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Piercing the (Sovereign) Veil: The Role of Limited Liability in State-Owned Enterprises

W. Mark C. Weidemaier*

Sovereign nations own more than ten percent of the world's largest firms and use these ownership stakes to pursue economic, social, and political objectives unrelated to profit maximization. Sovereign nations also have unique powers and attributes that "ordinary" owners lack. Sovereigns do not need an owner's control rights to direct entity behavior; they have the power to regulate. Sovereigns do not need an owner's economic rights to extract value; they have the power to tax. And sovereigns do not need to hide behind the principle of limited liability, which protects owners of limited liability entities; they have sovereign immunity in both domestic and foreign courts.

Despite these fundamental differences, neither courts nor legal scholars have seriously examined whether organizational law should distinguish sovereigns from other owners. This Article takes up that question, focusing on the law of veil piercing as applied to corporations and other limited liability entities owned by sovereign states. Its first contribution is to demonstrate that the principle of limited liability does different work for sovereign states than for ordinary shareholders. That principle's primary function is to create a partition between the owner's assets and those belonging to the entity. Because the partition yields important economic benefits, veil piercing is reserved for exceptional cases. But foreign states do not need organizational law to realize these benefits. The law of foreign sovereign immunity already protects the state's assets in ways that mimic the protections of organizational law. By contrast, state-owned entities rely on organizational law for asset protection.

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Put differently, in the sovereign context, organizational law mostly protects entities.

In the United States, the law of veil piercing in this context derives from the Supreme Court's seminal Bancec case. The Article's second contribution is to demonstrate that Bancec supports its clarified understanding of the relevance of organizational law. Indeed, Bancec was a reverse veil piercing case in which a creditor of a foreign state asserted a claim against a state-owned firm. Bancec's emphasis on the traditional asset-protective function of organizational law must be understood in that context. Bancec does not stand for the proposition that foreign states should receive the same protections as ordinary shareholders. The Article closes by exploring implications of this analysis. Perhaps the most important (if counter-intuitive) implication is that courts should be more receptive to traditional veil piercing claims, at least in a subset of cases.

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INTRODUCTION

When should the law respect the separate legal status of corporations or other limited liability entities owned by foreign governments? To use a prominent contemporary example, the Venezuelan economy was in free-fall even before the onset of the Covid-19 pandemic. The government and its state-owned oil company, *Pétroleos de Venezuela* (PDVSA), are mired in debt and in the crosshairs of creditors.¹ Should courts in the United States and elsewhere let one entity's disappointed creditors attach assets owned by the other?² The question implicates familiar principles of organizational law. The defining feature of the modern limited liability entity is that it creates a partition between assets belonging to the entity and assets belonging to owners.³ Shareholders are not usually liable for corporate debts,⁴ nor must a corporation typically answer to its owners' creditors.⁵ These features of corporate law are so well-known they are often reduced to metaphor. Corporations, we say, are separate legal persons.⁶

Nothing about the metaphor implies that the owner's identity will affect the corporation's treatment. And in fact, courts also

1. Andrew Scurria, *Venezuela Creditor Cleared to Resume Citgo Seizure Efforts*, WALL ST. J. (Sept. 30, 2019, 3:59 PM), <https://www.wsj.com/articles/venezuela-creditor-cleared-to-resume-citgo-seizure-efforts-11569865813?st=x4p29kfsglpyo43>; Caroline Simson, *U.S. Urges Del. Judge to Pause Crystallex's Bid for Citgo*, LAW360 (Aug. 31, 2020, 5:59 PM), <https://www.law360.com/articles/1305785/us-urges-del-judge-to-pause-crystallex-s-bid-for-citgo>; Clifford Krauss, *Venezuela's Crisis Imperils CITGO, Its American 'Cash Cow'*, N.Y. TIMES (Oct. 1, 2018), <https://www.nytimes.com/2018/10/01/business/energy-environment/venezuela-citgo-oil-sanctions.html?searchResultPosition=1>.

2. For example, a creditor of the Venezuelan government holding \$1.4 billion judgment resulting from an arbitration award recently attached PDVSA's equity interest in the ultimate U.S. parent company of CITGO petroleum. Krauss, *supra* note 1.

3. Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387, 390 (2000).

4. See, e.g., MODEL BUS. CORP. ACT § 6.22 (2016); Janet Cooper Alexander, *Unlimited Shareholder Liability Through a Procedural Lens*, 106 HARV. L. REV. 387, 390 (1992).

5. STEPHEN B. PRESSER, *PIERCING THE CORPORATE VEIL* § 1:1 (2016). Incorporation also protects corporate assets from some claims by shareholders, including attempts to recover an investment by forcing a liquidation or dissolution of the corporation. Margaret M. Blair, *Locking in Capital: What Corporate Law Achieved for Business Organizers in the Nineteenth Century*, 51 UCLA L. REV. 387, 392 (2003). This is not to say that the presumption is equally firm in all cases.

6. *Cedric Kushner Promotions, Ltd. v. King*, 533 U.S. 158, 163 (2001); *Riverdale Cotton Mills v. Ala. & Ga. Mfg. Co.*, 198 U.S. 188, 199 (1905); see also Jonathan Macey & Joshua Mitts, *Finding Order in the Morass: The Three Real Justifications for Piercing the Corporate Veil*, 100 CORNELL L. REV. 99, 100 (2014).

respect the separate legal status of corporations owned by foreign sovereigns.⁷ But it is less obvious why this should be so. Sovereign states do not need organizational law as much, or in the same ways, as other owners.⁸ Despite this, the law often draws no distinction between state-owned and other corporations. For example, when deciding whether to pierce the corporate veil of a corporation owned by a foreign sovereign—thus letting the corporation's creditors reach state assets, and potentially vice versa—courts in the United States apply familiar corporate law rules without asking whether this makes sense in context.

This Article examines the law of veil piercing as applied to corporations and other limited liability entities owned by sovereign states. I focus on *foreign* sovereigns—that is, entities recognized as states under international law, challenged in the courts of another such state or before an international tribunal.⁹ Veil piercing is among the most important de-partitioning remedies under U.S. law and can have enormous practical consequences.¹⁰ To return to the Venezuelan context, the government and PDVSA separately owe over \$200 billion, which they cannot pay, and have already defaulted on much of the debt. This mountain of debt will prove hard to restructure—among other reasons, because there is no bankruptcy mechanism allowing sovereign states to impose restructuring terms on a dissenting creditor minority.¹¹ The prospects for successful restructuring will dim further if courts do not respect the boundary between the government and its oil company.¹² In fact, courts already have disregarded that boundary,

7. See, e.g., *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 625 (1983).

8. See *infra* Section I.B.

9. Similar arguments could be made, of course, with regard to other types of sovereign-owned entities. In the U.S. context, this might include entities controlled by state or tribal governments.

10. Henry Hansmann & Richard Squire, *External and Internal Asset Partitioning: Corporations and Their Subsidiaries*, in *THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE* (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2018).

11. Steven L. Schwarcz, *Sovereign Debt Restructuring: A Bankruptcy Reorganization Approach*, 85 CORNELL L. REV. 956 (1999).

12. The reasons are complicated but stem from the fact that creditors who successfully pierce the corporate veil have less reason to fear contract-based restructuring mechanisms. For example, many of Venezuela's loan contracts have so-called collective action clauses, which let the government impose restructuring terms on dissenting creditors if a creditor majority approves a restructuring plan. But PDVSA's creditors did not assent to these

allowing a creditor of the government to attach PDVSA's ownership stake in U.S. oil refiner CITGO Petroleum.¹³

One cannot have a principled veil piercing doctrine without understanding why the corporate form matters in the first place,¹⁴ and the reasons differ for sovereign states than for other shareholders. In the usual context, a shareholder's control over the corporation derives largely from voting and other rights attendant to stock ownership.¹⁵ Sovereigns may value these rights but can assert control without them.¹⁶ In the usual context, owners rely on limited liability to shield personal assets from the entity's creditors, and to protect the entity from owners' creditors. But sovereigns do not need organizational law to the same extent to partition assets. That is because the law of foreign sovereign immunity automatically creates a partition between assets the state uses for commercial activities and assets it devotes to other purposes.¹⁷ With limited exceptions, creditors can enforce claims only against commercial assets. Moreover, the law in the United States further partitions commercial assets owned by a foreign state into separate pools associated with different commercial activities.¹⁸ This result, which owes no debt whatsoever to organizational law, loosely resembles the modern business firm, which siloes risks associated with distinct commercial activities into multiple, legally separate entities.¹⁹ To be sure, sovereign states do want foreign courts to respect the corporate form, and their reasons are not entirely distinct from those that motivate other shareholders.

contracts. If allowed to enforce their claims against government assets, they may be in a position to disrupt the government's future access to foreign financial and commercial markets.

13. See *Crystallex Int'l Corp. v. Bolivarian Republic of Venez.*, 333 F. Supp. 3d 380 (D. Del. 2018) (granting motion by creditor holding arbitration award against Venezuela to attach PDVSA's equity stake in CITGO Holding), *aff'd*, 932 F.3d 126 (3d Cir. 2019), *cert. denied*, 140 S. Ct. 2762 (2020).

14. David Milton, *Piercing the Corporate Veil, Financial Responsibility, and the Limits of Limited Liability*, 56 EMORY L.J. 1305, 1326 (2007); Stephen M. Bainbridge, *Abolishing Veil Piercing*, 26 J. CORP. L. 479 (2001).

15. Poonam Puri, *The Future of Stakeholder Interests in Corporate Governance*, 48 CANADIAN BUS. L.J. 427, 428 (2009); Jill E. Fisch, *Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy*, 31 J. CORP. L. 637, 652-53 (2006).

16. See *infra* Section I.B.1.

17. See *infra* Section I.B.2.

18. 28 U.S.C. § 1610(a)(2).

19. Hansmann & Kraakman, *supra* note 3, at 400-01.

But organizational law does work for sovereigns distinct from work done for other types of shareholders.²⁰

Part I of this Article provides background on the asset partitioning benefits of organizational law. These include protecting owners from creditors of the entity and, perhaps more important, protecting the entity from its owners' creditors. Part I also describes veil piercing doctrine as it has evolved in the traditional context. In *First National City Bank v. Banco Para el Comercio Exterior de Cuba* (*Bancec*), the U.S. Supreme Court presumptively recognized the separate legal status of entities owned by foreign governments.²¹ When creditors try to overcome this presumption, courts have incorporated veil piercing doctrine almost wholesale – albeit with one important modification²² – from the traditional context. That practice might be justified if sovereign states need organizational law for the same reasons as other shareholders. And to an extent, *Bancec* suggests that they do; much of the Court's reasoning emphasizes the familiar asset-partitioning benefits of organizational law. Part I closes, however, by highlighting an important, but often overlooked, limitation of *Bancec*'s reasoning. The case involved the role of organizational law in protecting state-owned *entities* from the sovereign's creditors. It did not require the Court to consider the extent to which sovereigns require similar protection or to articulate reasons for insulating foreign states from the liabilities of state-owned firms.

Part I explains why sovereign states differ from other owners of firms. Importantly, I focus on disputes arising out of commercial activities conducted by foreign states or state-owned entities. I do not focus on other potential sources of liability, such as cases arising from acts of state-sponsored terrorism or from expropriation in

20. Sovereigns also implicate concerns, such as comity and reciprocity, that are present but less pronounced in cases involving privately-owned foreign corporations. This is not to say that veil piercing decisions are—or should be—premised on notions of comity or reciprocity. It is not clear that such considerations can produce principled results. The claim is descriptive: courts explicitly (and sometimes implicitly) take these considerations into account when deciding whether to pierce the veil of an entity owned by a foreign sovereign. See *First National City Bank v. Banco Para El Comercio Exterior de Cuba* (*Bancec*), 462 U.S. 611, 626 (1983).

21. *Id.* at 627.

22. See *infra* notes 32–36 and accompanying text.

violation of international law. These scenarios implicate a different and less protective set of sovereign immunity rules.²³

In the commercial context relevant here, one difference relates to the mechanisms by which sovereign states wield control over state-owned entities. States view these entities as policy vehicles, often for achieving objectives unrelated to profit maximization.²⁴ Political actors may value ownership as a lever of control.²⁵ But because the owner is sovereign, it has many other levers, such as the ability to regulate. This complicates the application of veil piercing doctrine. A state may extensively wield power *as an owner* without implicating any policy relevant to organizational law. By contrast, it may extensively wield power *as a sovereign* to accomplish goals that would be forbidden to any other owner.

