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The Foreign Sovereign Immunities Act and Corporate Subsidies of Agencies or Instrumentalities of Foreign States

By
Andrew Loewenstein*

I. INTRODUCTION

We are entering an era of ever quickening globalization.¹ Over the next five years, the U.S. is predicted to receive an average inflow of \$236.2 billion in foreign direct investment annually.² Indeed, the gross product of U.S. affiliates of foreign corporations increased by seven percent in 1997, swelling to \$385 billion.³ This came on the heels of a full eleven percent increase in 1996.⁴ Few areas remain untouched by the economic reconfiguration caused by transnational commerce and large-scale investment.⁵ The law governing the jurisdiction of U.S. courts is no exception. As the number of foreign state-owned corporations located or engaged in business in the United States increases, so does the strain on the traditional interpretation of federal jurisdiction for such entities.

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1. The impact of globalization has been the subject of extensive literature. See, e.g., Roman Terrill, Symposium, *Part Three: Private Capital and Development: Challenges Facing International Financial Institutions in a Globalized Economy*, 9 TRANSNAT'L L. & CONTEMP. PROBS. 217, 218 (1999) (discussing "declining significance of national borders in the operation of national economies"); Mark Weisbrot, *Globalization for Whom?* 31 CORNELL INT'L L.J. 631, 644 (1998) (discussing the financial impact of globalization); Renato Ruggiero, *Trading into the Global Century*, 10 N.Y. INT'L L. REV. 1, 1 (1997) ("The forces driving globalization are the technological advances that have shrunk the cost of international transport and communications, together with the free movement of capital and, especially the now virtually unanimous realization around the world that trade and open markets provide the best route to prosperity."); Stephen H. Willard et al., *International Investment, Development, and Privatization*, 33 INT'L LAW. 231, 239 (1999) (discussing efforts to increase global investment).

2. *The Cutting Edge*, ECONOMIST, Feb. 24, 2001, at 80.

3. William J. Zeile, *Foreign Direct Investment in the United States*, 79 Bureau of Econ. Analysis, U.S. Department of Commerce 21 (1999).

4. See *id.*

5. See John Stopford, *Multinational Corporations*, FOREIGN POL'Y, Winter, 1998-99, at 12-13 (discussing the impact of multinational corporations on the global economy).

Like privately owned corporations, foreign state-owned entities often become entangled in litigation in United States courts. The Foreign Sovereign Immunities Act (FSIA)⁶ established certain limits on the extent of such litigation by granting foreign states the presumption of immunity from suit in U.S. courts.⁷ The FSIA's protection extends somewhat broadly, including within its coverage foreign states proper, as well as the "agencies or instrumentalities" of foreign states.⁸ Determining precisely what constitutes an agency or instrumentality, however, is a difficult process. As U.S. plaintiffs seek to sue foreign state-owned corporations, one vexing yet unresolved question is becoming increasingly important and contentious: whether a corporation owned by an agency or instrumentality of a foreign state is itself part of the foreign state for purposes of the FSIA.⁹

This question centers on so-called "tiered corporations," those with multiple layers of corporate ownership, in which intermediate corporations buffer a corporate entity from its ultimate owner—in this context, a foreign state.¹⁰ While the contours of tiered corporations vary, a typical corporate structure is illustrated in *Gardiner Stone Hunter Int'l. v. Iberia Lineas Aereas de España, S.A.*¹¹ *Gardiner* centers on the activities of Aerolineas Argentinas, an Argentina based corporation owned by Iberia Lineas Aereas de España, S.A., a corporation owned by the Spanish government.¹² Aerolineas' ownership structure is said to be "tiered," since Spain's ownership of Aerolineas Argentinas is indirect, i.e. mediated through an intermediate corporation in the form of Iberia Lineas Aereas de España.¹³

Historically, courts interpreted the FSIA as covering this type of corporate structure. As a result, tiered subsidiaries could reap the benefits conferred upon

6. 28 U.S.C. §§ 1330, 1602-1611 (1994).

7. See generally Troy Daniels, *An Analysis of the United States Foreign Sovereign Immunities Act*, 4 DETROIT J. INT'L L. & PRAC. 175 (1995); Michael A. Tessitore, *Immunity and the Foreign Sovereign: An Introduction to the Foreign Sovereign Immunities Act*, 73 FLORIDA BAR. J. 48 (1999); William R. Dorsey, III, *Reflections on the Foreign Sovereign Immunities Act After Twenty Years*, 28 J. MAR. L. & COM. 257 (1997); Joel Mendal Overton, II, *Will the Real FSIA Choice-of-Law Rule Please Stand Up*, 49 WASH. & LEE L. REV. 1591 (1992); Danny A. Hoek, Note, *Foreign Sovereign Immunity and Saudi Arabia v. Nelson: A Practical Guide*, 18 HASTINGS INT'L & COMP. L. REV. 617 (1995); Everett C. Johnson, Jr., *Saudi Arabia v. Nelson: The Foreign Sovereign Immunity Act in Perspective*, 16 Hous. J. INT'L L. 291 (1993).

8. 28 U.S.C. § 1603(a) (1994).

9. Tessitore, *supra* note 7, at 50 (noting the split among the circuits); Thad T. Dameris & Michael J. Mucchetti, *Vectors to Federal Court: Unique Approaches to Subject Matter Jurisdiction in Aviation Cases*, 62 J. AIR L. & COM. 959, 972 (1997) (discussing tiered ownership under FSIA); Karen Geller, Case Note, *The Interplay Between the Foreign Sovereign Immunities Act and ERISA: The Effects of Gates v. Victor Fine Foods*, 29 U. MIAMI INTER-AM. L. REV. 575, 578 (1998) (arguing that "jurisdictional implications of the FSIA require a clarification of what constitutes an agency or instrumentality").

10. See, e.g., Douglas K. Mullen, *Foreign Sovereign Immunity and the Foreign Sovereign Immunities Act*, 34 INT'L LAW 553, 557 (2000) (defining "tiering").

11. *Gardiner Stone Hunter Int'l v. Iberia Lineas Aereas de España, S.A.*, 896 F. Supp. 125 (S.D.N.Y. 1995).

12. See *id.* at 127.

13. See *id.* at 130 (concluding that Argentinas Aerolineas is not a foreign state for purposes of the FSIA).

foreign states.¹⁴ Indeed, the advantages were considerable. First and foremost, absent falling within an enumerated exception, foreign states were presumptively immune from the jurisdiction of U.S. courts.¹⁵ Even if a foreign state were subject to one of the statutory exceptions to immunity, it remained entitled to remove the action from state court to federal court and was exempt from jury trials.¹⁶ Thus, the courts' traditional approach to tiered subsidiaries gave them a significant advantage over competitors that were not indirectly owned by foreign states.

Beginning in 1995, with the Ninth Circuit's decision in *Gates v. Victor Fine Foods*,¹⁷ courts have become increasingly divided over whether tiered subsidiaries fall within the definition of a foreign state. In *Gates*, the Ninth Circuit held, contrary to available precedent, that subsidiaries of tiered, foreign state-owned corporations are not entitled to sovereign immunity under the FSIA. Shortly thereafter, the Seventh Circuit, in *In re Air Crash Disaster Near Roselawn, Indiana*,¹⁸ challenged the Ninth Circuit's interpretation of the FSIA. In ruling that the FSIA does extend sovereign immunity to subsidiaries of foreign state-owned agencies or instrumentalities, the Seventh Circuit created a split among the circuits.¹⁹ Adding to the confusion, in *Hyatt Corp. v. Stanton*,²⁰ the U.S. District Court for the Southern District of New York found the Ninth and Seventh Circuits' analyses to be equally problematic and issued an influential opinion holding that tiered entities are not entitled to foreign state status under the FSIA. The *Stanton* court agreed with the Ninth Circuit's holding, but

14. See, e.g., *Am. W. Airlines v. GPA Group, Ltd.*, 877 F.2d 793, 796 (9th Cir. 1989) (noting that it is undisputed that a subsidiary of a state-owned airline is entitled to sovereign immunity); *Gould, Inc. v. Pechiney Ugine Kuhlmann & Trefimetaux*, 853 F.2d 445, 450 (6th Cir. 1988) (noting that a corporation indirectly owned by a foreign state falls within the scope of FSIA); *Alberti v. Empresa Nicaraguense De La Carne*, 705 F.2d 250, 253 (7th Cir. 1983) (holding that an agent of a nationalized corporation falls within the definition of a foreign state); *Gilson v. Republic of Ireland*, 682 F.2d 1022, 1026 (D.C. Cir. 1982) (holding that a corporation wholly owned by an instrumentality of Ireland is a foreign state); *Delgado v. Shell Oil Co.*, 890 F. Supp. 1315, 1317-19 (S.D. Tex. 1994) (rejecting the argument that indirect ownership is insufficient to establish an entity as a foreign state); *Talbot v. Saipem A.G.*, 835 F. Supp. 352, 353 (S.D. Tex. 1993) (finding fact that entity's "ownership by the Italian government as indirect is immaterial"); *Trump Taj Mahal Assocs. v. Cos-truzioni Aeronautiche Giovanni Agusta, S.p.A.*, 761 F. Supp. 1143, 1150 (D.N.J. 1991) ("It is irrelevant whether [the defendant] is a public corporation or a private corporation, so long as the Italian government has a majority ownership interest . . .").

15. 28 U.S.C. §§ 1330(a), 1604 (1994).

16. 28 U.S.C. § 1330(a) ("The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.").

17. *Gates v. Victor Fine Foods*, 54 F.3d 1457 (9th Cir. 1995).

18. *In re Air Crash Disaster Near Roselawn, Indiana*, 96 F.3d 932 (7th Cir. 1996).

19. See Tessitore, *supra* note 7, at 50 (noting that the "tiering problem" has "caused a split in the federal circuits"); Ole R. Sandberg, *The Untouchables*, L.A. LAW., Oct. 1999, at 37 (1999) (observing that courts "faced with this issue have come down on both sides of the fence"); Michael M. Baylson & Clare Ann Fitzgerald, *Courts Disagree on Extent to Which Foreign Sovereign Immunities Act Permits Pooling of Interests and Tiering of Subsidiaries by Foreign Governments*, NAT'L L.J., Feb. 3, 1997, at B7 (noting that *Roselawn* "constitutes a direct rejection of the reasoning and result reached in *Gates v. Victor Fine Foods*").

20. *Hyatt Corp. v. Stanton*, 945 F. Supp. 675 (S.D.N.Y. 1996).

reached its conclusion through an examination of the troublesome repercussions such a reading of the statute would have for plaintiffs seeking to sue tiered subsidiaries. With this split in the circuits, and with disagreement on fundamental issues, even among courts that ultimately arrive at the same conclusion, each of the three interpretations has developed its own following. Indeed, the jurisprudence on the issue has become so fractured that even courts within the same federal district are divided on the issue.²¹

This article assesses the split among the circuits on the definition of an "agency or instrumentality" under the FSIA. Part II traces the development of the doctrine of foreign sovereign immunity from its introduction in the early nineteenth century through the enactment of the Foreign Sovereign Immunities Act in 1976. Part III discusses how the courts have treated the issue of tiered corporations under the FSIA, beginning with the initial unquestioned acceptance that subsidiaries are properly considered to be within the definition of foreign states, and then discussing the divisions that have developed among the circuits. Part IV goes on to argue that the FSIA, properly construed, does not grant foreign state status to corporate entities a majority of whose shares are owned by agencies or instrumentalities of foreign states. This Part shows that although the Ninth Circuit is ultimately correct in its result, both the Seventh and Ninth Circuits' readings of the statute are internally ambiguous and contradictory. Part IV also discusses the significant procedural benefits accorded to entities deemed to be foreign states, including exemption from jury trials, difficulty in establishing personal jurisdiction over tiered subsidiary defendants, and shifting the burden of production for showing that a foreign state is subject to an exception under the FSIA. Finally, Part V concludes that the procedural considerations, in light of the attenuated relationship between foreign states proper and many of their corporate subsidiaries, suggest that Congress did not intend for subsidiaries of agencies or instrumentalities to fall within the definition of a foreign state.

II.

