the relationship between the entity and the foreign state can a court resolve the tension between the maintenance of proper foreign relations and the uniform and predictable resolution of claims against foreign states.