A second difference relates to the reasons why states need organizational law. As noted, states benefit from an important kind of asset partitioning by default. The law of foreign sovereign immunity, at least in the United States, effectively divides a state's assets into distinct pools associated with distinct commercial activities. Because of this, sovereigns already enjoy significant *owner protections*; they do not need limited liability in the same way as non-sovereign owners.²⁶ To be sure, organizational law still does some work in this context; it allows the sovereign to further subdivide assets associated with the same commercial activity into distinct, legally-separate pools. But the protections already afforded by sovereign immunity reduce the importance of this function.

For sovereigns, organizational law functions primarily as a means of partitioning *contracts*, not assets. Many of the protections of sovereign immunity can be waived by contract, and one

23. Indeed, in some scenarios U.S. law automatically disregards the separate legal status of state-owned entities. See 28 U.S.C. § 1610(g) (permitting attachment and execution on property owned by a state agency or instrumentality whether or not *Bancec* factors are present); see also *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816 (2018) (holding that notwithstanding 28 U.S.C. § 1610(g), creditors must demonstrate that the property at issue is not otherwise immune from attachment and execution under 28 U.S.C. §§ 1609–10).

24. See *infra* Section I.B.1.

25. Cf. Julian Velasco, *Shareholder Ownership and Primacy*, 2010 U. ILL. L. REV. 897 (discussing relationship between shareholders and corporations); ALDO MUSACCHIO & SERGIO G. LAZZARINI, *REINVENTING STATE CAPITALISM: LEVIATHAN IN BUSINESS, BRAZIL AND BEYOND* 7–13 (2014) (discussing ownership models for state-owned entities and varieties of state capitalism).

26. See *infra* Section I.B.2.

consequence of veil piercing is that courts may impute the entity's contractual obligations to the owner.²⁷ State-owned entities can bestow upon creditors contract rights—especially arbitration clauses and waivers of sovereign immunity—that would be costly for the sovereign to grant. If imputed to the sovereign itself, these contract rights will dramatically reduce the protections of sovereign immunity law. Respecting the boundaries imposed by organizational law ensures that this happens only in rare cases.

When it comes to *entity protections*, however, organizational law plays a crucial role for state-owned firms, just as it does in the usual context. The reason is that sovereign immunity offers less protection to state-owned firms than it offers to the state itself. A legally-separate entity qualifies for immunity (if at all) only as an “agency or instrumentality” of the state.²⁸ If a foreign state is its majority owner, the entity will typically be entitled to sovereign immunity.²⁹ The same is true of many non-U.S. entities over which the sovereign wields significant control.³⁰ But for other entities, such as most subsidiaries of state-owned firms, sovereign immunity does no work whatsoever. Moreover, even when protected by sovereign immunity, state agencies and instrumentalities receive less protection than the state itself.³¹ Organizational law thus serves its traditional asset-protective function in this context.

Part II explores implications, beginning with questions implicated by the myriad ways in which sovereign states exercise control over state-owned entities. As noted, when dealing with such entities, courts in the United States have imported veil piercing doctrine almost wholesale from the traditional corporate context. But there is one important exception. In the traditional context, courts occasionally assert that veil piercing is appropriate when the owner “dominates or controls” the entity, without explicitly requiring that the owner use its control to harm creditors

27. See *infra* notes 176–78 and accompanying text.

28. 28 U.S.C. § 1603(b).

29. See *infra* Section I.B.2.

30. See *infra* Section I.B.2.

31. See *infra* notes 188–91 and accompanying text.

or subvert important legal policies.³² This is the so-called “alter ego” justification for veil piercing.³³ In practice, however, courts do not invoke the alter ego theory to pierce the veil of an ordinary limited liability entity unless the owner’s domination of the entity produces “some fraud or wrong mandating disregard of the corporate form.”³⁴ By contrast, when the entity is owned by a foreign sovereign, control alone can justify veil piercing.³⁵ Moreover, while many of the alter ego cases involving foreign sovereigns involve some degree of fraud or wrongdoing, there are cases in which courts pierce the veil without identifying any concrete harm resulting from the sovereign’s control.³⁶

Part II attempts to articulate a principled justification for (and limitations on) the rule that a foreign sovereign’s domination of an entity justifies veil piercing without specific proof of fraud or injustice.³⁷ Sensibly understood, the alter ego theory rests on the insight that control can be used to both enable and obscure the opportunistic subordination of creditors. In particular, some manifestations of control permit debtors to strategically declare that an asset in fact belongs to another party. Outside of the sovereign context, for instance, an owner might keep such poor records that one cannot tell whether an asset belongs to the corporation or to the owner.³⁸ When control is manifested in such

32. See, e.g., *Carte Blanche (Sing.) Pte., Ltd. v. Diners Club Int’l, Inc.*, 2 F.3d 24, 26 (2d Cir. 1993); *Gartner v. Snyder*, 607 F.2d 582, 586 (2d Cir. 1979); *Intel Containers Int’l Corp. v. Atlanttrafik Express Serv. Ltd.*, 909 F.2d 698, 703 (2d Cir. 1990).

33. *TNS Holdings, Inc. v. MKI Sec. Corp.*, 703 N.E.2d 749, 751 (N.Y. 1998).

34. See, e.g., *id.*

35. See *infra* notes 196–207 and accompanying text.

36. For example, in the *Crystallex* litigation, the district court invoked the alter ego theory to allow creditors of Venezuela to attach assets belonging to state-owned PDVSA. *Crystallex Int’l Corp. v. Bolivarian Republic of Venezuela*, 333 F. Supp.3d 380, 395–98 (D. Del. 2018). Despite noting that the alter ego theory “inherently assumes that some element of unfairness would result if the Court fails to treat one entity as the alter ego of the other,” the court did not identify any unfairness that would result in that case. *Id.* at 397 n.15.

37. When a creditor seeks to impute an entity’s conduct to its state owner, the alter ego theory does not require that the state actually direct the entity’s liability-generating conduct. In such cases, agency law might provide a basis for imposing liability on the state; there would be no need for the alter ego theory. See *infra* notes 198–201.

38. See *Macey & Mitts*, *supra* note 6, at 113.

a way, veil piercing is appropriate to prevent debtors from unilaterally declaring assets to be beyond the creditors' reach.³⁹

Similar principles are in play when the entity is owned by a foreign sovereign. In this context, however, the law of foreign sovereign immunity, more than organizational law, determines the rights of creditors. Part II argues that, if courts are to treat control alone as sufficient to pierce the veil, they should make clear that a sovereign's domination of an entity matters only when the sovereign uses its control to subvert the law of foreign sovereign immunity. That law—represented in the United States by the Foreign Sovereign Immunities Act of 1976 (FSIA)—allows foreign states and state-owned entities to forge commercial ties with the United States but requires them to place at risk their assets associated with liability-generating activity.⁴⁰ Veil piercing under a pure alter ego theory is appropriate when (and only when) a state violates this implicit bargain, using control over an entity to engage in commerce while keeping non-immune assets away from creditors.

Part II also examines whether the source of a state's control rights should affect the veil piercing analysis. Some courts arguably have suggested that acts taken in the exercise of "sovereign powers" should be disregarded for purposes of the veil piercing inquiry. What matters, these courts suggest, is whether the sovereign abuses its rights *as owner*. But it makes little sense to draw such a distinction. It is the purpose for which the state uses its control that matters. There is no meaningful difference between,

39. *Id.* By contrast, other forms of control, such as failure to hold regular directors' meetings, do not create the risk of opportunism; it "makes no sense" to premise veil piercing on such matters. *Id.*

40. The point is not that the state must place at risk sufficient assets to cover anticipated liabilities. Instead, it is that the law of foreign sovereign immunity recognizes that states often behave as commercial actors and insists that, to the extent this happens, the state should not gain unfair advantage over private commercial actors. A primary motivation for the U.S. government's adoption of the restrictive theory of immunity was concern that the law of foreign sovereign immunity was giving an advantage to state-owned firms, especially those in Soviet bloc countries. *See* Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State, to Philip B. Perlman, Acting U.S. Attorney General (May 19, 1952), in 26 DEP'T ST. BULL. 969, 985 (June 23, 1952) (noting that the desire to insulate state-owned firms acting abroad "obviously motivate[d]" the Soviet Union's continued embrace of absolute immunity); H.R. REP. NO. 94-1487, at 6-7 (1976) (noting that "foreign state enterprises are every day participants in commercial activities" and that extending immunity to such cases "call[ed] into question whether our citizens will have access to the courts in order to resolve ordinary legal disputes").

say, a dividend payment that leaves a state-owned corporation insolvent and a confiscatory tax (or mandatory contribution to social programs) that produces the same result.

Finally, Part II offers tentative thoughts on whether courts should be more (or less) willing to pierce the veil of an entity owned by a foreign sovereign. Any case involving such an entity implicates considerations of comity and reciprocity that are muted, although not entirely absent, in other settings. For instance, courts hesitate to pierce the veil of state-owned entities so that foreign jurisdictions will reciprocate when asked to pierce the veil of a U.S. corporation acting abroad.⁴¹ Despite this, there is an argument that courts have been too reluctant to impute the liabilities of a state-owned entity to its sovereign owner, especially in cases where the entity's contracts do not impose significant additional risk for the sovereign. By contrast, courts should be especially reluctant to allow the sovereign's creditors to reach assets owned by a state-owned entity. Here, organizational law serves its usual entity-shielding function, and considerations of comity and reciprocity provide additional reason for caution.

I. WHY (AND WHETHER) ORGANIZATIONAL LAW MATTERS

At the outset, let me offer three points of clarification. First, except when greater precision is needed, I will use the term "veil piercing" broadly to refer to several, ostensibly separate, justifications for disregarding the separate legal status of a limited liability entity. For example, some courts understand the alter ego theory to permit veil piercing based only on a shareholder's "domination or control" of the corporation, whether or not that control results in any clearly-identified fraud or unfairness to a creditor.⁴² Other courts have invoked agency law,⁴³ often without

41. See H.R. REP. NO. 94-1487, at 29-30 ("If U.S. law did not respect the separate juridical identities of different agencies or instrumentalities, it might encourage foreign jurisdictions to disregard the juridical divisions between different U.S. corporations or between a U.S. corporation and its independent subsidiary.").

42. See, e.g., *Carte Blanche (Sing.) Pte., Ltd. v. Diners Club Int'l, Inc.*, 2 F.3d 24, 26 (2d Cir. 1993); *Pearson v. Component Tech. Corp.*, 247 F.3d 471, 485 (3d Cir. 2001). See generally Stephen B. Presser, *The Bogalusa Explosion, "Single Business Enterprise," "Alter Ego," and Other Errors: Academics, Economics, Democracy, and Shareholder Limited Liability: Back Towards a Unitary "Abuse" Theory of Piercing the Corporate Veil*, 100 NW. U. L. REV. 405, 412-15 (2006).

43. *Pearson*, 247 F.3d at 487 n.5.

making clear whether and how this differs from other analyses.⁴⁴ These distinctions appear in cases involving both sovereign and non-sovereign shareholders.

Second, I am mostly concerned with the law of the United States. Although state law usually governs veil piercing questions, federal law governs when a foreign sovereign is the owner.⁴⁵ Although focused on U.S. law, I will occasionally note how the United States differs from other countries in its application of the law of foreign sovereign immunity.⁴⁶ Because of these differences, a U.S. court's decision to pierce the corporate veil can have greater consequences outside of the United States, if recognized by courts in other countries.⁴⁷

Finally, I should be clear what I mean when I refer to a state-owned corporation. Governments of all sorts hold ownership stakes of all kinds in many different limited liability entities.⁴⁸ I will mostly ignore differences in entity type and will use the terms "sovereign-owned" and "state-owned" interchangeably and only when:

- an entity is organized under a law that entitles it to separate legal status, and

44. In some cases, it appears that the court invokes agency law as a metaphor, "simply to justify a conclusion that . . . liability should follow from shareholder control." Milton, *supra* note 14, at 1332. These cases often lack evidence—central to finding that an actual agency relationship exists—that the controlling shareholder assented to have the subsidiary act on its behalf. *Id.* At least a few cases, however, more carefully distinguish agency law from veil piercing doctrine. See, e.g., *Transamerica Leasing, Inc. v. Republic of Venez.*, 200 F.3d 843, 849 (D.C. Cir. 2000).