THE HISTORICAL DEVELOPMENT OF FOREIGN SOVEREIGN IMMUNITY

A. *From Absolute to Restrictive: Evolution of the Approach to Sovereign Immunity*

The incorporation of the doctrine of foreign sovereign immunity into American law dates to Chief Justice John Marshall's 1812 opinion in *The Schooner Exchange v. McFaddon*.²² Starting from the proposition that "[t]he

21. *Compare* *Gardiner Stone Hunter Int'l v. Iberia Lineas Aereas de España, S.A.*, 896 F. Supp. 125 (S.D.N.Y. 1995) (following *Gates'* textual analysis), *with* *United States Fid. & Guar. Co. v. Braspetro Oil Servs. Co.*, No. 94-6124, 1999 U.S. Dist. LEXIS 7236 (S.D.N.Y. May 13, 1999) (agreeing with *Stanton's* "careful analysis"); *compare also* *Martinez v. Dow Chem. Co.*, No. 95-3212, 1996 U.S. Dist. LEXIS 13180 (E.D. La. Sept. 4, 1996) (following *Gates*), *with* *In re Clearsky Shipping Corp.*, No. 96-4099, 1999 U.S. Dist. LEXIS 17784 (E.D. La. Nov. 3, 1999) (finding *Rose-lawn* "to be the more persuasive interpretation of the statute").

22. *The Schooner Exchange v. McFaddon*, 11 U.S. 116 (1812).

jurisdiction of the nation within its own territory is necessarily exclusive and absolute,"²³ Chief Justice Marshall developed a theory of foreign sovereign immunity based on notions of international comity:

One sovereign being in no respect amenable to another, and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.²⁴

Over the next century, as what became known as the absolute theory of foreign sovereign immunity took hold, foreign states were generally afforded immunity from suit, regardless of the nature of their conduct.²⁵ American courts were considered to lack jurisdiction over a foreign sovereign, even where that sovereign's actions were purely commercial in nature.²⁶ The Supreme Court's decision in *Berizzi Bros. v. S.S. Pesaro*,²⁷ a case involving a merchant ship wholly owned by the Italian government, illustrates the extent to which the Supreme Court had embraced the absolute theory of sovereign immunity by

23. *Id.* at 136.

24. *Id.* at 137. Chief Justice Marshall suggested "[t]his perfect equality and absolute independence of sovereigns, and this common interest impelling them to mutual intercourse, and an interchange of good offices with each other, have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation." *Id.* at 137. He concluded that "[i]t seems then to the Court, to be a principle of public law, that national ships of war, entering the port of a friendly power open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction." *Id.* at 145-46. Thus, the Court ruled that:

[T]he Exchange, being a public armed ship, in the service of a foreign sovereign, with whom the government of the United States is at peace, and having entered an American port open for her reception, on the terms on which ships of war are generally permitted to enter the ports of a friendly power, must be considered as having come into the American territory, under an implied promise, that while necessarily within it, and demeaning herself in a friendly manner, she should be exempt from the jurisdiction of the country.

Id. at 147.

25. See M. Mofidi, *The Foreign Sovereign Immunities Act and the "Commercial Activity" Exception: The Gulf Between Theory and Practice*, 5 J. INT'L LEGAL STUD. 95, 98 (1999) (discussing theory of absolute sovereign immunity after *Berizzi Bros.*); Stella Havkin, Note, *The Foreign Sovereign Immunities Act: The Relationship Between the Commercial Activity Exception and the Noncommercial Tort Exception in Light of De Sanchez v. Banco Central de Nicaragua*, 10 HASTINGS INT'L & COMP. L. REV. 455, 459 (1987) (discussing expansion of sovereign immunity "to encompass a nation's commercial as well as governmental activities").

26. See M. Scott Bucci, Comment, *Breaking Through the Immunity Wall? Implications of the Terrorism Exception to the Foreign Sovereign Immunities Act*, 3 J. INT'L LEGAL STUD. 293, 296-97 (noting that "it became apparent that adherence to the absolute theory of immunity was problematic as more and more states participated in commercial activities"); Sandra Engle, Note, *Choosing Law for Attributing Liability Under the Foreign Sovereign Immunities Act: A Proposal for Uniformity*, 15 FORDHAM INT'L L.J. 1060, 1064 n.22 (noting that "the absolute theory of sovereign immunity extended to all acts of the foreign state whether they were governmental or commercial in nature"). The granting of immunity to a foreign state's commercial activities was later abandoned in the enactment of the "commercial activities" exception to foreign sovereign immunity later codified in 28 U.S.C. § 1605(a)(2) (1994) (providing that a foreign state is not immune for the jurisdiction in any case "in which the action is based upon a commercial activity carried on in the United States by the foreign state . . .").

27. *Berizzi Bros. Co. v. The Pesaro*, 271 U.S. 562 (1926).

1926. *Berizzi Bros.* held that a state-owned commercial vessel was entitled to full protection from the jurisdiction of American courts.²⁸ According to the Supreme Court, sovereign immunity attached “alike to all ships held and used by a government” for any “public purpose,” a principle encompassing economic activities such as “advancing the trade of its people or providing revenue for its treasury.”²⁹

During the ascendancy of the absolute immunity regime, the Executive Branch remained the ultimate arbiter of whether U.S. courts could maintain jurisdiction over foreign states.³⁰ The “Judicial Branch deferred to the decisions of the Executive Branch on such questions.”³¹ In 1952, however, the Department of State signaled its intention to abandon the absolute theory of sovereign immunity in favor of a more restrictive approach, which was contemporaneously gaining widespread international acceptance. In what is commonly known as the Tate Letter, the State Department noted:

[T]he widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary a practice which will enable persons doing business with them to have their rights determined in the courts. For these reasons, it will hereafter be the Department’s policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity.³²

Nonetheless, the system of judicial deference to the Executive Branch’s requests concerning whether foreign states should be afforded sovereign immunity from suit continued to engender serious difficulties for the Department of State. Foreign governments often pressured the State Department to recommend immunity, and “[o]n occasion, political considerations led to suggestions of im-

28. See *id.* at 574.

29. *Id.* Under this broad conception of a public purpose, the Court could readily conclude that state-owned merchant ships “are public ships in the same sense that war ships are,” observing that “[w]e know of no international usage which regards the maintenance and advancement of the economic welfare of a people in time of peace as any less a public purpose than the maintenance and training of a naval force.” *Id.* at 574. As the Supreme Court later noted, “From the Nation’s founding until 1952, foreign states were generally granted . . . complete immunity from suit in United States courts.” *Argentine Republic v. Amerasia Shipping Corp.*, 488 U.S. 428, 434 n.1 (1989).

30. See, e.g., *Ex Parte Republic of Peru*, 318 U.S. 578, 589 (1943) (relying on the State Department to recognize its claim to sovereign immunity). The Court held that a State Department certificate regarding immunity “must be accepted by the courts as a conclusive determination by the political arms of the government that the continued retention of the vessel interferes with the proper conduct of our foreign relations.” *Id.* For another example of judicial deference to the State Department, see *Republic of Mexico v. Hoffman*, 324 U.S. 30, 35 (1945) (holding that it is “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”).

31. *Amerasia Hess*, 488 U.S. at 434.

32. See Letter of Jack B. Tate, Acting Legal Adviser to Philip B. Perlman, Deputy Attorney General, May 19, 1952. Under the restrictive theory of sovereign immunity, “a state is immune from any exercise of judicial jurisdiction by another state in respect of claims arising out of governmental activities (*de jure imperii*),” but it is “not immune from the exercise of such jurisdiction in respect of claims arising out of activities of a kind carried on by private persons (*de jure gestionis*), notably commercial activities.” RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 451 cmt. A (1987).

munity in cases where immunity would not have been available under the restrictive theory.”³³

B. *The Foreign Sovereign Immunities Act of 1976*

Congress enacted the Foreign Sovereign Immunities Act³⁴ in 1976, in order to alleviate pressure on the State Department to make quasi-judicial recommendations regarding whether foreign states should be granted immunity from suit.³⁵ The purpose of the statute, Congress declared, was to provide statutory guidelines for the courts to determine whether parties are subject to immunity, thereby “protect[ing] the rights of both foreign states and litigants in United States courts.”³⁶ By enacting the FSIA, Congress thus intended to codify into federal statutory law general principles of “international law.”³⁷

Practically speaking, the FSIA transferred the responsibility for determining when sovereign immunity would be granted from the State Department³⁸ to the judiciary.³⁹ Foreign states’ claims to immunity “[w]ould henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.”⁴⁰ As the House Report made clear, the FSIA was intended to provide the “sole and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states before federal and state courts in the United States.”⁴¹

The FSIA accomplished this objective by granting presumptive immunity to foreign states, absent one of the enumerated exceptions to sovereign immunity.⁴² Section 1330 does this affirmatively, granting the districts courts juris-

33. *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 487 (1983) (citing Testimony of Monroe Leigh, Legal Adviser, Department of State, Hearings on H.R. 11315 before the Subcommittee on Administrative Law and Governmental Relations of the House Committee on the Judiciary, 94th Cong., 2d Sess., 34-35 (1976)).

34. See 28 U.S.C. §§ 1330, 1602-1611 (1994).

35. See Carolyn J. Brock, Note, *The Foreign Sovereign Immunities Act: Defining a Role for the Executive*, 30 VA. J. INT’L L. 795, 795 (1990) (noting that the FSIA was “designed to prevent the executive branch from conclusively intervening in foreign state immunity determinations”); William F. Webster, Note, *Amerada Hess Shipping Corp. v. Argentine Republic: Denying Sovereign Immunity to Violators of International Law*, 39 HASTINGS L.J. 1109, 1109 (1988) (“Congress intended the Act to transfer from the executive branch to the judicial branch the decision whether to grant jurisdictional immunity to a sovereign defendant brought before American courts.”).

36. 28 U.S.C. § 1602 (1994).

37. *Id.*

38. See *Verlinden*, 461 U.S. at 488 (noting that Congress enacted the FSIA “to free the Government from . . . case-by-case diplomatic pressures”).

39. See 28 U.S.C. § 1602 (1994) (“The Congress finds that the determination by the United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts.”).

40. *Id.*

41. H.R. REP. NO. 1487, at 12 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6610-11. The House Report went on to specify that the purpose of the FSIA is to stipulate “when and how parties can 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 sovereign immunity.” *Id.* at 6604.

42. Section 1605 sets out the “general exceptions to the jurisdictional immunity of a foreign state,” including, *inter alia*, waiver, commercial activities, and property taken in violation of international law. See 28 U.S.C. § 1605(a) (1994).

diction to hear suits against foreign states where the foreign state is not entitled to immunity.⁴³ Section 1604, on the other hand, grants immunity negatively, barring courts from exercising jurisdiction over suits involving foreign states where the foreign state is entitled to immunity.⁴⁴ As the Supreme Court noted in *Argentine Republic v. Amerada Hess Shipping Corp.*,⁴⁵ “the text and structure of the FSIA demonstrate Congress’ intention that the FSIA be the sole basis for obtaining jurisdiction over a foreign state in our courts.”⁴⁶

In order to qualify for the FSIA’s presumption of immunity under § 1604, the entity in question must be a “foreign state” within the meaning of § 1603(a).⁴⁷ Rather than defining what constitutes a foreign state affirmatively, however, the FSIA merely states what is *included* within the ambit of the Act—beyond a foreign state proper.⁴⁸ Thus, § 1603(a) specifies that a foreign state includes “a political subdivision of a foreign state”⁴⁹ and an “agency or instru-

43. See 28 U.S.C. § 1330(a) (1994) (“The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.”).

44. See 28 U.S.C. § 1604 (1994) (“Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605-1607 of this chapter.”).

45. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989).

46. *Id.* at 434; see also *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993) (“Under the Act, a foreign state is presumptively immune from the jurisdiction of United States courts; unless a specified exception applies, a federal court lacks subject-matter jurisdiction over a claim against a foreign state.”).

47. 28 U.S.C. § 1603(a) (1994) (“A ‘foreign state’ except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).”).

48. A “state” is defined as “an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities.” THE RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW, § 201 (1987); *Nat’l Petrochemical Co. of Iran v. M/T Stolt Sheaf*, 860 F.2d 551, 553 (2d Cir. 1988) (noting definition of statehood).

The courts will defer to the Executive Branch’s determination as to whether a given entity is recognized as a state. See *Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 48 (finding that the PLO is not a state for purposes of the FSIA). As the Supreme Court explained in *United States v. Belmont*, “Governmental power over external affairs is not distributed, but is vested exclusively in the national government. And . . . the Executive ha[s] authority to speak as the sole organ of that government.” *United States v. Belmont*, 301 U.S. 324, 330 (1937) (upholding the President’s recognition of the Soviet Union). According to the Restatement:

Recognition of a state has been effected by express official declaration, by the conclusion of a bilateral agreement with the state, by the presentation of credentials by a United States representative to the authorities of the new state, and by receiving the credentials of a diplomatic representative of that state. The fact that the United States is a member of an international organization of which a state it does not recognize is also a member does not imply recognition of that state by the United States . . .

THE RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 204, note 2.

For purposes of the FSIA, the “definition of ‘foreign state’ is generally understood as including any nation recognized by the United States in its diplomatic relations as an independent state.” GARY B. BORN, INTERNATIONAL LITIGATION IN UNITED STATES COURTS 213 (3rd ed. 1996).

49. 28 U.S.C. § 1603(a) (1994). Political subdivisions include “all governmental units beneath the central government, including local governments.” H.R. Rep. No. 1487, 94th Cong., 2d Sess. 15, reprinted in 1976 U.S.C.C.A.N. at 6613. For application of the political subdivision prong

mentality of a foreign state.”⁵⁰ An “agency or instrumentality,” in turn, is defined in § 1603(b) as any entity which (1) “is a separate legal person, corporate or otherwise”; (2) “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) “is neither a citizen of a State of the United States . . . nor created under the laws of any third country.”⁵¹ Under this definition, foreign corporations incorporated in and at least fifty percent owned by the foreign state, are regarded as agencies or instrumentalities of a foreign state.⁵² Corporations that are less than fifty percent owned by a foreign state do not fall within the definition of an agency or instrumentality of a foreign state.⁵³

Despite qualifying for coverage under the FSIA, an entity may nonetheless be subject to jurisdiction if it falls within one of the exceptions to sovereign immunity provided by § 1605.⁵⁴ The “most significant of the FSIA’s exceptions”⁵⁵ is the commercial activities exception, found in § 1605(a)(2), which stipulates that foreign states are not immune if:

[T]he action is based upon a commercial activity carried on in the United States in connection with a commercial activity of the foreign states elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.⁵⁶

By creating this exception to immunity from suit, Congress sought to codify the international legal principle that “states are not immune from the jurisdic-

of the FSIA, see *Marlowe v. Argentine Naval Commission*, 604 F. Supp. 703, 707 (D.D.C. 1985) (holding defendant to be political subdivision).

50. 28 U.S.C. § 1603(a) (1994).

51. 28 U.S.C. § 1603(b) (1994).

52. See, e.g., *S&S Mach. Co. v. Masinenexportimport*, 706 F.2d 411, 415 (2d Cir. 1983) (finding a wholly state-owned export/import company established to carry out the foreign trade goals of the state to be an agency or instrumentality); *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371, 1374 (5th Cir. 1980) (noting a wholly foreign state-owned corporation’s prerogative to remove action to federal court); *Carey v. Nat’l Oil Co.*, 592 F. 2d. 673, 676 n.1 (2d Cir. 1979) (finding a government owned oil company to be a foreign state); *Lopez del Valle v. Gobierno de la Capital*, 855 F. Supp. 34, 36 (D.P.R. 1994) (finding a corporation to be a “foreign state” since the Government of Venezuelan owns a majority of its shares); *Aliferis v. Am. Airlines, Inc.*, 523 F. Supp. 1189, 1190-91 n.2 (E.D.N.Y. 1981) (“Congress clearly intended that commercial entities . . . which are owned by foreign states should be afforded the same protections as foreign governments under the Foreign Sovereign Immunities Act.”).

53. See *Outbound Mar. Corp. v. P.T. Indonesia Consortium*, 575 F. Supp. 1222, 1224 (S.D.N.Y. 1983) (finding a single affidavit insufficient to support a claim that a corporation is majority-owned by the government of Indonesia).

54. 28 U.S.C. § 1605 (providing seven general exceptions to sovereign immunity).

55. *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 611 (1992).

56. 28 U.S.C. § 1605(a)(2). A “commercial activity” is defined in the FSIA as “either a regular course of commercial conduct or a particular commercial transaction or act.” Moreover, “the commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.” 28 U.S.C. § 1603(d). Furthermore, a “commercial activity carried on in the United States by a foreign state” is defined as “commercial activity carried on by such state and having substantial contact with the United States.” 28 U.S.C. § 1603(e). For further discussion of the scope of the commercial activities exception, see *Saudi Arabia v. Nelson*, 507 U.S. 349, 358-62 (1993); *Weltover*, 504 U.S. at 610-18.

tion of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities.”⁵⁷

III.

STATE-OWNED TIERED CORPORATIONS UNDER THE FSIA

A. *The Initial Approach to Tiering*

For close to the first two decades of the FSIA, the courts assumed as a matter of course that an entity owned by an agency or instrumentality of a foreign state was entitled to the protections afforded to foreign states themselves. For example, *Gilson v. Republic of Ireland*,⁵⁸ involved a suit brought against Leictron Teoranta, an Irish corporation wholly owned by defendant Gaeltarra Eireann, an instrumentality of the Republic of Ireland.⁵⁹ On appeal, the D.C. Circuit held that each of the defendants was a foreign state within the meaning of § 1604.⁶⁰ Likewise, the Seventh Circuit arrived at the same conclusion in *Alberti v. Empresa Nicaraguense De La Carne*,⁶¹ a case involving the Empresa Nicaraguense De La Carne (“ENCAR”), an agent of Empacadora Nicaraguense, S.A., a recently nationalized Nicaraguan livestock corporation.⁶² Noting that the FSIA defines foreign states as including agencies or instrumentalities of foreign sovereigns, the Seventh Circuit summarily held that “[t]here is no question but that ENCAR falls within this definition.”⁶³

B. *The Ninth Circuit’s Rejection of Tiering: Gates v. Victor Fine Foods*

*Gates v. Victor Fine Foods*⁶⁴ marked the first time a federal court ruled that a subsidiary of a tiered, foreign state-owned corporation is not entitled to immu-

57. 28 U.S.C. § 1602 (1994).

58. *Gilson v. Republic of Ireland*, 682 F.2d 1022 (D.C. Cir. 1982).

59. *See id.* at 1024.

60. *Id.* at 1026. In a footnote, the court commented that the district court below observed that “it is undisputed between the parties that all defendants are foreign states within the meaning of section 1603.” *Id.* at 1027 n.19 (emphasis in original) (quoting Mem. Op. at 4, J.A. at 227 (emphasis added)).

61. *Alberti v. Empresa Nicaraguense De La Carne*, 705 F.2d 250 (7th Cir. 1983).

62. *See id.* at 252.

63. *Id.* at 253. Many other jurisdictions endorsed this approach. *See, e.g.*, *Am. W. Airlines v. Prot. Mut. Ins. Co.*, 877 F.2d 793, 795 (9th Cir. 1989) (noting that it is undisputed that a subsidiary of state-owned airline is entitled to sovereign immunity); *Gould v. Pechiney Ugine Kuhlman & Trefimetaux*, 853 F.2d 445, 449-50 (6th Cir. 1988) (noting that a corporation indirectly owned by a foreign state falls within scope of FSIA); *Delgado v. Shell Oil Co.*, 890 F. Supp. 1315, 1317-19 (S.D. Tex. 1994) (rejecting the argument that indirect ownership is insufficient to establish entity is a foreign state); *Talbot v. Saipem A.G.*, 835 F. Supp. 352 (S.D. Tex. 1993) (finding the fact that entity’s “ownership by the Italian government is indirect is immaterial”); *Trump Taj Mahal Assocs. v. Construzioni Aeronautiche Giovanni Agusta, S.p.A.*, 761 F. Supp. 1143, 1150 (“It is irrelevant whether [the defendant] is a public corporation or a private corporation, so long as the Italian government has a majority ownership interest . . .”).

64. *Gates v. Victor Fine Foods*, 54 F.3d 1457 (9th Cir. 1995). For an overview of the *Gates* decision, see Karen Geller, *The Interplay Between the Foreign Sovereign Immunities Act and ERISA: The Effects of Gates v. Victor Fine Foods*, 29 U. MIAMI INTER-AM. L. REV. 575 (1998).

nity under the FSIA.⁶⁵ The case involved the Alberta Pork Producers Development Corporation ("Alberta Pork"), a Canadian entity established by the Alberta Marketing of Agricultural Products Act in order to serve as the exclusive marketing agent for hogs raised in Alberta.⁶⁶ Under Canadian law, all hogs raised in the province were required to be sold to Alberta Pork, which would then resell them and return the proceeds to the original hog producers.⁶⁷ Acting pursuant to its authority under Canadian law, Alberta Pork purchased a 100% share of Fletcher's Fine Foods ("FFF"), a British Columbia-based pork processing plant.⁶⁸ The subsidiaries owned by FFF included Golden Gate Fresh Foods ("GGFF"), a California pork processing plant located in Lodi, California and operating under the trade name Victor Fine Foods.⁶⁹

When GGFF decided to terminate its employee welfare benefit plan and, shortly thereafter, its entire workforce, GGFF's former employees filed a class action suit against GGFF, Alberta Pork, and FFF. The plaintiffs alleged violations of the Worker Adjustment and Retraining Act, the Consolidated Omnibus Budget Reconciliation Act of 1985, breach of the employee benefit plan obligations, breach of fiduciary duty, and violations of § 510 of the Employee Retirement Income Security Act.⁷⁰ The District Court ruled for the plaintiffs, but the defendants appealed.⁷¹ At the Ninth Circuit, the plaintiffs maintained that the court lacked subject matter jurisdiction because, in their estimation, FFF did not fall within the scope of the FSIA's definition of a "foreign state."⁷²

65. One should note, however, that the first suggestion that corporations a majority of whose shares are owned by an agency or instrumentality of a foreign state may not be entitled to sovereign immunity came in 1993 in the Third Circuit's opinion in *Fed. Ins. Co. v. Richard I. Rubin & Co., Inc.*, 12 F.2d 1270 (2d Cir. 1993). In an appeal concerning issues unrelated to sovereign immunity, a footnote attributed to Judge Greenberg argued that although the appellant did not dispute the district court's determination that an agency or instrumentality's ownership makes its subsidiary a foreign state for purposes of the FSIA, such an appeal might have been meritorious. According to Judge Greenberg, "a reasonable inference might be drawn that the term 'foreign state' in 28 U.S.C. § 1603(b)(2) does not include an entity which is a foreign state only because it is an agency or instrumentality of a foreign state." Moreover, he reasoned, "if 'foreign state' in section 1603(b)(2) includes an 'agency or instrumentality' of a foreign state then it must also include a 'political subdivision' of a foreign state yet section 1603(b)(2) expressly provides that an 'agency or instrumentality' may be an 'organ of' or be owned by a 'political subdivision' of a state." Continuing, the footnote suggested that since "section 1603(a) expressly provides that 'foreign state' includes both political subdivisions and agencies or instrumentalities . . . [t]hus a reasonable inference can be drawn that the term 'political subdivision' must have been used in section 1603(b)(2) because 'foreign state' in that section did not include a 'political subdivision thereof.'" Otherwise, Judge Greenberg reasoned, the use of the phrase "political subdivision" in § 1603(b)(2) would be superfluous. Moreover, one could reasonably conclude that the failure to include "agency or instrumentality" and the decision to include "political subdivision" in § 1603(b)(2) reflects a conscious policy choice by Congress to "to distinguish between these types of entities."

66. See *Gates*, 54 F.3d. at 1459.

67. See *id.*

68. See *id.*

69. See *id.*

70. See *id.*

71. See *id.*

72. The court quickly disposed of the plaintiffs' other argument that Alberta Pork was not a foreign state, concluding that the corporation satisfied the Act's definition. Noting that the FSIA defines a "foreign state" as including an "agency of instrumentality of a foreign state," the Court recognized that to be appropriately considered an agency of instrumentality, an entity must satisfy

The Ninth Circuit was forced to determine whether Alberta Pork, the parent of FFF, was itself a foreign state. The Court reasoned that since FFF, "an ordinary pork processing plant," could not be considered an organ of the Providence of Alberta,⁷³ to receive the protections afforded to foreign states by the FSIA, FFF had to satisfy one of the other criteria for being an agency or instrumentality, i.e. a majority of its shares must be owned by a "foreign state or a political subdivision thereof."⁷⁴ Thus, if the plaintiffs could show that Alberta Pork was a foreign state, then FFF would receive protection under the FSIA by virtue of being majority-owned by a foreign state; if not, then FFF would be treated like any other non-state party.

In conducting this inquiry, the Ninth Circuit confronted the difficulty that it had already determined that Alberta Pork was an agency or instrumentality of a foreign state.⁷⁵ The court noted that "[o]ne might argue that once we determine that Alberta Pork is an agency or instrumentality, then it *ipso facto* becomes a foreign state or political subdivision thereof."⁷⁶ In contrast to all previous courts, however, the Ninth Circuit rejected the proposition.