45. Principles of international law may also inform the analysis. See *Bancec*, 462 U.S. 611, 623 (1983).

46. E.g., *infra* notes 170, 175–76 and accompanying text.

47. In particular, many countries allow creditors to enforce claims by attaching and executing upon all commercial assets of a foreign state. See, e.g., State Immunity Act, (1978) § 13(4) HALS. STAT. (UK). Under U.S. law, by contrast, a creditor whose claim arises out of a foreign state's commercial activity, and who does not benefit from a waiver of sovereign immunity or arbitration award, generally may attach an asset if the asset is "used for a commercial activity in the United States" and when the asset "is or was used for the commercial activity upon which the claim is based." 28 U.S.C. § 1610(a), (a)(2). It is this latter requirement—of a nexus between the asset and the claim—that creates a partition between pools of assets devoted to distinct commercial activities. For further discussion, see *infra* Section I.B.2.a.

48. See ORG. FOR ECON. COOP. & DEV., CORPORATE GOVERNANCE OF STATE-OWNED ENTERPRISES: A SURVEY OF OECD COUNTRIES (2005) (summarizing practices of OECD member states with regard to state ownership).

- a foreign state (as that term is defined under international law), or a political subdivision, agency, or instrumentality of such a state, directly or indirectly holds a controlling ownership interest.⁴⁹

When an entity meets these criteria, (i) the law of foreign sovereign immunity protects the owner (although the protection is not absolute), (ii) the law of foreign sovereign immunity *may* protect the entity, and (iii) the state has demonstrated that it values the control and other rights associated with ownership.⁵⁰ The definition excludes entities whose owners cannot claim immunity as *foreign* sovereigns. For example, it does not cover lawsuits in U.S. courts against corporations created by U.S. states or by Native American tribal governments. Such entities raise similar questions but merit separate treatment, as the applicable rules of immunity derive from domestic law.

For an example of an entity that meets this definition, return again to Venezuela and its relationship to state oil company PDVSA. Venezuela is a foreign state. In addition to PDVSA, it owns other legally independent Venezuelan entities, such as heavy industry conglomerate Corporación Venezolana de Guayana (CVG). The law of foreign sovereign immunity regards such entities as agencies or instrumentalities of the state.⁵¹ Sovereign immunity protects them, although to a lesser extent than it protects the state itself.⁵² Each state-owned firm conducts operations through domestic (and at times foreign) subsidiaries. Venezuelan

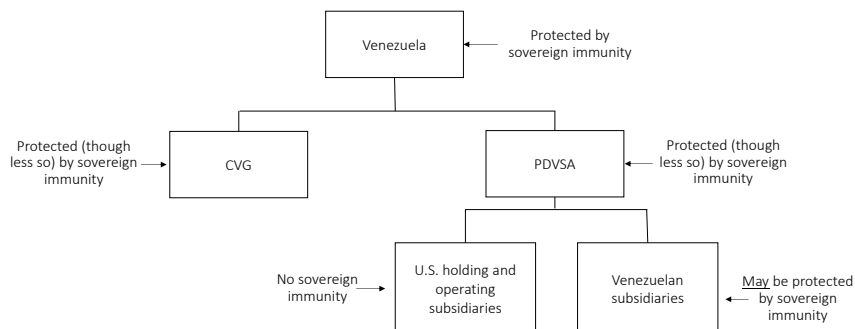
49. Under international law, a state is an entity with a defined territory and permanent population, under the control of its own government, that engages or has the capacity to engage in formal relations with other such entities. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (AM. LAW INST. 1987). A state can hold a controlling interest without holding the majority of voting shares. *See generally* ORG. FOR ECON. COOP. & DEV., OECD GUIDELINES ON CORPORATE GOVERNANCE OF STATE-OWNED ENTERPRISES (2015 ed. 2015) (defining ownership and control to include holding a majority of voting shares or “otherwise exercising an equivalent degree of control”). The law of foreign sovereign immunity protects such entities, as well as their political subdivisions, agencies, and instrumentalities. *See, e.g.*, 28 U.S.C. § 1603(a).

50. Some aspects of the discussion to follow can usefully be applied to other entities. For example, states routinely hold minority interests in entities, either directly or through state-controlled entities such as sovereign wealth funds. *See, e.g.*, MUSACCHIO & LAZZARINI, *supra* note 25, at 47–50. As sovereigns, these state owners are entitled (at least presumptively) to sovereign immunity.

51. 28 U.S.C. § 1603.

52. *See infra* Section I.B.2.b.

subsidiaries *may* be able to assert sovereign immunity as a defense to legal proceedings in the United States. Subsidiaries organized under U.S. law cannot.⁵³ Although I reserve detailed discussion for later, the figure below depicts these relationships (in grossly simplified form) and the distinctions drawn by sovereign immunity law.



A. Organizational Law When the Owner Is (and Is Not) a Sovereign

Limited liability entities shield owners' assets from claims asserted by the entity's creditors.⁵⁴ The entity, in turn, is protected from claims asserted by creditors of its owners.⁵⁵ The decision to pierce the corporate veil withdraws these protections. To understand when it makes sense to do this, one must first understand why asset partitioning matters in the first place.⁵⁶ Only then can we decide whether doctrine developed in the traditional corporate context can sensibly be applied to state-owned entities.

53. An agency or instrumentality must be "neither a citizen of a State of the United States . . . nor created under the laws of any third country." 28 U.S.C. § 1603(b)(3).

54. Henry Hansmann, Reinier Kraakman & Richard Squire, *Law and the Rise of the Firm*, 119 HARV. L. REV. 1335, 1336 (2006).

55. *Id.*

56. Bainbridge, *supra* note 14, at 487 ("The extent to which one believes courts should invoke the veil piercing remedy . . . depends in the first instance on one's assessment of the policy merits of limited liability itself."); Peter B. Oh, *Veil-Piercing Unbound*, 93 B.U. L. REV. 89, 91 (2013) ("[V]eil piercing is justified potentially only when limited liability is not.").

1. Owner and entity shielding in the traditional setting

I keep the discussion in this Section brief, in recognition of the fact that much ink has already been spilled on the functions of organizational law in general and on veil piercing in particular.⁵⁷ I begin with the owner-shielding aspects of organizational law, best exemplified by the rule that shareholders are not personally liable for corporate debts unless their own conduct provides a basis for liability.⁵⁸ The usual justification for the rule runs something like this: limited liability reduces monitoring costs and the cost of firm governance,⁵⁹ enables investor diversification,⁶⁰ increases liquidity,⁶¹ and (hopefully) encourages an appropriate level of risk-taking by firms engaged in economic activity.⁶²

For present purposes, it is unnecessary to elaborate on these claims, but a brief example may illustrate.⁶³ Consider the

57. For just a few examples, see Macey & Mitts, *supra* note 6, at 99; Hansmann & Kraakman, *supra* note 3, at 401; Hansmann et al., *supra* note 54, at 1352; Bainbridge, *supra* note 14; Alexander, *supra* note 4, at 391; Oh, *supra* note 56, at 91; Robert B. Thompson, *Piercing the Corporate Veil: An Empirical Study*, 76 CORNELL L. REV. 1036, 1058 (1991); Christina L. Boyd & David A. Hoffman, *Disputing Limited Liability*, 104 NW. U. L. REV. 853, 854 (2010); and Blair, *supra* note 5, at 391.

58. See, e.g., MODEL BUS. CORP. ACT § 6.22 (AM. BAR ASS'N 2011).

59. Hansmann & Kraakman, *supra* note 3, at 424–25; Bainbridge, *supra* note 14, at 490.

60. Bainbridge, *supra* note 14, at 490.

61. See generally FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* (1991).

62. See, e.g., Stephen B. Presser, Commentary, *Thwarting the Killing of the Corporation: Limited Liability, Democracy, and Economics*, 87 NW. U. L. REV. 148, 164 (1992) (linking limited liability to the desire to promote entrepreneurial activity). We might add a variety of procedural and other concerns that underpin the limited liability rule. See, e.g., Alexander, *supra* note 4 (exploring procedural barriers to the expansion of shareholder liability); Poonam Puri, *Judgment Proofing the Profession*, 15 GEO. J. LEGAL ETHICS 1, 21 (2001) (describing evolution of veil piercing as an exception to the rule of limited liability for shareholders).

63. Much (though by no means all) corporate law theory embraces the so-called nexus-of-contracts model, which views firms as webs of implicit contracts between groups of claimants with competing interests in the firm's earnings. See, e.g., Bainbridge, *supra* note 14; EASTERBROOK & FISCHEL, *supra* note 61, at 1–39; Larry E. Ribstein, *Limited Liability and Theories of the Corporation*, 50 MD. L. REV. 80 (1991); William W. Bratton, Jr., *The "Nexus of Contracts" Corporation: A Critical Appraisal*, 74 CORNELL L. REV. 407 (1989). For present purposes, one need not embrace the nexus-of-contracts model of the corporation, which despite its prominence has attracted criticism. See, e.g., Bratton, *supra*, at 410 (arguing that the nexus-of-contracts model "suffers from a single-mindedness of its own, and, as a result, fails to offer a viable contractual theory of the corporation"). It is only necessary to realize that the owner- and entity-shielding consequences of incorporation are less relevant to sovereign states, and to accept that veil piercing doctrine should be informed by the purposes of organizational law in this setting.

relationship between shareholders and voluntary creditors of a publicly held corporation. The shareholders lack the inclination, expertise, and ability to monitor corporate managers or the solvency of other shareholders (who, absent limited liability, will be jointly liable for corporate debts). For them, unlimited liability creates risks that cannot be effectively mitigated; they will therefore favor the limited liability rule.⁶⁴ For creditors, it is a closer call, but it is not obvious that they would prefer a rule of unlimited liability given the cost of pursuing claims against dispersed investors.⁶⁵ At least arguably, then, these parties would contract for the limited liability rule, if it were necessary and feasible to contract.

Similar justifications support the entity-shielding aspects of organizational law. For instance, because creditors of a corporation have priority claims to firm assets, they need not concern themselves with monitoring the solvency of shareholders.⁶⁶ By contrast, if a shareholder's creditors could force a liquidation of corporate assets, a prospective transaction partner would struggle to assess the risk of dealing with the corporation: "Intimate familiarity with the firm's own assets and business affairs would not suffice to determine the firm's creditworthiness; knowledge of the personal creditworthiness of each of the firm's owners would be necessary as well."⁶⁷ Arguably, this entity-shielding function of organizational law is most important, for it would be difficult or impossible to replicate by contract.⁶⁸

Veil piercing is a de-partitioning remedy.⁶⁹ One would think, therefore, that courts would pierce the corporate veil only after deciding that it is no longer appropriate to respect the boundaries between the entity and its owners (or between the entity and its various subsidiaries).⁷⁰ At first glance, however, the law of veil piercing is in some disarray. In general, courts pierce the corporate veil when the owner exercises complete domination over the corporation *and* uses that control to perpetrate a fraud or injustice

64. Hansmann & Kraakman, *supra* note 3, at 424; Bainbridge, *supra* note 14, at 492.

65. Bainbridge, *supra* note 14, at 492-94.

66. *Id.* at 492-93.

67. Hansmann & Kraakman, *supra* note 3, at 402-03.

68. *Id.* at 432; Hansmann, Kraakman & Squire, *supra* note 54, at 1340-41.

69. Hansmann & Squire, *supra* note 10, at 1.

70. Oh, *supra* note 56, at 91 ("[V]eil-piercing is justified potentially only when limited liability is not.").

(as when a shareholder leaves other creditors in the lurch by siphoning away corporate assets).⁷¹ On occasion, the two parts of this test are phrased disjunctively, so that a creditor may pierce the veil upon showing *either* that the owner extensively dominated the corporation or that the owner used the corporate form to perpetrate fraud.⁷² The former theory—extensive domination and control—is sometimes called “alter ego” liability.⁷³ As implemented, however, courts generally invoke the alter ego theory to pierce the veil only when the owner’s domination “leads to a wrong against third parties.”⁷⁴

In practice, courts often analyze veil piercing questions by invoking a laundry list of factors. These include (among many others)⁷⁵:

- undercapitalization
- commingling of corporate and personal assets
- failure to observe corporate formalities
- failure to pay dividends
- siphoning of corporate funds
- failure to keep corporate records
- the corporation’s payment of the shareholder’s personal obligations, and
- the shareholder’s use of the corporate form to pursue personal objectives

Many of these factors have no obvious connection to the reasons why the law might (or might not) respect the corporate form.⁷⁶ It is not obvious, for example, why it advances the underlying purposes of the law to impose personal liability on a shareholder who has

71. PRESSER, *supra* note 5.

72. See, e.g., *Carte Blanche (Sing.) Pte., Ltd. v. Diners Club Int’l, Inc.*, 2 F.3d 24 (2d Cir. 1993); *Gartner v. Snyder*, 607 F.2d 582, 586 (2d Cir. 1979); *Itel Containers Int’l Corp. v. Atlanttrafik Express Serv. Ltd.*, 909 F.2d 698, 703 (2d Cir. 1990).