The Ninth Circuit's decision relied on a textual analysis, concluding that "the literal language of the statute requires us reject that argument."⁷⁷ The analysis itself involved two main issues. The first was the distinction between what a foreign state *includes*, and how a foreign state *is defined*. Closely examining the text of § 1603(a), the Ninth Circuit noted that "the statute provides that a foreign state *includes* an agency or instrumentality, not that it *is* an agency or instrumentality or that it is defined as an agency or instrumentality."⁷⁸ The court attempted to place § 1603(a) in context, examining it against the backdrop of the rest of the FSIA. The results of such an analysis, the Ninth Circuit concluded, reveal that "the remainder of the statute contradicts any interpretation that would equate 'an agency or instrumentality' with 'a foreign state.'" Reasoning by analogy, the Court suggested that "[i]f Congress had intended 'agencies or instrumentalities of a foreign state' to mean 'a foreign state' for the purposes of section 1603, then it also would have intended a 'political subdivision' to mean 'a foreign state' because section 1603(a) defines a foreign state as

three conditions: 1) it must be a separate legal person; 2) it must neither be a citizen of the United States nor created under the laws of a third country; and 3) it must be either an "organ" of the foreign state or a political subdivision thereof, or a majority of its shares must be owned by the foreign state or a political subdivision thereof. Since Alberta Pork clearly satisfied the first and second prongs of the inquiry, the Ninth Circuit considered whether Alberta Pork could be properly construed as an "organ" of Alberta. After examining the character and structure of Alberta Pork, and reviewing the relevant legislative history that specifies that organs of foreign states may include such entities as "state trading compan[ies]" and "export association[s]," the Ninth Circuit concluded that as an organ of Alberta, Alberta Pork "is an agency or instrumentality of the Providence of Alberta," and thus entitled to the protections afforded by the FSIA to foreign states.

73. *Id.* at 1461.

74. *Id.* at 1461-62.

75. *Id.* at 1462. The Ninth Circuit conceded that "FFF is wholly owned by an agency or instrumentality of a foreign state."

76. *Id.*

77. *Id.*

78. *Id.*

including both 'a political subdivision of a foreign state or an agency or instrumentality of a foreign state.'⁷⁹ The Ninth Circuit concluded that such a reading is implausible; that "the statutory language strongly indicates that Congress did not intend this interpretation . . . because the remainder of the section differentiates between 'foreign states' and 'political subdivisions thereof.'"⁸⁰

To support this conclusion, the Ninth Circuit drew from both the statute itself and its legislative history. The court noted that § 1603(b)(2) requires that an entity be "an organ or a foreign state or political subdivision thereof," or alternatively, that a majority of its shares "be owned by a 'foreign state' or 'political subdivision thereof.'"⁸¹ In the FSIA's legislative history, Congress similarly differentiated between foreign states and political subdivisions thereof.⁸² Congress, the Ninth Circuit noted, "seemed exceedingly conscious of the distinction between foreign states, political subdivisions, and agencies or instrumentalities of foreign states and political subdivisions."⁸³ Accordingly, Congress "easily could have stated that an entity must be owned by a foreign state, a political subdivision or an agency or instrumentality of a foreign state or political subdivision." Since Congress did not use such language, the court was reluctant to "put words in Congress' mouth."⁸⁴

The other issue addressed by the Ninth Circuit was the implication of a broad construction of the FSIA. The court feared that a construction of the FSIA that would permit subsidiaries of agencies or instrumentalities of foreign states the protections afforded by the FSIA would vastly enlarge its scope far beyond what Congress had intended. Adding immunity for entities owned by agencies or instrumentalities would:

[E]xpand the potential immunity considerably because it would provide potential immunity for every subsidiary in a corporate chain, no matter how far down the line, so long as the first corporation is an organ of the foreign state or political subdivision of has a majority of its shares owned by the foreign state or political subdivision. Although such a broad view of sovereign immunity may very well be desirable, we cannot assume that Congress intended such a result when a literal reading of the statute leads to the opposite conclusion.⁸⁵

The Ninth Circuit's analysis in *Gates* has been met with a mixed reception; although rejected by the Seventh Circuit in *Roselawn*, the *Gates* approach to tiered companies has been adopted in some jurisdictions, and remains a powerful rejection of the traditional approach taken by the federal courts. One court that has accepted the *Gates* approach is the U.S. District Court for the Southern District of New York. In *Gardiner Stone Hunter International v. Iberia Lineas Aereas de España, S.A.*,⁸⁶ the court considered whether Iberia Lineas Aereas de

79. *Id.*

80. *Id.*

81. *Id.*

82. *See id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Gardiner Stone Hunter Int'l v. Iberia Lineas Aereas de Espana, S.A.*, 896 F. Supp. 125 (S.D.N.Y. 1995).

España, S.A., a state-owned Spanish corporation, was entitled to sovereign immunity under § 1603(b)(2). Iberia had acquired an eighty-five percent share in the defendant, Aerolineas Argentinas, S.A., an Argentinean corporation.⁸⁷ Thus, the defendants argued, "Iberia's interest in Aerolineas Argentinas is attributable to Spain under the FSIA, because the Act applies to entities owned directly or indirectly by foreign states and Iberia is owned by Spain."⁸⁸ The *Gardiner* court relied on *Gates*'s textual analysis to conclude that indirect ownership of a corporation by a foreign state is insufficient to satisfy § 1603(b)(2), and found that "[t]he interpretation of the Act and its legislative history set forth by the Court of Appeals for the Ninth Circuit in *Gates* is straightforward and persuasive." The *Gardiner* court thus held that "Iberia's interest in Aerolineas Argentinas would not be attributable to Spain, because Iberia is not itself a foreign state or political subdivision. Aerolineas Argentinas would therefore not meet the majority share requirement of § 1603(b)(2) and would not be a foreign state under the Act."⁸⁹

C. *The Seventh Circuit's Response to Gates: In re Air Crash Disaster Near Roselawn, Indiana*

*In re Air Crash Disaster Near Roselawn, Indiana*⁹⁰ arose out of the crash of an American Eagle airplane on October 31, 1994, which killed sixty-eight people.⁹¹ Among the defendants named in the ensuing lawsuit was the airline manufacturer, Avions de Transport Regional, G.I.E. ("ATR").⁹² ATR was formed in 1982 through a joint French and Italian intergovernmental agreement, the objective of which was to promote the French and Italian "civil aeronautic industry within the framework of European cooperation."⁹³ The French and Italian governments did not own ATR directly; rather, they owned the company through two European commercial aerospace companies, Aerospatiale, Societe Nationale Industrielle, S.A., ("SNIA"), and Alenia. SNIA, the French national aerospace company, was 91.42% owned by the French government.⁹⁴ France and French government-owned corporations exercised control over SNIA through their appointment of six members of its board of directors, which included five representatives of France's ministries of economy, defense, and transportation.⁹⁵ Similarly, Alenia was a division of Finmeccania SPA, a corpo-

87. *See id.* at 130.

88. *Id.*

89. *Id.* For other jurisdictions that have adopted the *Gates* analysis, see *Martinez v. Dow Chem. Co.*, No. 95-3212, 1996 U.S. Dist. LEXIS 13180 (E.D. La. Sept. 4, 1996); *S. Ocean Seafood Co. v. Holt Cargo Sys., Inc.*, No. 96-5217, 1997 U.S. Dist. LEXIS 12159 (E.D. Pa. Aug. 11, 1997).

90. *In re Air Crash Disaster Near Roselawn, Indiana*, 96 F.3d 932 (7th Cir. 1996).

91. *See id.* at 935.

92. *See id.*

93. *Id.*

94. 62.16% of the French-owned shares of SNIA were owned directly by the French government; 20% were owned by the French government through Sogepa; and 17.81% were owned by Credit Lyonnais Industria, which itself was owned by Credit Lyonnais, a corporation 52% owned by the French government. *See id.*

95. *See id.*

ration that was 62.14% owned by the Istituto Per La Ricostruzione Industriale, a holding company owned by the Italian government.⁹⁶

After successfully removing the suit to federal court under 28 U.S.C. § 1441(d),⁹⁷ the plaintiffs filed motions to remand the cases back to state court, arguing, *inter alia*, that ATR was not a foreign state within the definition of § 1603(a) because “for an entity to be a foreign state, a majority ownership interest must be held directly by a foreign government.”⁹⁸ Consequently, according to the plaintiffs, “tiered foreign government ownership through intermediaries, even if they are foreign states under the Act, should not suffice under the FSIA.”⁹⁹ Rejecting the plaintiffs’ claim, the district court held that the FSIA extends immunity to foreign states that tier their ownership of corporations through intermediaries.¹⁰⁰ On appeal, the plaintiffs asserted that ATR should be precluded from invoking the FSIA’s removal provision, since ATR was owned equally by two commercial parent companies, one of which was a subsidiary of an instrumentality of a foreign state.¹⁰¹ Thus, the plaintiff argued, § 1603(b)(2) was intended “to narrowly limit qualifying majority shareholders under the FSIA.”¹⁰²

First, the Seventh Circuit held that the “plain language of § 1603(a) defines ‘foreign state’ broadly.”¹⁰³ Rejecting *Gates*’ interpretation that the use of the word “includes” limits the definition of “foreign state,” *Roselawn* took the opposite approach, ruling that the “use of ‘includes’ shows Congress’ intent to broadly define ‘foreign state.’”¹⁰⁴ According to the Seventh Circuit, the legislative history of the FSIA buttresses this conclusion, as the House Report specified that instrumentalities could assume “a variety of forms,” including such entities as “a transport organization such as a[n] airline.”¹⁰⁵

96. *Id.* at 935-36.

97. See 28 U.S.C. § 1441(d) (1994) (“Any civil action brought in a State court against a foreign state as defined in § 1603(a) . . . may be removed by the foreign state to the district court of the United States for the district . . . embracing the place where such action is pending . . .”).

98. *Roselawn*, 96 F.3d at 936-937. The plaintiffs also argued that § 1603(a) does not encompass corporations owned by multiple governments (a practice known as “pooling”), and that in those in which ATR is named as a third-party defendant, § 1441(d) permits removal only of those claims pleaded directly against it. See *id.* *Roselawn* rejected this alternative argument, that in order to fall within the ambit of the FSIA an entity must be majority owned by a *single* foreign state; consequently, the court held, entities with ownership pooled among multiple foreign states are covered by the statute. See *id.* at 939. For other cases allowing pooling, see *Mangattu v. M/V IBN Hayyan*, 35 F.3d 205, 208 (5th Cir. 1994) (holding that an entity wholly owned by multiple states satisfies the FSIA); *Kern v. Jeppesen Sanderson, Inc.*, 867 F. Supp. 525, 530-33 (S.D. Tex. 1994); *LeDonne v. Gulf Air, Inc.*, 700 F. Supp. 1400, 1406 (E.D. Va. 1988); *Rios v. Marshall*, 530 F. Supp. 351, 371 (S.D.N.Y. 1981). But see *Linton v. Airbus Industrie*, 794 F. Supp. 650, 651-52 (S.D. Tex. 1992) (holding pooling is not permitted where no single foreign state owns more than 50% of entity). For discussion of pooling, see *Dameris & Mucchetti*, *supra* note 9, at 970.

99. *Roselawn*, 96 F.3d. at 937.

100. See *In re Aircrash Disaster Near Roselawn, Indiana*, 909 F. Supp. 1083, 1090-97 (N.D. Ill. 1995).

101. *Roselawn*, 96 F.3d at 939.

102. *Id.*

103. *Id.* at 940.

104. *Id.*

105. *Id.* (quoting 1976 U.S.C.C.A.N. at 6614).

The Seventh Circuit summarily dismissed *Gates*' analysis that reading § 1603(b)(2) to grant foreign state status to corporations owned by agents or instrumentalities of foreign states would render the phrase "political subdivisions" superfluous. Even if § 1602(b)(2) were so construed, the Seventh Circuit maintained, "it cannot alter our reading of the entirety of the FSIA, in which corporations with ATR's precise characteristics may be considered an agency or instrumentality of a foreign state."¹⁰⁶ Consequently, *Roselawn* held that:

The Act does not expressly require direct ownership, nor does it exclude the form in which France and Italy hold ATR as an instrumentality. SNIA is an "agency or instrumentality of a foreign state" because it is more than 90% owned by France and meets the other requirements of § 1603(b)(2). Likewise, Alenia is an "agency or instrumentality of a foreign state" because it is a division of Finmeccanica SPA, which is 62% owned by IRI, which is a holding company 100% owned by Italy. . . . Although France and Italy controlled ATR through intervening entities, the language and legislative history consistent with the language of the FSIA demonstrate that ATR is the type of corporation included within the statutory definition of "foreign state."¹⁰⁷

Since the dispute was joined over whether a subsidiary of an agency or instrumentality of a foreign state falls within the definition of a foreign state, some jurisdictions, following *Roselawn*, have remained faithful to the original, pre-*Gates* understanding that such entities are entitled to foreign state status.¹⁰⁸ For example, the U.S. District Court for the District of Columbia's opinion in *Millicom International Cellular, S.A. v. Republic Costa Rica*,¹⁰⁹ considered the situation where the defendant, Radiográfica, was a Costa Rican corporation wholly owned by the Instituto Costarricense de Electricidad, an agency or instrumentality of the Costa Rican government.¹¹⁰ The plaintiffs asserted, following *Gates*, that Radiográfica, as a subsidiary of an agency or instrumentality, did not qualify as an agency or instrumentality of Costa Rica. The *Millicom* Court, however, rejected the *Gates* approach, first on the ground that in *Gilson v. Republic of Ireland*, the District of Columbia Circuit had ruled that an entity wholly owned by an agency or instrumentality of a foreign state is presumptively immune under the FSIA.¹¹¹ In addition, following *Roselawn*, *Millicom* stated that the plain language of § 1603(a) defines foreign states broadly; a "foreign state" is defined to "include" an "agency or instrumentality of a foreign state."¹¹² *Millicom* held that "consistent with the broad statutory language of Section 1603(a), an entity that is majority owned by a "foreign state" "includes" an entity majority owned by "an agency or instrumentality of a foreign state."

106. *Id.* at 940-41. *Roselawn* also relied on the fact that "[o]ur reading of the Act also comports with the construction other courts have given it in similar circumstances." *Id.* at 941. (citing *Antoine v. Atlas Turner, Inc.*, 66 F.2d 65, 109; *Straub v. A.P. Green*, 38 F.2d at 451; *Am. W. Airlines v. GPA Group, Ltd.*, 877 F.2d at 795-96; *Gilson v. Republic of Ireland*, 682 F.2d 1022, at 1026).

107. *Id.* at 941.

108. See, e.g., *Jackson v. Resolution GGF Oy*, 136 F.2d 1130, 1132 (7th Cir. 1998) (holding that "an entity established and owned by the Government Guarantee Fund of Finland, fits the definition of a 'foreign state.'").

109. *Millicom Int'l Cellular, S.A. v. Republic Costa Rica*, 955 F. Supp. 14 (D.D.C. 1998).

110. See *id.*

111. See *id.* (citing *Gilson v. Republic of Ireland*, 682 F.2d 1022, 1026 n.19 (D.C. Cir. 1982)).

112. See *id.*

This reading of the statute, the court held, "is consistent with the legislative intent to have Section 1603(a)'s definition of 'foreign state' apply to all provisions of the FSIA except for Section 1608."¹¹³ *Millicom* also noted that "even if Radiográfica did not qualify as an 'agency or instrumentality of a foreign state' under Section 1603(b), the sole breach of contract claim against it would be properly dismissed pursuant to 28 U.S.C. § 1367."¹¹⁴

Likewise, the Federal District Court for the Eastern District of Louisiana confronted the same issue in *In re Clearsky Shipping Corp.*¹¹⁵ At issue was a motion for removal by COSCO HK, a majority-owned subsidiary of COSCO (Hong Kong) Group Ltd., which itself is majority-owned by Cinga Ocean Shipping (Group) Company, a wholly-owned subsidiary of the Peoples' Republic of China.¹¹⁶ After reviewing the *Gates* and *Roselawn* opinions, and observing that "the wording of the FSIA is vague," the *Clearsky* Court noted that because "neither the plain language of the statute nor the legislative history suggests that indirect majority ownership through intermediaries was outside the contemplation of § 1603(b)(2), it found the *Roselawn* analysis "to be the more persuasive interpretation of the statute."¹¹⁷

D. Hyatt Corp. v. Stanton and the Importance of Policy Considerations

Shortly after the split between the Seventh and Ninth Circuits, the Federal District Court for the Southern District of New York issued an influential opinion, reaching the same result as the Ninth Circuit in *Gates*, but arriving at its conclusion through rather different reasoning. *Hyatt Corp. v. Stanton*¹¹⁸ concerned a suit brought against the vice president of Skopbank, a Finnish bank owned by the Finnish Government Guarantee Fund (GGF).¹¹⁹ The case, originally filed in state court, had been removed to federal court pursuant, *inter alia*, to 28 U.S.C. § 1441(d). When the plaintiff sought to remand the case back to state court, because Skopbank was 52.9% owned by the GGF, an entity created by the Finnish Parliament, the district court confronted the same issue presented in *Gates* and *Roselawn*, namely whether the protections of the FSIA extend to tiered subsidiaries of foreign states.¹²⁰

After holding that the GGF qualified as an agency or instrumentality of Finland,¹²¹ the Court considered whether an entity such as Skopbank, "a majority of whose shares are owned by an agency or instrumentality can be an agency or instrumentality itself," causing it to fall under the FSIA's definition of a for-

113. *Id.*

114. *Id.*

115. *In re Clearsky Shipping Corp.*, No. 96-4099, 1999 U.S. Dist. LEXIS 17784 (E.D. La. Nov. 3, 1999).

116. *See id.*

117. *Id.* at *18.

118. *Hyatt Corp. v. Stanton*, 945 F. Supp. 675 (S.D.N.Y. 1996).

119. *See id.* at 677.

120. *See id.*

121. *See id.* at 685.

eign state.¹²² Unlike the Ninth and Seventh Circuits, both of which thought that the text of the statute was dispositive of the issue, *Stanton* determined that the “proper interpretation of § 1603(b)(2) cannot be resolved simply by reference to the text.”¹²³ Instead, the court ruled that since the text of the statute is internally contradictory, its interpretation required asking whether Congress was likely to have intended the impact on tiered subsidiaries that the *Roselawn* reading of the statute implies. After reviewing the procedural impact of such an interpretation, the court determined that such congressional intent was unlikely.¹²⁴

Although the approach adopted in *Stanton* has been favorably received in other jurisdictions,¹²⁵ *Stanton* has not been fully accepted even within the Southern District of New York. In *Parex Bank v. Russian Savings Bank*,¹²⁶ the court considered the argument that the defendant, Sberbank, was a “foreign state” within the meaning of the FSIA because the Russian Central Bank (indisputably an agency or instrumentality of Russia) owned a 66.5% share of Sberbank’s voting common stock and over 60% of all its outstanding stock.¹²⁷ Noting that “[w]hile the language of the statute itself is not a model of clarity,” the *Parex* Court ruled that “the plainer reading of the statutory language contemplates successive tiers.”¹²⁸ Rejecting *Stanton*’s view that since the *Gates* and *Roselawn* Courts’ interpretations of the statute are “equally inconsistent,” and so other factors should be considered in construing the statute, *Parex Bank* found the Seventh Circuit’s interpretation preferable, since “an interpretation giving an outright contradiction is less consistent than one giving a superfluity—as a principle of statutory construction.”¹²⁹ Consequently, *Parex Bank* held that “a better reading of the plain language of § 1603 would permit tiering.”¹³⁰

In addition, *Parex Bank* buttressed its conclusion by rejecting the fear expressed in *Gates* that granting subsidiaries of agencies or instrumentalities of foreign states would greatly expand the coverage of the FSIA. Rather than viewing this eventuality as an undesirable and unwanted consequence of § 1603(b), *Parex Bank* embraced the outcome as its explicit purpose, arguing that “this appears to have been one of the very goals of the legislation: ‘[s]uch broad jurisdiction in the Federal courts should be conducive to uniformity in

122. *Id.*

123. *Id.* at 688.

124. *See id.* at 688-90.

125. *See United States Fid. & Guar. Co. v. Braspetro Oil Servs. Co.*, No. 97-6124, 1999 U.S. Dist. LEXIS 7236 (S.D.N.Y. May 13, 1999) (agreeing with *Stanton*’s “careful analysis” that because a subsidiary is not owned directly by the Brazilian Government but rather by another corporation, it does not qualify as an agency or instrumentality of a ‘foreign state’ within the meaning of § 1603(a)); *see also Dewhurst v. Telnor Invest A.S.*, 83 F. Supp. 2d 577, 592-94 (D. Md. 2000) (rejecting *Gates*’s theory that a distinction should be drawn between the use of the terms “defining” and “including,” and deciding the issue based on policy considerations).

126. *Parex Bank v. Russian Sav. Bank*, 81 F. Supp. 2d 506 (S.D.N.Y. 2000).

127. *See id.* at 507.

128. *Id.*

129. *Id.* at 508.

130. *Id.*

decision, which is desirable since a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences.”¹³¹

IV.

CONSTRUING THE TEXT OF § 1603

A. *Construing the Word “Includes”*

Resolving whether subsidiaries of agencies or instrumentalities of foreign states are covered by the FSIA depends on what significance, if any, attaches to Congress’ decision to employ the word “includes” in § 1603(a)’s definition of a foreign state. Recall that § 1603(a) provides that a “foreign state . . . *includes* a political subdivision of a foreign state or an agency or instrumentality of a foreign state”¹³² In *Gates*, the Ninth Circuit understood this to mean that “the statute provides that a foreign state includes an agency or instrumentality, not that it is an agency or instrumentality or that it is defined as an agency or instrumentality.”¹³³ In *Roselawn*, the Seventh Circuit understood § 1603(a) differently, as providing the contours of the *definition* of a foreign state. As *Roselawn* explained, the “use of ‘includes’ shows Congress’ intent to broadly *define* ‘foreign state.’”¹³⁴ In other words, under the Ninth Circuit’s interpretation, § 1603(a) specifies entities that are accorded the same rights as foreign states; according to the Seventh Circuit, § 1603(a) legislatively *defines* a foreign state.

This is a subtle yet important distinction. If agencies and instrumentalities are defined as being part of the foreign states, as the Seventh Circuit would have it, then their majority-owned subsidiaries are also part of the foreign state and thus receive the benefits of FSIA protection. Conversely, if § 1603 merely expresses a congressional intention to place agencies and instrumentalities within the ambit of protection accorded to foreign states, without affirmatively defining them as foreign states, then their subsidiaries would not be entitled to FSIA protection.

There is good reason to believe that the Ninth Circuit is correct in its conclusion that Congress did not intend § 1603(a) to provide a definition of a foreign state.¹³⁵ The plain text of the statute belies such an interpretation. As the

131. *Id.* (quoting H.R. Rep. No. 9401487[sic] (1976)).

132. 28 U.S.C. § 1603(a) (1994) (emphasis added).

133. *Gates*, 54 F.3d at 1462.

134. *Roselawn*, 96 F.3d at 940 (emphasis added).

135. The intersection between the FSIA and what constitutes a foreign state has received very little attention. See JOSEPH W. DELLAPENNA, *SUING FOREIGN GOVERNMENTS AND THEIR CORPORATIONS* 13 (1988) (noting that commentators “have little considered what a foreign state proper is”). For discussion of the relationship between foreign sovereign immunity and separation of powers, see generally Jack I. Garvey, *Judicial Foreign Policy-Making in International Civil Litigation: Ending the Charade of Separation of Powers*, 24 *LAW & POL’Y INT’L BUS.* 461, 463 (1993) (“In the area of sovereign immunity, foreign policy evaluation by the courts occurs right at the heart of the contemporary doctrine, through manipulation of the fundamental distinction between ‘commercial’ and ‘public’ activity of foreign governments and their agencies. This is ironically right where the United States Congress, in establishing the contemporary U.S. law of sovereign immunity, said it was removing foreign policy issues from adjudication under the sovereign immunity analysis.”); Todd Connors, Note, *The Foreign Sovereign Immunities Act: Using Separation of Powers Analysis to*

Supreme Court has noted, "it is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain . . . the sole function of the courts is to enforce it according to its terms."¹³⁶

If Congress intended § 1603(a) to serve as a definition of a foreign state, it certainly provided an odd one. Although appearing in the "definitions" section of the FSIA, § 1603(a) does not, by its terms, affirmatively define a "foreign state."¹³⁷ This becomes apparent when § 1603(a) is compared with other subsections in § 1603. The wording of § 1603(a) stands in marked contrast to that used for the other terms defined in § 1603, which are defined affirmatively, in the usual manner. Thus, when the statute defines a "commercial activity," it states explicitly that the term "*means* either a regular course of commercial conduct or a particular commercial transaction or act."¹³⁸ Likewise, when it defines a "commercial activity carried on in the United States by a foreign state," it states explicitly that this term "*means* commercial activity carried on by such state and having substantial contact with the United States."¹³⁹ The subsection devoted to a foreign state, however, does not follow this conventional pattern. Rather than specifying what a foreign state *means*, the statute instead merely states what a foreign state *includes*.¹⁴⁰

The use of different terms is significant. A proper construction of § 1603 must give effect to the legislative decision to employ distinct terms. In statutory construction, every word of a statute is presumed to have been used for a purpose.¹⁴¹ Consequently, "courts do not construe different terms within a statute to embody the same meaning."¹⁴² As a result, Congress' choice to employ two distinct terms—"means" and "includes"—cannot be judicially contorted so that they are given identical meanings. But the Seventh Circuit's opinion in *Rose-lawn* does just that. By construing § 1603(a) as defining a foreign state, it eviscerates any difference in meaning between "means" and "includes."