73. *Itel Containers*, 909 F.2d at 703.

74. *Wm. Passalacqua Builders, Inc. v. Resnick Devs. S., Inc.*, 933 F.2d 131, 138 (2d Cir. 1991).

75. Robert B. Thompson, *Piercing the Veil Within Corporate Groups: Corporate Shareholders as Mere Investors*, 13 CONN. J. INT’L L. 379 (1999).

76. Oh, *supra* note 56, at 90.

failed to observe corporate formalities.⁷⁷ Thus, it is perhaps no surprise that the law of veil piercing has been criticized as incoherent.⁷⁸ But this does not necessarily mean there is no order in the cases. Jonathan Macey and Joshua Mitts, for instance, assert that courts pierce the veil in three categories of cases: to further statutory or regulatory goals (such as those relating to environmental law), to prevent shareholders from obtaining credit by misrepresentation, and to promote bankruptcy-type values (as by preventing shareholders from transferring corporate assets to themselves, thus elevating themselves over higher priority creditors).⁷⁹ For present purposes, readers need not accept that veil piercing cases can be rationally sorted according to this typology.⁸⁰ The important point is that efforts to make sense of veil piercing doctrine reflect the (sensible) view that courts should pierce the veil only “to achieve discrete, specific policy objectives.”⁸¹

77. See Bainbridge, *supra* note 14, at 511–12; Milton, *supra* note 14, at 1335–36; Macey & Mitts, *supra* note 6, at 109 (“[P]iercing the corporate veil for failing to observe corporate formalities . . . makes no sense. It is like imposing liability on a person because he did not wear a tie or keep a napkin in his lap while eating.”).

78. Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 89 (1985) (referring to the law of veil piercing as “severe, and unprincipled”); Frederick Tung, *Limited Liability and Creditors’ Rights: The Limits of Risk Shifting to Creditors*, 34 GA. L. REV. 547, 568 (2000) (criticizing veil piercing doctrine as vague); Steven L. Schwarcz, *Collapsing Corporate Structures: Resolving the Tension Between Form and Substance*, 60 BUS. LAW. 109, 113 (2004) (calling veil piercing doctrine “conceptually confusing”); Oh, *supra* note 56, at 90 (referring to the law of veil piercing as an “abysmal failure”).

79. See Macey & Mitts, *supra* note 6.

80. For example, Macey and Mitts rely on automated text analysis of judicial opinions, which accompany only a small minority of judicial actions. See, e.g., David A. Hoffman, Alan J. Izenman & Jeffrey R. Lidicker, *Docketology, District Courts, and Doctrine*, 85 WASH. U. L. REV. 681, 710 (2007); Margo Schlanger & Denise Lieberman, *Using Court Records for Research, Teaching, and Policymaking: The Civil Rights Litigation Clearinghouse*, 75 UMKC L. REV. 155, 165 (2006). Moreover, judicial opinions do not necessarily reveal the actual reasons for a decision; they do not “tell us what went on in judges’ minds,” but do reveal “what judges *think* is legitimate argument and legitimate authority, justifying their behavior.” Lawrence M. Friedman, Robert A. Kagan, Bliss Cartwright & Stanton Wheeler, *State Supreme Courts: A Century of Style and Citation*, 33 STAN. L. REV. 773, 794 (1981). Thus, Christina Boyd and David Hoffman criticize much veil piercing scholarship for placing too much reliance on “how judges *justify* themselves,” leading critics to paint a caricature of veil piercing doctrine that “predict[s] the iceberg by its odd, biased tip.” Christina L. Boyd & David A. Hoffman, *Disputing Limited Liability*, 104 NW. U. L. REV. 853, 855 (2010). Boyd and Hoffman’s work identifies other, often non legal, factors associated with the decision to pierce the corporate veil.

81. Macey & Mitts, *supra* note 6, at 100–01.

Put differently, one should disregard an entity's separate legal status only when the reasons for respecting it are absent. Of course, this requires an understanding of why separate legal status matters in the first place. For state-owned entities, it is not clear that such an understanding exists.

2. *Bancec's incomplete case for entity shielding in the sovereign context*

In the seminal *Bancec* case, the Supreme Court held that when "government instrumentalities [are] established as juridical entities distinct and independent from their sovereign [they] should normally be treated as such."⁸² Invoking principles "common to international law and federal common law,"⁸³ *Bancec* made clear that U.S. courts must respect the separate legal status of entities owned by foreign sovereigns except when the "entity is so extensively controlled by its owner that a relationship of principal and agent is created" or when respecting the entity's separate legal status "would work fraud or injustice."⁸⁴ Though derived from a different source—organizational law is typically state law—this formulation does not distinguish state-owned from other entities.

The *Bancec* majority did not try to articulate clear rules for determining when to disregard the separate legal status of state-owned entities. It did, however, offer a preliminary justification for its willingness to indulge the fiction of separate legal personhood in this context. To understand the limits of its reasoning, it will help to keep in mind that *Bancec* was a "reverse" veil piercing case, which implicated the entity shielding functions of organizational law. The question was whether a U.S. bank with an expropriation claim against the Cuban government could assert this claim as a set-off in an action brought by a legally separate, state-owned entity.⁸⁵ *Bancec* did not involve an attempt to reach government assets by a creditor of a state-owned entity.⁸⁶

In explaining its decision, the *Bancec* majority invoked principles that would be familiar to any student of corporate law.

82. *Bancec*, 462 U.S. 611, 626–27 (1983).

83. *Id.* at 613.

84. *Id.* at 629. *See also* *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816, 822 (2018).

85. *Bancec*, 462 U.S. at 613–14.

86. Such an attempt would match the traditional veil piercing scenario and implicate the owner-shielding functions of limited liability.

For instance, the majority emphasized that entity shielding facilitates access to credit for state-owned corporations:

Freely ignoring the separate status of government instrumentalities would result in substantial uncertainty over whether an instrumentality's assets would be diverted to satisfy a claim against the sovereign, and might thereby cause third parties to hesitate before extending credit to a government instrumentality without the government's guarantee.⁸⁷

This reasoning would not be out of place in a modern discussion of the benefits of limited liability in a corporation with non-sovereign shareholders. In both sovereign and non-sovereign settings, entity shielding lets prospective creditors transact with the entity without monitoring the solvency of its owners.⁸⁸ *Bancec*'s reasoning likewise provides a reason to respect the separate legal status of affiliated entities within one state-controlled firm.⁸⁹ Here, too, the Court's opinion would not be out of place in a modern discussion of the benefits of complex corporate structures involving non-sovereign shareholders.⁹⁰ It bears repeating, however, that *Bancec* was discussing the benefits of *entity shielding*—i.e., insulating firm assets from claims by creditors of the shareholder. The majority's reasoning provides no explicit justification for *owner shielding*—i.e., insulating owners from claims by creditors of the firm. I return to this important distinction shortly.⁹¹

87. *Bancec*, 462 U.S. at 626.

88. See *De Letelier v. Republic of Chile*, 748 F.2d 790, 795 n.1 (2d Cir. 1984) (noting that imposing a government shareholder's liabilities on a state-owned corporation would create risks for lenders and other "unsuspecting third parties"); *Bank of N.Y. v. Yugoimport*, 745 F.3d 599, 614 n.14 (2d Cir. 2014) ("In the case of a developing country, diversion of an instrumentality's assets to satisfy debts of the sovereign could stymie investment and cause third-parties dealing with the instrumentality to demand government guarantees."); Hansmann & Kraakman, *supra* note 3, at 402 (noting that, but for the entity shielding function of organizational law, "creditors of any single owner would have the right to proceed against that owner's share of the firm's assets in case of the individual's insolvency").

89. See H.R. REP. NO. 94-1487, at 29 (1976) ("Section 1610(b) will not permit execution against the property of one agency or instrumentality to satisfy a judgment against another, unrelated agency or instrumentality.").

90. See, e.g., Anthony J. Casey, *The New Corporate Web: Tailored Entity Partitions and Creditors' Selective Enforcement*, 124 YALE L. J. 2680 (2015) (characterizing complex corporate groups as designed to allow efficient creditor monitoring, including the ability to select between project-specific and firm-wide enforcement).

91. See *infra* Section I.B.2.b.

To be sure, the *Bancec* majority opinion also highlights considerations unique to, or more acutely raised by, state-owned entities. “[P]rinciples of comity,” the majority noted, also justify the presumption of independence afforded to state-owned entities.⁹² Quoting the authoritative House Report on the FSIA, the Court posited that a U.S. court’s refusal to respect the separate legal status of a state-owned entity “might encourage foreign jurisdictions to disregard the juridical divisions between different U.S. corporations or between a U.S. corporation and its independent subsidiary.”⁹³ To a degree, this concern is implicated whenever a U.S. court is faced with any entity organized under the law of a foreign state, but it is especially acute when the foreign state is the owner.

The concern for comity also suggests a justification for extending the owner-shielding aspects of limited liability to foreign sovereigns. Perhaps U.S. courts should protect the sovereign’s assets from creditors of a state-owned entity to avoid creating diplomatic headaches and to encourage foreign jurisdictions to reciprocate by protecting owners of U.S. entities, whether or not owned by the federal government. That is a primary concern animating the law of foreign sovereign immunity;⁹⁴ it might also justify extending owner shielding to foreign sovereigns. Indeed, after *Bancec*, courts faced with traditional veil piercing questions have invoked comity to justify the presumption that state-owned entities are separate from their owners.⁹⁵ In the main, however,

92. *Bancec*, 462 U.S. at 626. The majority referenced the authoritative House Report accompanying the Foreign Sovereign Immunities Act of 1976, which expressed the concern that “[i]f U.S. law did not respect the separate juridical identities of different agencies or instrumentalities, it might encourage foreign jurisdictions to disregard the juridical divisions between different U.S. corporations or between a U.S. corporation and its independent subsidiary.” H.R. REP. NO. 94-1487, at 29-30 (1976).

93. *Bancec*, 462 U.S. at 627-28 (quoting H.R. REP. NO. 94-1487, at 29-30 (1976), as reprinted in 1976 U.S.C.C.A.N. 1976, 6628-29).

94. *Republic of Austria v. Altmann*, 541 U.S. 677, 688 (2004).

95. *DRC, Inc. v. Republic of Hond.*, 71 F. Supp. 3d 201, 209 (D.D.C. 2014) (noting, in an action to enforce against the government an arbitration award against a state instrumentality, that the presumption of separateness is “rooted in principles of comity”); *Doe v. Holy See*, 557 F.3d 1066, 1079 (9th Cir. 2009) (deciding whether to impute conduct by a U.S. Archdiocese to the Holy See and noting *Bancec*’s concern for comity).

courts have not offered clear justifications for owner shielding in the context of state-owned entities.⁹⁶

3. Importing organizational law (mostly) wholesale into the sovereign context

Bancec left to lower courts the work of fashioning rules for disregarding the separate legal status of state-owned entities. As noted, *Bancec* also implicated the entity-shielding, not the owner-shielding, attributes of organizational law. Yet lower courts have not distinguished between these scenarios.⁹⁷ In both contexts, moreover, courts have largely imported the law developed in the context of “ordinary” limited liability entities. Thus, in deciding whether a corporation is the “alter ego” or agent of a foreign state, courts have invoked a familiar laundry list of factors, including whether the state:

- (1) uses the instrumentality’s property as its own; (2) ignores the instrumentality’s separate status or ordinary corporate formalities; (3) deprives the instrumentality of the independence from close political control that is generally enjoyed by government agencies; (4) requires the instrumentality to obtain approvals for ordinary business decisions from a political actor; and (5) issues policies or directives that cause the instrumentality to act directly on behalf of the sovereign state.⁹⁸

96. Again, I do not suggest that considerations of comity and reciprocity can provide a principled basis for veil piercing decisions. *See supra* note 20. At most, they represent a thumb on the scale. As a descriptive matter, it is fair to say that such concerns partially explain the general reluctance of U.S. courts to pierce the veil of entities owned by foreign states.

97. *See, e.g., Transamerica Leasing, Inc. v. Republic of Venez.*, 200 F.3d 843, 847–48 (D.C. Cir. 2000). On rare occasions, courts suggest that different policies might be at stake in the two contexts, but they have not elaborated on the differences. *Bayer & Willis, Inc. v. Republic of Gambia*, 283 F. Supp. 2d 1, 5–6 (D.D.C. 2003).