Guide Judicial Decision-Making, 26 LAW & POL'Y INT'L BUS. 203, 203-04 (1994) (arguing that the FISA, by "attempting to separate the roles of the executive and judicial branches in foreign sovereign immunity decisions, has needlessly entangled them, to the detriment of private litigants, foreign states, and the foreign relations interests of the United States").

136. *Caminetti v. United States*, 242 U.S. 470, 485 (1917); *see also* *Cent. Trust Co., Rochester v. Official Creditors' Comm. of Geiger Enters.*, 454 U.S. 354, 359 (1982). For expression of the plain meaning rule, *see Rosenman v. United States*, 323 U.S. 658, 661 (1945) (noting that "Congress has evidently meant what these words ordinarily convey").

137. *See* 28 U.S.C. § 1603(a) (1994) ("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).").

138. 28 U.S.C. § 1603(d) (1994) (emphasis added).

139. 28 U.S.C. § 1603(e) (1994) (emphasis added); *see also* 28 U.S.C. § 1603(b) (defining "agency or instrumentality of a foreign state" in the usual manner).

140. *See* 28 U.S.C. § 1603(a) (1994).

141. NORMAN J. SINGER, 2A SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 46:06 (6th ed. 2000) [hereinafter SUTHERLAND STATUTES].

142. *Id.*

B. Construing the FSIA to Avoid Internal Contradictions

1. Contradictions in the *Roselawn* Approach

Beyond giving effect to Congress' decision to employ two different terms within the definitions section, there is a second textual reason for reading § 1603(a) narrowly. There is an inherent contradiction in the suggestion that Congress intended for agencies and instrumentalities to be defined as part of a foreign state. As *Gates* points out, if this is the case, then one must also accept that political subdivisions, which are included within agencies and instrumentalities in § 1603(a), are also defined as foreign states. But this cannot be; throughout the rest of the FSIA Congress differentiates between foreign states and political subdivisions. For example, § 1603(b)(2) stipulates that in order to be defined as an agency or instrumentality, an entity must be "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"¹⁴³

The fact that the statute differentiates between foreign states and political subdivisions is therefore highly significant. If, as *Roselawn* suggests, agencies and instrumentalities (and thus political subdivisions) are included within the definition of foreign states, then § 1603(b)(2)'s specification that qualifying for agency or instrumentality status requires being either an organ of a foreign state or a political subdivision thereof would be wholly redundant. In other words, if § 1603 defined agencies and instrumentalities as being part of a foreign state, then there would be no reason for § 1603(b)(2) to differentiate between foreign states and political subdivisions thereof. As one court has noted, *Roselawn's* interpretation of the FSIA would force "a court to believe that Congress's repeated references to 'political subdivisions' throughout the statute were merely superfluous."¹⁴⁴

The Supreme Court has made it clear that a statute should be construed as a harmonious whole,¹⁴⁵ so that each section should be construed in line with every other section of the statute.¹⁴⁶ Generally, statutes are read so an effect is given, if possible, to every word, clause and sentence of a statute.¹⁴⁷ One mani-

143. 28 U.S.C. § 1603(b)(2) (1994).

144. *Dewhurst v. Telenor Invest, A.S.*, 83 F. Supp. 2d 577, 592 (D. Md. 2000).

145. *United States Sav. of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) ("Statutory construction, however, is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . ."); *United States v. Generix Drug Corp.*, 460 U.S. 453, 459 (1983) ("The natural reading of this definition is corroborated by other sections of the Act."); *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 117 (1983) (noting that "Provisions of Title VII, enacted simultaneously with Title IV, are helpful to our analysis. We have treated Titles VII and IV as in pari material in construing statutory language identical to that at issue here").

146. See *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561, 570 (1995) (holding that acts of Congress "should not be read as a series of unrelated and isolated provisions"); *Smith v. United States*, 508 U.S. 223, 229 (1993) ("The meaning of a word that appears ambiguous if viewed in isolation may become clear when the word is analyzed in light of the terms that surround it").

147. 2A SUTHERLAND STATUTES, *supra* note 141 at § 46:03. For application of this principle, see *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 216 (1995) (construing statute so as not to render provision without effect); *American Nat'l Red Cross v. S.G.*, 505 U.S. 247, 263 (1992) (following

festation of this rule is that Congress is “presumed to have used no superfluous words”¹⁴⁸ and that Congress “intended each term to have a particular, non-superfluous meaning.”¹⁴⁹ Accordingly, courts should be “hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law.”¹⁵⁰ If *Roselawn* is correct, and agencies and instrumentalities are foreign states, then the inclusion of the phrase “or political subdivision thereof” would be entirely unnecessary as that category of entities would have been included within the original definition of a foreign state. Such a finding is clearly at odds with Supreme Court jurisprudence.

Roselawn recognized the infirmity of its interpretation of § 1603, but cavalierly dismissed the concern, suggesting that “even if so construed, it cannot alter our reading of the entirety of the FSIA, in which corporations with ATR’s precise characteristics may be considered an agency or instrumentality of a foreign state.”¹⁵¹ This weak dismissal is insufficient to overcome the directive that courts engaging in statutory construction should not construe statutes so as to render provisions superfluous. The fact that Congress consciously included the phrase “or political subdivision thereof” in § 1603(b)(2), serves to further indicate that corporations a majority of whose shares are owned by agencies or instrumentalities of foreign states are excluded from the definition of agencies and instrumentalities. Thus such corporations are not entitled to the protections afforded by the FSIA to foreign states.

2. Contradictions in the Gates Approach

However problematic *Roselawn*’s reading of the statute may be, relying solely on a textual interpretation of § 1603 is not entirely satisfactory either. The *Gates* line of analysis is infected with its own, albeit less serious, internal contradiction. The problem stems from the fact that § 1603(a) specifies that the

“canon of statutory construction requiring a change in language to be read, if possible, to have some effect”); *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (noting that it “is our duty ‘to give effect, if possible, to every clause and word of a statute’”) (quoting *Montclair v. Ramsdell* [sic], 107 U.S. 147, 152 (1883)).

148. *Tabor v. Ulloa*, 323 F.2d 823, 824 (9th Cir. 1963) (quoting *Platt v. Union Pac. R. Co.*, 99 U.S. 48, 58 (1878)); see also *Abourezk v. Reagan*, 785 F.2d 1043, 1054 (D.C. Cir. 1986) (construing statute so as to avoid rendering language superfluous); *Nat’l Ass’n of Recycling Indus., Inc. v. Interstate Commerce Comm’n*, 660 F.2d 795, 799 (D.C. Cir. 1981) (stating that “it is a fundamental principle of statutory construction that ‘effect must be given, if possible, to every word, clause and sentence of a statute’ . . . so that no part will be inoperative or superfluous, void or insignificant”) (quoting *In re Surface Mining Regulation Litigation*, 627 F.2d 1346 (D.C. Cir. 1980) (quoting *SUTHERLAND STATUTES* §46.06)).

149. *Bailey v. United States*, 516 U.S. 137, 146 (1995).

150. *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 837 (1988); see also *Babbitt v. Sweet Home*, 515 U.S. 687, 698 (1995) (noting that “a reluctance to treat statutory terms as surplusage supports the reasonableness of the Secretary’s interpretation”); *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142 (1985) (rejecting mode of statutory interpretation that “would render superfluous the preceding clauses”); *FEC v. Nat’l Conservative Political Action Comm.*, 470 U.S. 480, 486 (1985) (interpreting statute so as to avoid rendering word as surplusage); *Park ‘N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 197 (1985) (rejecting lower court’s statutory interpretation because it “emasculates” another section).

151. *Roselawn*, 96 F.3d at 940-41.

definition of a foreign state includes agencies and instrumentalities "except as used in section 1608." This represents a potential difficulty because, generally, canons of statutory construction direct that where the legislature has expressly included an exception to the operation of a statute, the courts should not read further exceptions into that statute.¹⁵² The "enumeration of exclusions from the operation of a statute indicates that the statute should apply to all cases not specifically excluded."¹⁵³ Although the courts have made it clear that the maxim "acts merely as an aid to determine legislative intent and does not constitute a rule of law,"¹⁵⁴ one should nonetheless proceed with caution before resolving the issue of the status of subsidiaries of foreign state agencies and instrumentalities on solely a textual basis.

As a result, one is left at an interpretive impasse. On the one hand, following *Roselawn* necessarily renders components of the statute superfluous; on the other hand, the *Gates* interpretation reads more exceptions into the statute than Congress may have intended. As one court concluded, both *Gates* and *Roselawn* fail to resolve certain inconsistencies. "The Ninth Circuit's distinction between "includes" and "defines as" is no more convincing evidence of congressional intent than the Seventh Circuit's attempt to explain the redundancy of the term "political subdivision" by reasoning that inclusion of "agency or instrumentality" in § 1603 would have made the definition circular. Both appeal to one's sense of symmetry, but neither is superior as an explanation of what Congress intended."¹⁵⁵

3. Resolving the Textual Impasse

The textual impasse suggests that resolution of the tiered corporations issue requires another line of inquiry. Generally, when confronted with an ambiguous statute, courts may look to the legislature's purpose in enacting the statute.¹⁵⁶ A

152. See 2A SUTHERLAND STATUTES, *supra* note 141, at § 47:23 (describing "Expressio unius est exclusio alterius"); see also *O'Melveny & Myers v. Fed. Deposit Ins. Corp.*, 512 U.S. 79, 86 (1994) (applying *expressio unius* principle to reject argument that statute should be read as providing non-exclusive listing of rights); *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993) (applying *expressio unius*); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 793 n.9 (1995) (discussing the history of *expressio unius* principle).

153. 2A SUTHERLAND STATUTES, *supra* note 141, at § 47:23.

154. *Id.* at § 47:24.

155. *Hyatt Corp. v. Stanton*, 945 F. Supp. 675, 688 (S.D.N.Y. 1996).

156. See generally *Lincoln v. Vigil*, 508 U.S. 182 (1993); *Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.*, 485 U.S. 495 (1988); see also *Cheung v. United States*, 213 F.3d 82, 91 (2d Cir. 2000) ("Where a statute is textually ambiguous, its terms must be determined by reference to the purpose of the particular statute."). Legislative intent thus is a crucial inquiry, according to Supreme Court doctrine as well as lower court decisions. The centrality of legislative intent also is supported by several academic approaches to statutory interpretation. Scholars in the field of statutory interpretation have described intentionalism, purposivism, and textualism as the three general approaches to statutory interpretation. William N. Eskridge & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 324 (1990) (citing Paul Brest, *The Misconceived Quest for the Original Understanding*, B.U. L. REV. 204 (1980)). Intentionalism usually involves giving primacy to the intent of the legislature. For examples of intentionalist scholarship, see generally RICHARD A. POSNER, *THE FEDERAL COURTS: CRISIS AND REFORM* 286-93 (1985); Earl M. Maltz, *Statutory Interpretation and Legislative Power: The Case for a Modified Intentionalist Approach*, 63 TUL. L. REV. 1 (1988). Purposivism, on the other hand, eschews a strict focus on

court's task is thus "to interpret the words of [the statute] in light of the purposes Congress sought to serve."¹⁵⁷ In conducting this inquiry, the court should attempt to construe the statute in a manner consistent with the overall legislative scheme.¹⁵⁸ As the Supreme Court has observed, the "scheme and structure of the legislation is important to a proper ascertainment of its purpose and intent."¹⁵⁹ Moreover, a "provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme."¹⁶⁰ This means of construing an ambiguous statute is particularly appropriate for resolving the conflict over the FSIA's applicability to tiered subsidiaries of foreign states. Since determining whether agencies and instrumentalities should be construed as part of a foreign state "cannot be answered solely by reference to the text of the statute,"¹⁶¹ one should try to infer Congress' intentions from other sources, namely by considering the issue in light of the congressional purpose in enacting the FSIA.

a. Procedural Impact of According Litigants Foreign State Status

Recognizing the profound procedural impact that foreign state status has on the litigation process, it seems unlikely that Congress intended the phrase "agency or instrumentality" to be construed as encompassing corporations a majority of whose shares are owned by agencies or instrumentalities of foreign states. If § 1603 is interpreted as extending the FSIA's protections to corporations owned by agencies or instrumentalities of foreign states, the FSIA would then encompass "every subsidiary in a corporate chain, no matter how far down the line, so long as the first corporation is an organ of the foreign state or political subdivision or has a majority of its shares owned by the foreign state or political subdivision."¹⁶² Such a broad interpretation would engender a number of troubling consequences.

legislative intent in favor of a broader project of attempting to give effect to the legislative purpose underlying the statute. See, e.g., Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223, 250-51 (1986). Textualism posits that a court's inquiry should be restricted to a contextualized examination of the plain language of the statute. See generally William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990); Michael Herz, *Textualism and Taboo: Interpretation and Deference for Justice Scalia*, 12 CARDOZO L. REV. 1663 (1991); Nicholas S. Zeppos, *Justice Scalia's Textualism: The "New" Legal Process*, 12 CARDOZO L. REV. 1597 (1991).

157. *Dickerson v. New Banner Inst., Inc.*, 460 U.S. 103, 118 (1983) (quoting *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 608 (1979) (alteration in original)).

158. See *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (construing the statute against a backdrop of the overall statutory scheme); see also *Shell Oil Co. v. Iowa Dep't of Revenue*, 488 U.S. 19, 25 (1988) ("Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used." (quoting *NLRB v. Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941))).

159. *United States v. Cooper*, 312 U.S. 600, 607 (1941).

160. *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assoc., Ltd.*, 484 U.S. 365, 371 (1988).

161. *Hyatt Corp. v. Stanton*, 945 F. Supp. 675, 685 (S.D.N.Y. 1996).

162. *Gates v. Victor Fine Foods*, 54 F.3d 1457, 1462 (9th Cir. 1995).

First, 28 U.S.C. § 1330(a) entitles entities defined as foreign states under the FSIA to avoid jury trials by establishing that "the district courts shall have original jurisdiction without regard to amount in controversy of any *non-jury* civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity"¹⁶³ Likewise, the federal removal statute provides that "[a]ny civil action brought in a State court against a foreign state as defined in section 1603(a) of this title 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. Upon removal the action shall be tried by the court *without jury*."¹⁶⁴

Since a foreign state's ability to avoid a jury trial applies regardless whether the FSIA's commercial activity exception removes the entity's immu-

163. 28 U.S.C. § 1330(a) ("The district courts shall have original jurisdiction without regard to amount in controversy of any non-jury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.") (emphasis added); see also *Bailey v. Grand Trunk Lines New England*, 805 F.2d 1097, 1099 (2d Cir. 1986) (noting that the FSIA's "statutory scheme expressly forecloses the right to a jury trial"); *Arango v. Guzman Travel Advisors, Corp.*, 761 F.2d 1527, 1534 (11th Cir. 1985) (holding that the FSIA's jury trial provision does not violate Seventh Amendment); *Goar v. Compania Peruana de Vapores*, 688 F.2d 417, 423 (5th Cir. 1982) (refusing to permit plaintiffs to sue a state-owned corporation before jury); *Ruggiero v. Compania Peruana De Vapores, "Inca Capac Yupanqui"*, 639 F.2d 872, 876 (2d Cir. 1981) ("The courts must learn to accept that, in place of the familiar dichotomy of federal question and diversity jurisdiction, the Immunities Act has created a tripartite division of federal question cases, diversity cases and actions against foreign states. If a case falls within the third division, there is to be no jury trial even if it might also come within one of the other two."); *Rex v. Compania Pervana de Vapores, S.A.*, 660 F.2d 61, 63 (2d Cir. 1981) ("Although Congress could have stated with more elegance that actions against foreign states and their instrumentalities could be litigated in federal court only to a judge sitting without a jury, we have been shown no indication that Congress intended its grant of jurisdiction over 'nonjury civil action(s)' to mean anything other than a statutory denial of jury trial in these cases."); *Williams v. Shipping Corp. of India*, 653 F.2d 875, 880 (4th Cir. 1981) ("In our opinion, the plain reading of the statutory language, the legislative history and the overriding purpose of the Immunities Act requires the conclusion that sections 1330 and 1441(d) are jurisdictionally exclusive and bar the plaintiff from a jury trial whether his case is filed originally in the district court or is one removed from a state court."); *Danny Abir, Foreign Sovereign Immunities Act: The Right to a Jury Trial in Suits Against Foreign Government-Owned Corporations*, 32 *STAN. J INT'L L.* 159, 161 (arguing that non-jury trial provision as applied against government owned corporations is unconstitutional); *Barbara A. Adams, Note, The Seventh Amendment and the Foreign Sovereign Immunities Act of 1976*, 5 *J. INT'L L. BUS.* 157 (1983).

164. 28 U.S.C. § 1441(d) (1994) (emphasis added). The House Report made clear its intention: In view of the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area, it is important to give foreign states clear authority to remove to a Federal forum actions brought against them in the State courts. New subsection (d) of section 1441 permits the removal of any such action at the discretion of the foreign state, even if there are multiple defendants and some of these defendants desire not to remove the action or are citizens of the State in which the action has been brought.

H.R. Rep. No. 1487, 94th Cong.2d Sess. 32, reprinted in (1976) U.S.C.C.A.N. 6604, 6631. For an application of this principle, see *Aliferis v. American Airlines, Inc.*, 523 F. Supp. 1189, 1192 (E.D.N.Y. 1981) (holding that "foreign state's right of removal should not be defeated merely because local procedural rules allow third-party pleading rather than requiring defendants to bring suit as ordinary plaintiffs").

nity from suit, this presents a significant difficulty for parties suing foreign states. As one court has noted, the statutory scheme established by the FSIA “expressly forecloses the right to a jury trial.”¹⁶⁵ Consequently, extending the scope of the definition of foreign states so as to include entities owned by agencies or instrumentalities of foreign states “eliminate[s] the plaintiff’s right to a jury trial in any suit against a corporation owned by an agency or instrumentality of a foreign state.”¹⁶⁶ In addition, when a foreign state defendant involved in multi-party litigation seeks to remove to federal court, the entire action is subject to removal.¹⁶⁷

Indeed, this rule can operate to the detriment even of non-foreign state defendants, which are also subject to removal to a non-jury federal court if its foreign state co-defendant so desires.¹⁶⁸ As the Sixth Circuit held in *Davis v. McCourt*, the “purpose and legislative history behind the FSIA reinforce the position that a foreign third-party defendant may remove the *entire case* to district court” since the statute “seeks to provide uniformity in the treatment of foreign sovereigns and to remove any local bias that might be present at a jury trial in a state court.”¹⁶⁹ Moreover, the FSIA’s mandate that claims against foreign sovereigns not be tried before juries can lead to inconsistent verdicts. As the Second Circuit has ruled, “the FSIA’s insulation of a foreign sovereign from jury fact-finding . . . assures the foreign sovereign the benefit of a court’s fact-finding even where such fact-finding differs from the fact-finding of a jury on the same issues in the same trial.”¹⁷⁰

Second, if corporations owned by agencies or instrumentalities of foreign states are covered by the FSIA, then the FSIA would become the sole basis for obtaining personal jurisdiction over such corporations.¹⁷¹ As a result, “the

165. *Bailey*, 805 F.2d at 1100.

166. *Id.*

167. *See In re Surinam Airways Holding Co.*, 974 F.2d 1255, 1259 (11th Cir. 1992) (“If a foreign state lacks the ability to remove an entire case to federal court, then the goals of the Foreign Sovereign Immunities Act will be frustrated when that foreign state is brought into an action as a third-party defendant and is denied, for all practical purposes, the opportunity to fully litigate its liability in federal court.”); *Chuidian v. Phillipine Nat’l Bank*, 912 F.2d 1095, 1099 (1990) (holding that “in the case of a removal by a foreign sovereign, that the federal court initially exercise jurisdiction over claims against co-defendants even if such claims could not otherwise be heard in federal court”); *Arango v. Guzman Travel Advisors Corp.*, 621 F.2d 1371, 1375 (5th Cir. 1980) (holding that where a sovereign defendant in a multi-party suit removes under section 1441(d), “the entire action against all defendants accompanies it to federal court.”).

168. *See, e.g., Refco, Inc. v. Galadari*, 755 F. Supp. 79, 84 (S.D.N.Y. 1991) (rejecting the proposition that all defendants must consent to removal).

169. *Davis v. McCourt*, 226 F.3d 506, 510-11 (6th Cir. 2000) (emphasis added).

170. *Matthews v. CTI Container Transport Int’l, Inc.*, 871 F.2d 270, 279 (2nd Cir. 1989).

171. *Argentine Republic v. Amerasia Shipping Co.* 488 U.S. 428, 435 n.3 (1989) (“[P]ersonal jurisdiction, like subject matter jurisdiction, exists only when one of the exceptions to foreign sovereign immunity in §§ 1605-1607 applies.”); *S & Davis Int’l, Inc. v. Republic of Yemen*, 218 F.3d 1292, 1303-05 (11th Cir. 2000) (discussing the application of due process to personal jurisdiction under the FSIA); *Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 845 (5th Cir. 2000) (stating that “the FSIA gives federal courts jurisdiction over civil actions against a foreign state . . . as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity . . .”) (internal quotation omitted, alteration in original); *Phaneuf v. Republic of Indonesia*, 106 F.3d 302, 305-06 (9th Cir. 1997).

terms of the commercial activity exception, rather than those of the state long-arm statute, would be the method for obtaining jurisdiction over such corporations.”¹⁷² As the Second Circuit observed in *Reiss v. Societe Centrale du Groupe des Assurances Nationales*:¹⁷³

The initial question to be answered in this case is not whether there is personal jurisdiction within the meaning of New York Civil Practice Law and Rules but whether there is subject matter jurisdiction within the meaning of the Foreign Sovereign Immunities Act . . . constrained only by constitutional due process considerations, personal jurisdiction under the FSIA equals subject matter jurisdiction plus valid service of process.¹⁷⁴

This would have serious ramifications for plaintiffs wishing to sue corporations owned by agencies or instrumentalities of foreign states. Unlike state long-arm statutes that permit courts to exercise general personal jurisdiction over defendants who do business in the state, the commercial activities exception under the FSIA stipulates that the claim at issue must arise from a commercial activity performed in the United States, from “an act performed in the United States in connection with a commercial activity of the foreign state elsewhere,” or from “an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.”¹⁷⁵ Extending the scope of the FSIA’s protections to include corporations owned by agencies or instrumentalities of foreign states would therefore eliminate personal jurisdiction in situations where “a corporation does business in the United States, but the actual claim arises from business transacted elsewhere and with no effect on the United States.”¹⁷⁶

Third, designating an entity as a foreign state results in a burden-shifting detrimental to plaintiffs suing a putative foreign state. Under the FSIA, a foreign state is presumptively immune from the jurisdiction of United States courts. As one court held, “unless a specified exception applies, a federal court lacks subject matter jurisdiction over a claim against a foreign state.”¹⁷⁷ Thus, once a defendant presents a prima facie case that it is a foreign state, the plaintiff must

172. *Id.*

173. *Reiss v. Societe Centrale du Groupe des Assurances Nationales*, 235 F.3d 738 (2d Cir. 2000).

174. *Id.* at 746 (quoting *Shapiro v. Republic of Bolivia*, 930 F.2d 1013, 1030 (2d Cir. 1991)).

175. 28 U.S.C. § 1605(a)(2) (1994).

176. *Hyatt Corp. v. Stanton*, 945 F. Supp. 675, 689 (S.D.N.Y. 1996) (citing *Vencedora Oceanica Navigacion, S.A. v. Compagnie Nationale Algerienne de Navigation*, 730 F.2d 195, 199 (5th Cir. 1984)).

177. *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993) (citing *Verlinden*, 461 U.S. at 488-89); see also *Argentine Republic v. Amerasia Shipping Co.* 488 U.S. 428, 434-35 (1989). According to the House Report:

[The FSIA] starts from a premise of immunity and then creates exceptions to the general principle. . . . Once the foreign state has produced [] prima facie evidence of immunity, the burden of going forward [] shift[s] to the plaintiff to produce evidence establishing that the foreign state is not entitled to immunity. The ultimate burden of proving immunity [] rest[s] with the foreign state.