98. *Kirschenbaum v. 650 Fifth Ave. & Related Props.*, 830 F.3d 107, 130 (2d. Cir. 2016); *EM Ltd. v. Banco Central de la República Argentina*, 800 F.3d 78, 91 (2d. Cir. 2015). Conceptually, there is a difference between calling an entity the “alter ego” of its owner—in the sense that the owner so completely dominates the entity that “they act as one”—and treating the entity as its owner’s agent. *See Transamerica*, 200 F.3d at 848. The latter relationship generally turns on principles of agency law, which overlap only barely with the “control” factors listed above. *See id.* at 849. The cases, however, often collapse the inquiry into one, omnibus inquiry into the extent of the state’s control over the entity. *See, e.g., id.* at 848.

As in the context of non-sovereign owners, courts rarely pause to explain why the decision whether to respect an entity's separate legal status should turn on *any* of these factors. To the contrary, outcomes appear to turn on relatively minor distinctions, which supposedly illuminate the extent to which the state controlled the entity's day-to-day operations.⁹⁹

As an example, in *Transamerica*, the DC Circuit declined to pierce the corporate veil between Venezuela and a state-owned shipping company. It distinguished a prior case, *Foremost-McKesson*, primarily by noting that, in the earlier case, the government had "directly controlled [r]outine business decisions, such as declaring and paying dividends . . . and honoring the [corporation's] contractual commitments."¹⁰⁰ In *Transamerica*, by contrast, there was little evidence that the state did more than use its influence over the board of directors to install its preferred managerial team to address the firm's operational difficulties.¹⁰¹ In another case, *Kalamazoo Spice*, a district judge disregarded the separate legal status of a state-owned corporation, explaining the result by noting, among other indicia of control, that a government ministry had been required to approve all invoices over \$13,000 and that all checks above \$25,000 had to be signed by a member of the board of directors appointed by the government.¹⁰²

Recall that *Bancec* allows courts to disregard the separate legal status of a state-owned entity when the entity and its owner are "alter egos" or when a contrary decision "would work fraud

99. See, e.g., *Walter Fuller Aircraft Sales, Inc. v. Republic of Phil.*, 965 F.2d 1375, 1382-83 (5th Cir. 1992) (emphasizing importance of day-to-day control); *Kirschenbaum*, 830 F.3d at 130 (dismissing state's extensive control over corporation as not enough to show "day-to-day" control); *First Inv. Corp. of Marshall Islands v. Fujian Mawei Shipbuilding, Ltd.*, 703 F.3d 742, 753 (5th Cir. 2012) (looking to "the ownership and management structure of the instrumentality, paying particularly close attention to whether the government is involved in day-to-day operations, as well as the extent to which the agent holds itself out to be acting on behalf of the government") (quoting *Walter Fuller*, 965 F.2d at 1381); *Holy See*, 557 F.3d at 1080 (interpreting *Bancec* to require an inquiry into "day-to-day control").

100. *Transamerica*, 200 F.3d at 853 (internal quotation marks omitted) (also emphasizing that the corporation had "acted to effectuate a governmental policy" intended to injure the corporation's foreign shareholders).

101. See *id.* at 851; see also *id.* at 853 (noting that other than "the government's ownership of stock and control of the Board of Directors, this case bears no resemblance to *McKesson*").

102. *Kalamazoo Spice Extraction Co. v. Provisional Military Gov't of Socialist Ethiopia*, 616 F. Supp. 660, 666 (W.D. Mich. 1985).

or injustice.”¹⁰³ When evaluating the risk of “fraud or injustice,” courts have again invoked familiar considerations, asking, for example, whether the sovereign has siphoned assets or otherwise manipulated the corporate form to thwart creditors of the corporation.¹⁰⁴ And on occasion, they insist that the injustice result from misuse of the corporate form, rather than from the exercise of regulatory or other powers, apparently regardless of the sovereign’s motivation.¹⁰⁵

In *Bridas v. Government of Turkmenistan*, for instance, the Fifth Circuit affirmed an arbitration award obtained by an Argentinian company (Bridas) against the Government of Turkmenistan.¹⁰⁶ Bridas had entered into a joint venture with an entity owned by Turkmenistan to exploit oil and gas reserves located in that country.¹⁰⁷ Thereafter, the government ordered Bridas to suspend operations and imposed an import/export ban that prevented further work.¹⁰⁸ Although the government’s motive was to increase “its share of future proceeds” and to “force Bridas’s submission,” the Fifth Circuit treated the export ban as irrelevant:

The Government’s exercise of its sovereign powers may have constituted a wrong to Bridas, but it was not a wrong based on misuse of the corporate organizational form . . . [T]he . . . export ban is not a “fraud or injustice” for alter ego purposes.¹⁰⁹

Instead, the court based its decision on the fact that the government had dissolved the state-owned counterparty to the joint venture, replacing it with a thinly capitalized entity funded by

103. *First Nat’l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 629 (1983).

104. *Bridas S.A.P.I.C. v. Gov’t of Turkm.*, 447 F.3d 411, 416–20 (5th Cir. 2006).

105. *Id.* at 417.

106. *Id.* at 420.

107. *Id.* at 414.

108. *Id.*

109. *Id.* at 415, 417. Note that the *Bridas* opinion arguably implies that the *Bancec* test is conjunctive, requiring both extensive domination and “fraud or injustice.” However, appealing this understanding, it is hard to square with the *Bancec* opinion and with later Supreme Court cases, which treat the “fraud or injustice” test as an independent basis for disregarding the corporate form. Either way, courts in both the sovereign and non-sovereign contexts generally do not impose alter ego liability unless some identifiable harm results from the owner’s domination of the entity. See *supra* text accompanying note 74; *Crystallex Int’l Corp. v. Bolivarian Republic of Venez.*, 932 F.3d 126, 141–43 (3d Cir. 2019) (rejecting the need to find a nexus between the foreign state’s control of the entity and the creditor’s injury).

assets that were placed out of reach of the entity's creditors.¹¹⁰ Only such "misuse" of the corporate form, and not the exercise of "sovereign powers," could constitute a fraud or injustice under *Bancec*.¹¹¹

I do not necessarily object to the result in any of these cases.¹¹² In *Kalamazoo Spice*, for example, an investor who had been majority owner of an Ethiopian corporation sued the government, which had expropriated the plaintiff's interest. Believing the government could not be sued unless it had minimum contacts with the United States, the court considered whether the expropriated corporation's contacts with the United States could be imputed to the government under an alter ego or agency theory.¹¹³ It is easy to see the argument for doing so, and equally easy to square the result with the objectives underlying the law of sovereign immunity (discussed below).¹¹⁴ Put simply: the government induced private investors to take an equity stake, the value of which derived largely from the corporation's ability to conduct commercial activities abroad. Having expropriated that stake, the government's argument implied that the corporation could continue to do business in the United States without exposing its assets to collection efforts by the plaintiff. So understood, preserving the fiction of separate corporate personhood would "insulate [the

110. *Bridas*, 447 F.3d at 417.

111. *Id.*

112. Appropriately, courts often focus on whether the foreign state has used the entity to defraud creditors or obtain credit by false pretenses. *See, e.g.,* *Transamerica Leasing, Inc. v. Republic of Venez.*, 200 F.3d 843, 854 (D.C. Cir. 2000) (finding no fraud or injustice where the government "did not manipulate [the corporation] in order to obtain a financial benefit from the plaintiffs before [the corporation] went bankrupt"); *EM Ltd. v. Banco Central de la República Argentina*, 800 F.3d 78, 96 (2d Cir. 2015) (noting that the plaintiffs had not shown that the country used the central bank "to frustrate the collection efforts of its creditors," as by transferring government assets to the central bank in an effort to shelter them from creditor enforcement efforts).

113. *Kalamazoo Spice Extraction Co. v. Provisional Military Gov't of Socialist Ethiopia*, 616 F. Supp. 660, 666 (W.D. Mich. 1985). Although the Supreme Court has not definitively ruled on the question, most courts hold that foreign states are not persons for due process purposes and are not entitled to litigation-related constitutional protections. *See, e.g.,* *Frontera Res. Azerbaijan Corp. v. State Oil Co. of Azerbaijan Republic*, 582 F.3d 393, 399–400 (2d Cir. 2009); *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82, 95–100 (D.C. Cir. 2002). Among the consequences of this treatment is that the state cannot object to the jurisdiction of the U.S. courts on the basis of a lack of minimum contacts. *See, e.g., Price*, 294 F.3d at 95–100. For a critique of this position, see Ingrid Wuerth, *The Due Process and Other Constitutional Rights of Foreign Nations*, 88 *FORDHAM L. REV.* 633 (2019).

114. *See infra* Section I.B.

government] from liability for expropriation . . . while permitting [it] . . . to profit from its commercial activities in the US”¹¹⁵

But while the result is sensible, the problem is that the explanation focuses largely on trivial concerns with no obvious relevance to any policy objective. Indeed, subsequent cases reduce *Kalamazoo Spice* to its quotidian details, distinguishing it not because it involved what amounted to fraud, but because of the extensive day-to-day control supposedly exercised by the government: in *Kalamazoo Spice*, you see, the government approved the checks.¹¹⁶

At one level, my criticism echoes those leveled against veil piercing doctrine in the usual (non-sovereign) context. There, observers often describe veil piercing doctrine as incoherent,¹¹⁷ emphasizing that many veil piercing factors, especially those related to control, have “no logical link or nexus” to any policy reason for piercing the veil.¹¹⁸ In the sovereign context, however, the concern runs somewhat deeper. Recall that, in the traditional context, the alter ego theory lets a court pierce the veil upon finding that the owner dominated the entity, without any specific reason to think the owner’s conduct harmed any third party or subverted any important legal policy.¹¹⁹ But in practice, courts tend to pierce the veil only when the owner’s domination plausibly results in some harm or wrongdoing.¹²⁰ In the sovereign context, the alter ego decisions do not always link the state’s control to any policy justification for veil piercing. To be sure, in some cases, such as *Kalamazoo Spice*, the facts reveal such a justification, even if it does not feature prominently in the court’s opinion.¹²¹ In others, the foreign state is treated as the entity’s alter ego based solely on a

115. *Kalamazoo Spice*, 616 F. Supp. at 666.

116. See, e.g., *General Star National Ins. Co. v. Administratia Asigurarilor de Stat*, 713 F. Supp. 2d 267, 278 (S.D.N.Y. 2010) (distinguishing *Kalamazoo Spice*, not as a case involving fraud, but as a case where “all checks above a certain amount were signed by [a] government official and all orders above a certain amount were subject to government approval”).

117. See *supra* note 78.

118. *Macey & Mitts*, *supra* note 6, at 109.

119. See *supra* notes 32–33 and accompanying text.

120. *Supra* note 34.

121. See *supra* notes 113–15 and accompanying text.

finding of extensive control over the entity's operations.¹²² Especially in these cases, where control produces no obvious harm to creditors, there is a risk that veil piercing doctrine will become unmoored from any relevant policy objective.

B. Why Ownership? And What Does Organizational Law Do for Sovereigns?

The discussion to follow examines why organizational law matters for sovereign states and state-owned entities. That discussion requires answers to two fundamental questions. First, why do sovereign states own controlling interests in corporations and similar entities? Second, what work does organizational law do for these entities and their sovereign owners? Put differently, what happens when we disregard the separate legal personhood of an entity owned by a sovereign state?

1. The tenuous link between ownership and control

More than ten percent of the world's largest firms are state owned.¹²³ These firms control more than 330,000 domestic and foreign subsidiaries across a wide range of economic sectors, from natural resource extraction, to arms manufacturing, to telecommunications, to financial intermediation.¹²⁴ The sheer number and diversity of such firms implies that there is no simple explanation for the fact of state ownership, and I do not offer one here.¹²⁵ For present purposes, an incomplete answer will suffice:

122. See *supra* note 36; see also *Crystallex Int'l Corp. v. Bolivarian Republic of Venez.*, 333 F. Supp. 3d 380, 399 (D. Del. 2019) (basing alter ego ruling solely on the foreign state's extensive control over the entity).

123. Przemyslaw Kowalski, Max Büge, Monika Sztajerowska & Matias Egeland, *State-Owned Enterprises: Trade Effects and Policy Implications 9 (OECD Trade Pol'y Papers, Policy Paper No. 147, 2013)*, https://www.oecd-ilibrary.org/trade/state-owned-enterprises_5k4869ckqk7l-en; Poonam Puri, *Sovereign Veil Piercing* at 9 (Feb. 9, 2016 draft on file with author).

124. Kowalski et al., *supra* note 123, at 6.

125. There are many explanations for the prevalence of state ownership and many different models of state capitalism. For background, see MUSACCHIO & LAZZARAINI, *supra* note 25, at 57–78. For example, a government may deem ownership necessary to correct for market failures when private markets do not supply goods and services at optimal levels. Kowalski et al., *supra* note 123; ORG. FOR ECON. COOP. & DEV., *supra* note 48, at 20. This is a classic justification offered for government provision of water and sewage services, for example. See MUSACCHIO & LAZZARAINI, *supra* note 25, at 23–24.

Compared to private investors, governments more often view firms as vehicles for achieving political, economic, and social objectives unrelated to profit maximization.¹²⁶ And governments tend to own firms, at least in part, because they value the tools of corporate control in achieving these objectives.¹²⁷ However, states have many other levers of control, including the ability to tax and impose regulatory obligations. This complicates any attempt to predicate veil piercing on a finding of owner “domination.”¹²⁸ Governments may be deeply involved as owners without implicating any policy relevant to organizational law. By contrast, governments may use “sovereign powers” to accomplish goals that undermine organizational law’s traditional objectives.¹²⁹

Begin with the first point: that governments view ownership, and ownership rights, as tools for pursuing policy objectives. This is of course a generalization. Patterns of state ownership have evolved dramatically.¹³⁰ In recent decades, many state-owned entities have embraced improved—or at least more corporatized—governance, with less hands-on management by political actors.¹³¹ Political, economic, and ideological considerations also impact models of state ownership.¹³² From a governance perspective, there

126. MARY SHIRLEY & JOHN NELLIS, PUBLIC ENTERPRISE REFORM: THE LESSONS OF EXPERIENCE 16–18 (1991); *State-Owned Enterprises: Catalysts for Public Value Creation?*, PWC 20 (Apr. 2015), <https://www.pwc.com/gx/en/psrc/publications/assets/pwc-state-owned-enterprise-psrc.pdf>.

127. Of course, governments may have an ideological preference for state ownership, see, e.g., MUSACCHIO & LAZZARAINI, *supra* note 25, at 30, or may see ownership as necessary to ensure the optimal provision of public goods. But this is just to restate the broader point, which is that the state views the firm as a tool for achieving policy objectives, and ownership rights as a desirable lever of control over firm behavior.

128. See *Bancec*, 462 U.S. 611, 629 (1982).

129. To a degree, these observations also apply to entities with non-sovereign owners. There is no necessary link between the extent of a shareholder’s control, or the observance of corporate formalities, and the policies of organizational law. See Macey & Mitts, *supra* note 6, at 109–10. Moreover, in closely held corporations (where veil piercing is most likely), shareholders also may exploit social standing, family status, or other sources of authority to direct corporate behavior. Sovereigns, however, have more, and more powerful, levers of control. Their use of these levers also raises unique concerns that implicate relations between sovereign states.

130. See MUSACCHIO & LAZZARAINI, *supra* note 25, at 23–56.

131. *Id.* at 281–82; see also ORG. FOR ECON. COOP. & DEV., STATE-OWNED ENTERPRISE GOVERNANCE REFORM: AN INVENTORY OF RECENT CHANGE 10–30 (2011) (summarizing developments in governance practices with regard to state owned firms).

132. ORG. FOR ECON. COOP. & DEV., *supra* note 131 (summarizing developments in governance practices with regard to state owned firms).

are stark differences between, say, a firm whose managers answer directly to political actors, a firm in which multiple governance tiers or layers of state bureaucracy buffer managers from political pressure,¹³³ and a firm in which private investors hold a minority stake.¹³⁴ And of course there are some state-owned entities, such as sovereign wealth funds, where profit maximization will be a more pronounced concern.

Despite this variance, sovereigns differ from other owners in that they have more, and different, reasons to intervene in the entity's affairs.¹³⁵ To be sure, state-owned entities may enjoy more independence than government agencies.¹³⁶ But states nevertheless exert substantial control, often far in excess of that we might expect even from a controlling shareholder in a close corporation. Even when they act like commercial enterprises in other respects, state-owned firms may be asked to pursue objectives that are "non-economic, inconsistent, and frequently changing."¹³⁷ For example, some state-owned firms prioritize creating employment opportunities in poor regions.¹³⁸ Less benignly, governments might also view state-owned enterprises as vehicles for dispensing jobs or

133. Ian Thynne, *Ownership as an Instrument of Policy and Understanding in the Public Sphere: Trends and Research Agenda*, 32 POL'Y STUD. 183, 188 (2011).

134. See, e.g., Marta Nogueira, *Petrobras Respects Minority Shareholders Again: Board Member*, REUTERS (July 24, 2017, 10:00 AM), <http://www.reuters.com/article/us-petrobras-shareholders/petrobras-respects-minority-shareholders-again-board-member-idUSKBN1A921H>. For firms in which some portion of ownership stake is privately held, also consider the impact of the decision to list shares on a stock exchange whose rules impose disclosure requirements and constrain corporate governance. See Hans Christiansen & Alissa Koldertsova, *The Role of Stock Exchanges in Corporate Governance* (OECD, Working Paper No. 2009/1, 2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2384059.

135. See remarks by Jane Chalmers, *Attribution Issues in State Responsibility*, 84 AM. SOC'Y INT'L L. PROC. 51, 63 (1990) (noting that state investment decisions have motivations beyond "entrepreneurial risk analysis. . . . [P]articularly political motivations which may be at odds with the profit motive").

136. Bancec, 462 U.S. 611, 624–25 (1982). In fact, managers of state-owned firms may occasionally have *more* discretion than is true for other firms, as there is no market for corporate shares and civil servants responsible for monitoring managers may have weak incentives to do so. Saul Estrin, *State Ownership, Corporate Governance and Privatization*, in OECD PROCEEDINGS: CORPORATE GOVERNANCE, STATE-OWNED ENTERPRISES, AND PRIVATIZATION 11, 15 (1998). Yet the desire to align the entity with political objectives creates a tendency for government actors to intervene frequently in the management of state-owned firms. *Id.* at 16.

137. Estrin, *supra* note 136, at 17.

138. See SHIRLEY & NELLIS, *supra* note 126, at 17.

other benefits to supporters of ruling elites,¹³⁹ or simply to ensure a close correspondence between the firm's activities and the policy preferences of government officials.¹⁴⁰

The control rights attendant to ownership are one mechanism through which the state ensures that the entity pursues its desired objectives.¹⁴¹ Yet governments do not need ownership rights to assert control.¹⁴² Saudi Aramco, the Kingdom of Saudi Arabia's state-owned oil company, built a multi-million dollar complex favored by the royal family, complete with mosque, children's camp, museum, and staging ground for a camel beauty contest.¹⁴³ Was this because the Kingdom is Saudi Aramco's owner? Its regulator? Its largest and most important customer?¹⁴⁴

In Venezuela, PDVSA enjoys a monopoly on oil and gas exploitation and has historically generated 95% of the government's foreign currency.¹⁴⁵ It also has transferred billions of dollars annually to the government. In 2008, for instance, PDVSA paid \$2 billion in dividends to the government (as shareholder).¹⁴⁶ But that is a pittance compared to the \$14.7 billion it paid in

139. See, e.g., Maxim Boycko, Andrei Shleifer & Robert W. Vishny, *A Theory of Privatization*, 106 ECON. J. 309, 309–10 (1996).

140. Muiris MacCarthaigh, *Managing State-Owned Enterprises in an Age of Crisis: An Analysis of the Irish Experience*, 32 POL'Y STUD. 215, 217 (2011) ("[P]atronage appointments by governments to the boards of SOEs have traditionally ensured a direct form of accountability in relation to policy decisions.").

141. Thynne, *supra* note 133, at 184. To an extent, of course, it depends on the baseline. For instance, governments accustomed to funding and delivering goods and services through political departments or agencies might view the creation of a state-owned entity as an intermediate step towards full privatization. *Id.* at 187. I am referring here to entities in which governments plan to retain a controlling ownership stake.

142. Again, this is true, although to a lesser extent, of non-sovereign owners. For instance, a shareholder may also be a customer of the corporation, and it may use its influence as a customer to influence corporate behavior. See also MUSACCHIO & LAZZARAINI, *supra* note 25, at 23–56.

143. Justin Scheck, Bradley Hope & Summer Said, *Saudi Aramco Struggles to Disengage from Royal Family's Whims*, WALL ST. J. (May 25, 2017, 12:12 PM), <http://www.wsj.com/articles/investors-want-saudi-aramco-to-untangle-itself-from-saudi-arabia-it-wont-be-easy-1495725735>.

144. Matt Levine, *Aramco Now Comes with Some Numbers*, BLOOMBERG (Apr. 13, 2018, 8:28 AM), <http://www.bloomberg.com/view/articles/2018-04-13/aramco-now-comes-with-some-numbers>.

145. Keith Johnson, *How Venezuela Struck it Poor*, FOREIGN POL'Y (July 16, 2018, 8:00 AM), <http://foreignpolicy.com/2018/07/16/how-venezuela-struck-it-poor-oil-energy-chavez>.

146. See PETRÓLEOS DE VENEZ., S.A., LISTING PARTICULARS 42 (2011).

mandatory “contributions” to various social programs pursuant to Venezuelan law.¹⁴⁷ PDVSA has also provided gas domestically at exceptionally low prices set by the government.¹⁴⁸ It continued these transfers to the government even as its finances fell into disrepair and, eventually, it defaulted on billions worth of obligations to creditors.¹⁴⁹

If courts pierce the veil when dividends allow a shareholder to “systematically withdraw capital . . . without regard to the needs of the business,”¹⁵⁰ should it matter that Venezuela largely eschewed dividends in favor of subsidized gas and “contributions” to social programs? If courts view owner domination as a sufficient basis for veil piercing, what do we make of the fact that, in 2017, the Venezuelan government arrested senior executives and board members of CITGO, PDVSA’s U.S. subsidiary, on politically-motivated corruption charges?¹⁵¹ That is one way to dominate a corporation, although one that formally results from the exercise of “sovereign powers”¹⁵² rather than corporate control rights.¹⁵³

I return to these questions below. For now, I note only that, even when the owner is not a sovereign, it is not obvious why owner domination matters unless the owner uses its power to achieve an objective that organizational law seeks to prevent.¹⁵⁴ In the dividend “milking” example, for instance, a shareholder uses control over the corporation to elevate itself in priority over the

147. *Id.* at 47.

148. As of July 2018, gas was priced domestically at roughly \$0.04 per gallon. *See* Johnson, *supra* note 145.

149. William Neuman & Clifford Krauss, *Workers Flee and Thieves Loot Venezuela’s Reeling Oil Giant*, N.Y. TIMES (June 14, 2018), <https://www.nytimes.com/2018/06/14/world/americas/venezuela-oil-economy.html>.

150. PRESSER, *supra* note 5, at § 1.8; *see also* Hambleton Bros. Lumber Co. v. Balkin Enter., 397 F.3d 1217, 1231 n.14 (9th Cir. 2005) (“Piercing . . . based on ‘milking’ of ‘excessive dividends’ makes sense . . . where corporate assets are systematically and extensively removed from the corporation.”).

151. Kirk Semple & Clifford Krauss, *Politics Shadow Arrests of Citgo Executives in Venezuela Graft Inquiry*, N.Y. TIMES (Nov. 22, 2017), <https://www.nytimes.com/2017/11/22/world/americas/venezuela-citgo-oil-arrests-corruption.html>.

152. *Bridas S.A.P.I.C. v. Gov’t of Turkmenistan*, 447 F.3d 411, 417 (5th Cir. 2006). Again, the *Bridas* court dismissed the exercise of “sovereign powers” as irrelevant to *Banced’s* fraud or injustice test, not to the issue of control. *See supra* note 109 and accompanying text.

153. At least one creditor has argued that these facts warrant treating CITGO Petroleum as the government’s alter ego. *See* Complaint at 23, *OI Eur. Grp. B.V. v. Bolivarian Republic of Venez.* (D. Del., 2019), (No. 1:19-cv-00290-LPS).

154. Macey & Mitts, *supra* note 6, at 108.

entity's creditors.¹⁵⁵ In cases like this, it is the forbidden objective that justifies veil piercing; control over the corporation is simply the tool the shareholder uses to accomplish that objective. But sovereigns have other tools at their disposal.