Fed. Ins. Co. v. Richard I. Rubin & Co., Inc., 12 F.3d 1270 (3d Cir. 1983) 1285 n.13 (quoting H.R. Rep. No. 1487, 94th Cong., 2d Sess. 17 (1976) (reprinted in 1976 U.S.C.C.A.N. 6604, 6616)) (alterations in original).

assume the burden of production for demonstrating that the ostensible foreign state falls within one of the enumerated exceptions to the FSIA.¹⁷⁸ As one court observed, once the foreign state defendant has met its initial burden, the plaintiff must bear “the burden of going forward with the evidence by offering proof that one of the FSIA exceptions applies.”¹⁷⁹ Although the foreign state retains the ultimate burden of persuasion,¹⁸⁰ this burden-shifting nevertheless represents a significant hurdle for plaintiffs to overcome.

b. Gauging Congressional Intent

Taken together, these procedural nuances grant entities accorded foreign state status significant competitive advantages over their private counterparts. Three factors suggest it is unlikely that Congress intended that subsidiaries of foreign state agencies and instrumentalities to be accorded these advantages.

First and foremost, subsidiaries often have only attenuated relationships with their ultimate foreign sovereign parents. As one court observed, permitting subsidiaries to receive the benefit of FSIA protection “would extend immunity to corporations far down the chain of ownership, even if these subsidiaries are only remotely controlled by the foreign government.”¹⁸¹ Thus, “to provide this protection to corporations only remotely owned by a foreign government would give the protections of the FSIA to a great number of companies only tangentially controlled by a foreign state.”¹⁸² The facts of *Gates* are illustrative. In that case, the defendant at issue was an ordinary Lodi, California pork processing plant; its only claim to foreign state status was that it happened to be owned by a Canadian state corporation.¹⁸³ The defendant itself, however, was a standard commercial enterprise, no different than any other commercial enterprise engaged in the same line of work, and with little or no relationship with its ultimate foreign state owner.

A survey of other cases involving tiered subsidiaries of foreign state agencies or instrumentalities reveals similarly attenuated relationships with foreign

178. See, e.g., *Byrd v. Corporacion Forestal y Industrial de Olancho S.A.*, 182 F.3d 380, 388 (5th Cir. 1999); *Pere v. Nuovo Pignone, Inc.*, 150 F.3d 477, 481 (5th Cir. 1998); *Exp. Group v. Reef Indus., Inc.*, 54 F.3d 1466, 1470 (9th Cir. 1995); *Drexel Burnham Lambert Group Inc. v. Comm. of Receivers for A.W. Galadardi*, 12 F.2d 317, 325 (2d Cir. 1993) (holding that plaintiff has burden of establishing that immunity does not apply); *Baglab Ltd. v. Johnson Matthey Bankers Ltd.*, 665 F. Supp. 289, 293-94 (S.D.N.Y. 1987) (noting that once defendant has established prima facie case that it falls under FSIA, plaintiff must put forth evidence showing that FSIA does not apply).

179. *Gregorian v. Izvestia*, 871 F.2d 1515, 1528 n.11 (9th Cir. 1988); see also *Kelly v. Syria Shell Petroleum Dev. B.V.*, 213 F.3d 841, 847 (5th Cir. 2000) (holding that “although a party claiming FSIA immunity retains the ultimate burden of persuasion on immunity, it need only present a prima facie case that it is a foreign state; and, if it does, the burden shifts to the party opposing immunity to present evidence that one of the exceptions to immunity applies”).

180. See, e.g., *Cargill Int’l S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1016 (2d Cir. 1993) (detailing plaintiff’s successful efforts to establish exception to sovereign immunity); *Forsythe v. Saudi Arabian Airlines Corp.*, 885 F.2d 285, 289 n.6 (5th Cir. 1989) (holding that although foreign sovereign defendant maintains ultimate burden of persuasion, plaintiff must bear “burden of going forward with some facts to show that an exception to immunity” applies).

181. *Dewhurst v. Telenor Invest, A.S.*, 83 F. Supp. 2d 577, 594 (D. Md. 2000).

182. *Id.*

183. See *Gates*, 54 F.3d at 1459.

sovereigns. One case involved a corporation the purpose of which was “to invest in, purchase, sell, manage, and rent real estate in the United States.”¹⁸⁴ Another concerned a corporation that provided telecommunications and data transmission services.¹⁸⁵ In others, the putative foreign state defendants were such enterprises as a corporation engaged in “slaughtering livestock and packaging beef”¹⁸⁶ and a manufacturer of copper and copper alloy products.¹⁸⁷ In all these situations, the relationship between the tiered subsidiary defendant and the foreign state is at best weak, and at worst, non-existent.

Second, the FSIA, by its terms, already covers entities that have close relationships with their foreign state parents. Section 1603(b)(2)’s definition of an agency or instrumentality expressly includes within its scope “any entity . . . which is an organ of a foreign state . . .”¹⁸⁸ Thus, Congress did in fact provide a mechanism by which subsidiaries of agencies and instrumentalities may be afforded protection under the FSIA. Moreover, courts construe the definition of an organ “broadly.”¹⁸⁹ The key factor is the extent to which the foreign state exercises control over the entity in question. In determining whether an entity is an organ of a foreign state, courts consider such factors as whether the foreign state created the entity for a national purpose; whether the foreign state actively supervises the entity; whether the foreign state requires the hiring of public employees and pays their salaries; whether the entity holds an exclusive franchise in the country; and how the entity is treated under foreign state law.¹⁹⁰ Courts do not apply these factors mechanically, or even insist that all be present in order for an entity to be deemed an organ.¹⁹¹ Thus, if the subsidiary in question is an organ of a foreign state, it can receive FSIA protection regardless of who owns the subsidiary’s shares. In other words, “when the subsidiary acts as an instrument of the foreign state, thereby invoking Congress’s concerns in passing the FSIA, FSIA protections can attach without the use of tiering.”¹⁹² The fact that Congress specifically enumerated organs of foreign states among those entities that fall within the coverage of § 1603 suggests that Congress did not intend for tiered subsidiaries that are not significantly controlled by their foreign sover-

184. Fed. Ins. Co. v. Richard I. Rubin & Co., Inc., 12 F.3d 1270, 1277 (3d Cir. 1983).

185. See *Millicom Int’l Cellular, S.A. v. Republic of Costa Rica*, 995 F. Supp. 14, 16 (D.D.C. 1998).

186. *Alberti v. Empresa Nicaraguense de la Carne*, 705 F.2d 250, 252 (7th Cir. 1983).

187. See *Gould, Inc. v. Pechiney Ugine Kulamann & Trefimetaux*, 853 F.2d 445, 448 (6th Cir. 1988).

188. 28 U.S.C. § 1603(b)(2) (1994); see also *Alpha Therapeutic Corp. v. Nippon Hoso Kyokai*, 199 F.2d 1078, 1084 (9th Cir. 1999) (noting that defendant was an organ since the foreign state exercised control over its “programming, budget, and operations”).

189. *Alpha Therapeutic*, 199 F.2d at 1084.

190. See *Supra Med. Corp. v. McGonigle*, 955 F. Supp. 374, 379 (E.D. Pa. 1997) (delineating factors used by courts to determine organ status); see also *Intercontinental Dictionary Series v. De Gruyter*, 822 F. Supp. 662, 673 (C.D. Cal. 1993) (applying factors to find defendant to be organ of foreign state); see also *Corporacion Mexicana De Servicios Maritimos v. M/T Respect*, 89 F.2d 650, 655 (9th Cir. 1996) (holding corporation to be organ of Mexico because, *inter alia*, it was “charged with the exclusive responsibility of refining and distributing Mexican government property”).

191. See *Kelly v. Syria Shell Petroleum*, 213 F.3d 841, 847 (5th Cir. 2000) (holding that “we will not apply [the factors] mechanically or require that all five support an organ-determination”).

192. *Dewhurst v. Telenor Invest, A.S.*, 83 F. Supp. 2d 577, 594 (D. Md. 2000).

eign owners to benefit from the FSIA's protections. If Congress had intended such a result, a separate provision granting foreign state status to organs would have been largely redundant.

Lastly, the conclusion that Congress did not intend to include subsidiaries in its definition of foreign states is supported by the relative ambiguity with which Congress addressed the issue in comparison with how it dealt with foreign states and their political subdivisions. In enacting the FSIA, Congress recognized the significant procedural benefits conferred by endowing an entity with foreign state status. Thus, when Congress intended to permit these benefits to attach to foreign states and their political subdivisions, it was "explicit and unambiguous" in expressing this intention.¹⁹³ This suggests that if Congress wished to bestow the same protections to subsidiaries of agencies and instrumentalities, "Congress would have been just as explicit and unambiguous in stating its intention that such entities fall under the FSIA if it so intended."¹⁹⁴ Consequently, as one court concluded, "it does not seem . . . reasonable to use extremely ambiguous language to find that Congress intended to include corporations majority-owned by agencies or instrumentalities of foreign states in its definition of foreign states."¹⁹⁵ In other words, if Congress had intended to include such entities within its definition of a foreign state "it would have been as explicit as it was in extending immunity to corporations majority-owned by foreign states or their political subdivisions."¹⁹⁶

V.

CONCLUSION

Interpreting the FSIA is a challenge for many courts. Some have observed that the FSIA is a "statutory labyrinth" with a "bizarre structure" and "deliberately vague provisions."¹⁹⁷ One judge noted that the FSIA is a "particularly twisted exercise in statutory draftsmanship"¹⁹⁸ and another deemed it the "constant bane of the federal judiciary."¹⁹⁹

Applying the FSIA to tiered subsidiaries is no exception to these characterizations. Construing its language one way renders other provisions redundant; interpreting the statute in an alternative manner presents its own internal inconsistencies. Given this interpretative impasse, one must resort to alternative methods of construction—discerning Congress' intentions by assessing the policy implications of the statute's possible interpretations. Doing so reveals that if the FSIA is construed as covering corporate subsidiaries of an agency or instru-

193. *Hyatt Corp. v. Stanton*, 945 F. Supp. 675, 689 (S.D.N.Y. 1996).

194. *Id.* at 690.

195. *Id.*

196. *Id.* Of course, the best means of ascertaining congressional intentions is for Congress to amend the FSIA to clarify any ambiguity in the FSIA.

197. *Rush-Presbyterian-St. Luke's Med. Ctr. v. Hellenic Republic*, 877 F.2d 574, 576 (7th Cir. 1989); *see also* *Gibbons v. Udaras Na Gaeltachta*, 549 F. Supp. 1094, 1105 (S.D.N.Y. 1982).

198. *Vencedora Oceana Navigacion, S.A. v. Compagnie Nationale Algerienne De Navigation*, 730 F.2d 195, 205 (5th Cir. 1984) (Higginbotham, J., dissenting).

199. *Gibbons*, 549 F. Supp. at 1105.

mentality of a foreign state, several important ramifications follow. Such entities become exempt from being subjected to jury trials;²⁰⁰ the FSIA, rather than state long arm statutes are used to determine whether personal jurisdiction is satisfied;²⁰¹ and once the entity has made a prima facie case that it is a foreign state, the burden of production shifts to the other side to demonstrate that it falls within one of the FSIA's exceptions and as such is not entitled to immunity.²⁰²

Congress is unlikely to have intended that tiered subsidiaries enjoy these procedural advantages. First, tiered subsidiaries often have only very tenuous and remote relationships with their ultimate foreign state parents.²⁰³ Second, by including organs of foreign states within the definition of an agency or instrumentality, Congress provided a mechanism by which tiered subsidiaries with close relationships with foreign states can be afforded FSIA protection.²⁰⁴ Finally, the language that arguably justifies extending foreign sovereign immunity to tiered subsidiaries is ambiguous.²⁰⁵ Viewing the FSIA in this light suggests a likely conclusion, namely that, contrary to the Seventh Circuit's conclusion in *Roselawn*, Congress did not intend for the FSIA to accord the same procedural protections to foreign states and their agencies as the subsidiaries of the agencies and instrumentalities of those states.

200. See *supra* notes 163-70 and accompanying text.

201. See *supra* notes 171-76 and accompanying text.

202. See *supra* notes 177-80 and accompanying text.

203. See *supra* notes 181-87 and accompanying text.

204. See *supra* notes 188-92 and accompanying text.

205. See *supra* notes 193-96 and accompanying text.