2. *Why do sovereigns need organizational law?*

Asset partitioning is the primary economic benefit of limited liability entities. And of course, economic considerations also explain why states create and own legally separate entities. Because they are separate from the state itself, such entities can more easily pledge assets to obtain financing for development and other projects.¹⁵⁶ Likewise, state-owned entities can waive sovereign immunity without jeopardizing the state's own assets.¹⁵⁷ However, here too, sovereign states differ from other shareholders. The reason is that organizational law's economic attributes are inextricably tied to the law of foreign sovereign immunity.

The following discussion explains, in simplified form, how the U.S. law of foreign sovereign immunity affects the consequences of a court's decision to disregard the separate legal status of a state-owned entity. Again, bear in mind that the discussion focuses on liabilities arising out of commercial activity. Although the discussion applies generally to other kinds of liability, the rules of sovereign immunity are somewhat less protective in other contexts (e.g., expropriation).¹⁵⁸

a. Traditional veil piercing; sovereign immunity's owner-shielding function. Sovereign states enjoy natural advantages over their

155. *Hambleton Bros. Lumber Co. v. Balkin Enters., Inc.*, 397 F.3d 1217, 1231 n.14 (9th Cir. 2005).

156. *Bancec*, 462 U.S. 611, 625–26 (1982).

157. *See Bank of N.Y. v. Yugoimport*, 745 F.3d 599, 614 n.14 (2d Cir. 2014).

158. As noted *supra* note 47, and more fully discussed below, a creditor whose claim arises out of commercial activity (and who does not benefit from a waiver of execution immunity or an arbitration award) cannot attach and execute upon property of a foreign state used for a commercial activity in the United States without demonstrating that the property "is or was used for the commercial activity upon which the claim is based." 28 U.S.C. § 1610(a)(2). This requirement of a nexus between the property and the liability-generating activity does not exist in expropriation and other cases. *See, e.g.*, 28 U.S.C. § 1610(a)(3) (exception to attachment and execution immunity in expropriation cases). In these other settings, the FSIA affords less protection to state-owned assets. Despite this difference, the discussion in the main text applies generally to expropriation and other cases, as U.S. law still protects the bulk of a foreign state's property by limiting attachment and execution to property used for a commercial activity in the United States. 28 U.S.C. § 1610(a).

creditors. To be sure, all potential debtors can engage in judgment-proofing strategies, at a cost.¹⁵⁹ But for sovereign states, the protection is automatic. The state's most valuable assets are within its own borders, where they are accessible to creditors only to the extent its own law and institutions make them available. To escape these restrictions, foreign creditors must look for attachable assets abroad.

That task will prove difficult. Under U.S. law, execution immunity protects property located in the United States and owned by a foreign sovereign or its political subdivisions.¹⁶⁰ This protection is absolute unless the property is "used for a commercial activity in the United States."¹⁶¹ Even when that requirement is satisfied, a creditor must also show (subject to exceptions) that the property "is or was used for the commercial activity upon which the claim is based."¹⁶² Put differently, the default rule is that the creditor must link the commercial asset it wishes to seize to the liability-generating activity.¹⁶³

As noted, there are exceptions, often focused on the nature of the creditor's claim (like the exceptions for expropriation in violation of international law and for state-sponsored terrorism).¹⁶⁴

159. Lynn M. LoPucki, *The Essential Structure of Judgment Proofing*, 51 STAN. L. REV. 147 (1998).

160. 28 U.S.C. § 1610(a). The rule in § 1610(a) also applies to a foreign state's agencies or instrumentalities (such as state-owned firms), but § 1610(b) withdraws attachment and execution immunity from such entities in additional circumstances.

161. 28 U.S.C. § 1610(a).

162. 28 U.S.C. § 1610(a)(2).

163. Although the legislative history on this provision is sparse, the requirement arguably serves the FSIA's broader goal of withdrawing immunity to the extent (but only to the extent) a foreign state enters the market as a commercial actor. *See supra* note 40 and accompanying text. Nevertheless, it is somewhat unusual to block a creditor from attaching unrelated commercial assets, as this protection exceeds that normally afforded to a private commercial entity, and also exceeds the protection afforded to foreign states under the law of other countries. *See, e.g.*, State Immunity Act, (1978) § 13(4), HALS. STAT. (UK). Finally, note that, where a state-owned entity engages in commercial activity in the United States, it places *all* of its assets at risk, whether or not used for a commercial activity of any kind. 28 U.S.C. § 1610(b).

164. Leaving aside a creditor's ability to contract for greater rights (through a waiver of execution immunity or an arbitration clause), there are several contexts in which U.S. law lets creditors reach property "used for a commercial activity in the United States" without demonstrating a link between the property and the claim. These include cases of state-sponsored terrorism, 28 U.S.C. § 1610(a)(7); expropriation in violation of international law, 28 U.S.C. § 1610(a)(3); judgments establishing rights in certain property,

These exceptions relieve the creditor of the need to demonstrate a relationship between the attached property and the liability-generating activity. All the creditor must show is that the property is used for a commercial activity in the United States. In disputes arising out of commercial activity, however, the most relevant exceptions are contract-based. A creditor can avoid the need to show a link between the property and the liability-generating activity if it has contracted for a waiver of the sovereign's execution immunity.¹⁶⁵ The same is true if the creditor has contracted for arbitration and holds a judgment based on an arbitration award.¹⁶⁶

Finally, bear in mind that, outside the United States, execution immunity sometimes offers less protection. Under U.K. law, for instance, and with exceptions not relevant here, execution immunity does not protect property of a foreign state "which is for the time being in use or intended for use for commercial purposes," whether or not there is a link between that property and the creditor's claim.¹⁶⁷

To see the relevance of these rules to veil piercing disputes, consider a claim arising out of a state-owned entity's commercial activity, where the creditor has bargained for neither a waiver of execution immunity nor an arbitration clause. In a case like this, veil piercing has relatively little effect. To be sure, the creditor may now attach property "used for a commercial activity in the United States" and owned by the sovereign, rather than by the entity.¹⁶⁸ But it will also need to show that the property "is or was used for the commercial activity" on which it based its claim.¹⁶⁹ And most such property, perhaps all of it, will be housed within the entity itself.

To make this point concrete, return to the Venezuelan context and the figure (reprinted below) depicting PDVSA's corporate structure. PDVSA's only U.S. asset consists of shares in the U.S. holding company that sits atop its oil refining operations in the country. A creditor of PDVSA who meets the description above

28 U.S.C. § 1610(a)(4); and cases in which the property consists of insurance obligations or proceeds, *see* 28 U.S.C. § 1610(a)(5).

165. 28 U.S.C. § 1610(a)(1).

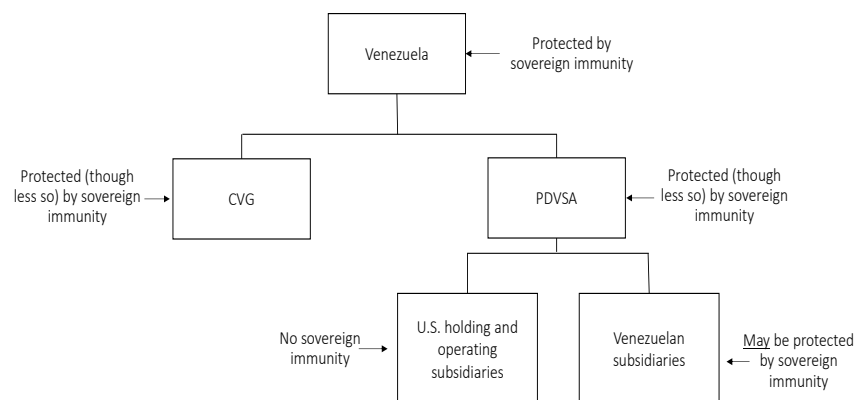
166. 28 U.S.C. § 1610(a)(6).

167. State Immunity Act, (1978) § 13(4), HALS. STAT. (UK).

168. 28 U.S.C. § 1610(a).

169. 28 U.S.C. § 1610(a)(2).

could in all likelihood attach those shares.¹⁷⁰ This does not require disregarding the entity's separate legal status; the shares belong to PDVSA. Piercing the corporate veil grants the creditor no additional access to attachable assets in the United States.¹⁷¹ Assuming the claim relates to PDVSA's oil operations, the Venezuelan government has no other U.S. assets that bear the requisite relationship to the claim.¹⁷² This is true even if we ignore all boundaries imposed by organizational law. For instance, the government's equity stake in heavy industry giant CVG will remain immune from attachment and execution (even if this interest were located in the United States), as it does not have the requisite nexus to the creditor's claim.¹⁷³ Likewise, the government and its ministries could engage in unrelated



170. As an agency or instrumentality of Venezuela, PDVSA's assets receive less protection. Assuming the creditor overcomes its immunity from suit, PDVSA's property is subject to execution as long as the entity is "engaged in commercial activity in the United States." 28 U.S.C. § 1610(b).

171. The result arguably changes if the creditor benefits from a waiver of execution immunity or arbitration clause. *See infra* text accompanying notes 176–82.

172. It is possible to imagine cases where veil piercing does place additional U.S. assets owned by the state at risk. For example, a state-owned entity's commercial activity outside the United States may have effects within the country, and in such a case the entity is subject to suit in the United States. 28 U.S.C. § 1605(a)(2). Although the entity may have no U.S. assets, the sovereign might. And if those assets have a sufficiently close relationship to the creditor's claim, execution immunity might not protect them. 28 U.S.C. § 1610(a)(2). An example might involve actions by a Venezuelan subsidiary of PDVSA that give rise to liability in the United States. The broader point is simply that veil piercing need not, and often does not, create additional risks for the sovereign's U.S. assets.

173. 28 U.S.C. § 1610(a)(2). The example is counterfactual. CVG is a Venezuelan firm and, to my knowledge, no asset directly owned by the government is located in the United States.

commercial and financial transactions in the United States—say, importing computers, or issuing bonds—without worrying about creditor interference.

In this scenario—in which the creditor benefits from neither a waiver of execution immunity nor an arbitration award—the primary risk to sovereign assets comes from the threat that other jurisdictions, with less protective immunity rules, might recognize and enforce the U.S. court’s veil piercing decision. A court in the United Kingdom, for instance, might treat the question as settled. In that event, because the State Immunity Act 1978 does not require a nexus between the asset and the claim, the creditor could reach property that the state owns and uses for a commercial purpose.¹⁷⁴ We might call this risk *preclusion risk*. It is present when courts pierce the veil in any context, but it assumes greater significance for sovereigns given the expansive execution immunity that protects their U.S. assets in cases arising out of commercial activity. It is important not to overstate this risk, however, as courts in other jurisdictions do not automatically recognize judgments of U.S. courts and in some cases are affirmatively resistant to doing so.¹⁷⁵

Finally, note that the threat to sovereign assets may increase dramatically if the creditor’s contract with the entity includes a waiver of execution immunity or an arbitration clause. The reason is that, if a court disregards the entity’s separate legal identity, it may require the owner to honor the entity’s contractual obligations. This includes the obligation to arbitrate:

[I]t is clear that the consequence of applying the alter ego doctrine is that the corporation and those who have controlled it without regard to its separate entity are treated as but one entity, and at least in the area of contracts, the acts of one are the acts of all. There is no reasonable basis for distinguishing between the parent’s obligation to respond in damages for its instrumentality’s breach of contract and its obligation to arbitrate the measure of those damages.¹⁷⁶

174. State Immunity Act, (1978) § 13(4), HALS. STAT. (UK).

175. See, e.g., Samuel P. Baumgartner, *How Well Do U.S. Judgments Fare in Europe?*, 40 GEO. WASH. INT’L L. REV. 173, 184–90 (2008) (summarizing practice in European countries with respect to recognition and enforcement of U.S. court judgments).

176. *Fisser v. Int’l Bank*, 282 F.2d 231, 234 (2d Cir. 1960) (citations omitted); see also *Interocean Shipping Co. v. Nat’l Shipping & Trading Corp.*, 523 F.2d 527, 539 (2d Cir. 1975) (“In an appropriate situation, the corporate veil may be pierced and a party may be held

In all likelihood, the same principle means that courts will impute an entity's waiver of execution immunity to its owner.¹⁷⁷ The consequences of doing so are unclear and depend on questions of interpretation and timing. As an initial matter, one would think an entity's waiver of execution immunity would apply only to assets *owned by the entity*. If the sovereign is treated as a party to the contract, does the scope of the waiver expand to include the vastly larger pool of assets owned by the sovereign? Does the answer depend on whether the veil piercing decision is based on facts in existence at the time of contract formation? These questions do not have clear answers, but the implications are significant. If the entity's waiver of execution immunity is imputed to the sovereign and construed to apply to all non-immune assets, then the creditor will be able to attach and execute upon property even when there is no link between the property and the commercial activity underlying its claim.¹⁷⁸ Returning to the Venezuelan example, a creditor of PDVSA armed with a waiver of execution immunity might attach the proceeds of a sovereign bond issuance in the United States, even though the proceeds are unrelated to oil extraction and refining.¹⁷⁹ As noted, this result is possible, but not certain, when the entity has agreed to a waiver of

bound to arbitrate as the signatory's alter ego."); *Thomson-CSF, S.A. v. Am. Arb. Ass'n*, 64 F.3d 773, 777 (2d Cir. 1995) (noting that parent corporation can be bound by the arbitration clause in a subsidiary's contract if the relationship between the entities is "sufficiently close as to justify piercing the corporate veil").

177. See *Kensington Int'l. Ltd. v. Republic of Congo*, 2007 WL 1032269 at *15, No. 03 Civ. 4578 LAP (Mar. 30, 2007) (imputing waiver of immunity in loan agreement executed by government to subsequently created state-owned corporation found to be government's alter ego); *EM Ltd. v. Banco Central de la Republica Argentina*, 800 F.3d 78, 96 (2d Cir. 2015) ("BCRA does not constitute Argentina's 'alter ego' for the purposes of this suit. Argentina's express waiver of its own sovereign immunity in the FAA, therefore, may not be imputed to BCRA.").

178. 28 U.S.C. §§ 1610(a)(1), (6).

179. The issuance of bonds is undoubtedly a commercial act. See *Republic of Argentina v. Weltover*, 504 U.S. 607, 614–15 (1992). Whether the proceeds are immune depends largely on whether the government uses the proceeds—or the intangible contract right to receive them—for a commercial activity in the United States. 28 U.S.C. § 1610(a); cf. *Aurelius Capital Partners v. Republic of Argentina*, 584 F.3d 120, 131 (2d Cir. 2009) (holding that funds held in the United States by legally-separate private corporations, which were to be transferred to Argentine government entities, were immune from execution because "a sovereign's mere transfer to a governmental entity of legal control over an asset does not qualify the property as being 'used for a commercial activity' in the United States).

execution immunity. When the entity has agreed to arbitrate, the result is effectively mandated by the FSIA.¹⁸⁰

To conclude, in the traditional veil piercing setting:

- In cases that originate from the commercial activities of a state-owned entity, the law of sovereign immunity protects the state in ways that approximate, and often exceed, the protection offered by limited liability. The owner-shielding benefits of a limited liability rule are much reduced.
- One risk to the sovereign's assets stems from what we might call *preclusion risk*—i.e., the risk that later tribunals will treat the veil piercing question as settled in contexts where the law of sovereign immunity offers less protection.
- The risk to the sovereign's assets increases dramatically in cases where the entity's contract includes provisions that, if imputed to the sovereign, will diminish the default protections of sovereign immunity law. To put the point a bit differently, limited liability is most important because it *partitions contracts, not assets*.
- Finally, in other settings, such as those arising from an expropriation in violation of international law, creditors need not show a nexus between the asset and the liability-generating activity.¹⁸¹ Here, limited liability does more owner-shielding work, although the law of foreign sovereign immunity still protects most sovereign assets.

b. *"Reverse" veil piercing; the more prominent role of organizational law.* In the reverse veil piercing setting like *Bancec*, where a creditor

180. Under 28 U.S.C. § 1610(a)(6), property used for a commercial activity in the United States is not immune from execution if "the judgment is based on an order confirming an arbitral award rendered against the foreign state [including its agencies or instrumentalities], provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement." If the arbitration agreement is accompanied by a waiver of execution immunity, it is possible that both provisions might be interpreted together to limit the creditor's execution rights to property housed in the entity. Otherwise, the creditor may attach any property used for a commercial activity in the United States.

181. See *supra* notes 158, 165.

of the sovereign seeks to impute liability to a state-owned entity, or attach the entity's assets, organizational law does more work. To begin with, many state-owned or state-controlled entities are not entitled to sovereign immunity. Under U.S. law, an entity can assert sovereign immunity only if it qualifies as an agency or instrumentality of a foreign state.¹⁸² To meet the definition, the entity must have been created under a law that entitles it to separate legal status, must be "neither a citizen of a State of the United States . . . nor created under the laws of any third country," and must either be majority-owned by a foreign state or qualify as an "organ" of the state.¹⁸³ The majority-ownership prong requires the state to directly own a majority stake.¹⁸⁴ This excludes many entities subject to meaningful state control, including subsidiaries of state-owned entities.¹⁸⁵ To qualify as a state organ, the entity must demonstrate that it "acts as an instrument" of the state—i.e., that it is subject to significant state control.¹⁸⁶ If this sounds like the test for alter ego liability, it isn't—or at least courts often appear to understand it differently. The level of control needed for an entity to qualify as an "organ" appears to be less than the level needed to pierce the corporate veil.¹⁸⁷

182. The term "foreign state" also includes political subdivisions. 28 U.S.C. § 1603(a). In addition, courts sometimes equate the state with entities that seem to meet the definition of "agency or instrumentality" when these entities serve core governmental functions. See *TMR Energy Ltd. v. State Prop. Fund of Ukr.*, 411 F.3d 296, 300 (D.C. Cir. 2005); *Garb v. Republic of Pol.*, 440 F.3d 579, 594 (2d Cir. 2006).

183. 28 U.S.C. §§ 1603(b)(2)–(3).

184. See generally *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003).

185. *Id.* Post-*Dole*, most courts take the view that subsidiaries of a state-owned entity can qualify as organs of a foreign state. See Phillip Riblett, *A Legal Regime for State-Owned Companies in the Modern Era*, 18 J. TRANSNAT'L L. & POL'Y 1, 17 (2008); *Janvey v. Libyan Inv. Auth.*, 840 F.3d 248, 259–60 (5th Cir. 2016) (per curiam); *USX Corp. v. Adriatic Ins. Co.*, 345 F.3d 190, 199–216 (3d Cir. 2003); *Cal. Dep't of Water Res. v. Powerex Corp.*, 533 F.3d 1087, 1097–102 (9th Cir. 2008); *Corporacion Mexicana De Mantenimiento Integral v. Pemex-Exploracion Y Produccion*, 832 F.3d 92, 116 (2d Cir. 2016) (concurring opinion by Winter, J.). But see *Allen v. Russian Fed'n*, 522 F. Supp. 2d 167, 183–84 (D.D.C. 2007) (apparently reading *Dole v. Patrickson* to establish that remote subsidiaries cannot meet the definition of "agency or instrumentality").

186. See *Dewhurst v. Telenor Inv. AS*, 83 F. Supp. 2d 577, 594–95 (D. Md. 2000).

187. See, e.g., *Janvey*, 840 F.3d at 259 (per curiam) ("Considering whether an entity is an 'organ' is, in some respects, similar to considering whether it is an 'agent.'" (emphasis added)); *U.S. Fid. & Guar. Co. v. Braspetro Oil Services Co.*, 1999 WL 307666, at *7 (S.D.N.Y. 1999) (apparently viewing *Bancec's* alter ego theory as requiring a greater level of control than the test for whether an entity is an "organ" of a foreign state); *Gen. Star Nat. Ins. Co. v. Administratia Asigurarilor de Stat*, 713 F. Supp. 2d 267, 276 & n.8 (S.D.N.Y. 2010).

Of course, if an entity cannot assert sovereign immunity, it relies entirely on organizational law to shield it from its owner's creditors (and from creditors of affiliated entities). But even if the entity can assert sovereign immunity, its property is generally "more amenable to attachment" than property owned by the state itself.¹⁸⁸ If it is engaged in commercial activity in the United States then, in most cases, the entity's creditors can reach any of its property in the United States,¹⁸⁹ at least in an action brought by one of its own creditors.

In an action by one of the *state's* creditors, matters become less clear. If the entity is viewed as an alter ego of the state, the question is whether the more protective immunity rules applicable to the state determine the scope of immunity. I have found few cases that address the question, but those that do reason—correctly, in my view—that the sovereign's immunities apply.¹⁹⁰ But even under this approach, ignoring the entity's separate legal status necessarily places at risk assets that would otherwise have been available only to the entity's creditors.¹⁹¹ Thus, state-owned entities always gain some protection from organizational law.

In summary:

- Notwithstanding the law of sovereign immunity, organizational law plays an important entity-shielding role for state-owned entities.

(noting that proof sufficient to demonstrate that an entity was an organ of a foreign state would not suffice to demonstrate that the entity was also the state's alter ego).

188. Rubin v. Islamic Republic of Iran, 637 F.3d 783, 794 (7th Cir. 2011).

189. 28 U.S.C. § 1610(b).

190. Af-Cap, Inc. v. Chevron Overseas (Congo) Ltd., 475 F.3d 1080, 1095 (9th Cir. 2007) ("Af-Cap asserts that as an instrumentality of the Congo, SNPC's immunity from execution is governed by the standard prescribed in . . . § 1610(b), . . . rather than the more restrictive standard of § 1610(a), . . . Af-Cap's contention is unavailing because . . . SNPC was an alter ego of the Congo, and an alter ego is not a 'separate legal entity.'"); Crystallex Int'l Corp. v. Bolivarian Republic of Venez., 333 F. Supp. 3d 380, 395 (D. Del. 2018) ("[A]s the Court is treating PDVSA as Venezuela, and therefore treating the property of PDVSA as the property of Venezuela, Crystallex must satisfy the narrower exception to execution immunity applicable to property of foreign states.").

191. As in the traditional veil piercing context, a waiver of sovereign immunity in the sovereign's contracts with its creditors can also be imputed to the entity. See Kensington Int'l Ltd. v. Republic of Congo, No. 03 Civ. 4578 LAP, 2007 WL 1032269 at *15 (S.D.N.Y. Mar. 30, 2007) (imputing waiver of immunity in loan agreement executed by government to subsequently-created state-owned corporation found to be government's alter ego).

- Even when applicable, sovereign immunity offers less protection to entities owned or controlled by foreign states. The extent of this protection is unclear in “reverse” veil piercing cases, but disregarding the entity’s separate legal status will place at least some entity assets at risk.

II. IMPLICATIONS

Even if organizational law added nothing to the law of foreign sovereign immunity—and that is clearly not so—it will remain relevant to state-owned entities. The FSIA anticipated that courts would continue to grapple with questions of organizational law¹⁹² and did not purport to instruct them how to handle such questions.¹⁹³ It is a given, however, that the protections offered by limited liability entities must yield where the corporate form is used to subvert important policies in the enforcing jurisdiction.¹⁹⁴ The FSIA is the primary statute governing U.S. courts’ use of legal coercion against foreign states.¹⁹⁵ It sets the terms on which foreign states may engage in commerce within the United States (or in ways that affect the United States), and it defines the assets they must put at risk to do so.¹⁹⁶ And it should inform the application of organizational law in this context.

192. According to the authoritative House report: “The bill is not intended to affect . . . the attribution of responsibility between or among entities of a foreign state . . .” H.R. REP. NO. 94-1487, at 12 (1976). Later amendments to the statute designed to address cases of state-sponsored terrorism also recognize the continued relevance of organizational law—for example, by explicitly abrogating *Bancec*’s presumption of independence in certain cases. See, e.g., 28 U.S.C. § 1610(g) (allowing creditors holding judgments against a foreign state in certain terrorism-related cases to seize property held by state agencies and instrumentalities notwithstanding the *Bancec* factors).

193. See Joseph W. Dellapenna, *Interpreting the Foreign Sovereign Immunities Act: Reading or Construing the Text?*, 15 LEWIS & CLARK L. REV. 555, 568 (2011). Moreover, organizational law inevitably affects the application of other immunity rules, such as the rule that an entity can qualify as an “agency or instrumentality” of a foreign state under the majority-ownership prong of 28 U.S.C. § 1603 only if it is directly owned by the state. *Dole Food Co. v. Patrickson*, 538 U.S. 468, 473 (2003).

194. *Bancec*, 462 U.S. 611, 630 (1982).

195. See, e.g., H.R. REP. NO. 94-1487, at 12 (noting the FSIA “sets forth the sole and exclusive standards to be used in resolving questions of sovereign immunity . . . before Federal and State courts in the United States”).

196. See *Kensington*, 2007 WL 1032269, at * 16. A foreign sovereign is not immune from suit in U.S. courts in lawsuits based on commercial activity within the United States, on acts within the United States in connection with commercial activity elsewhere, and on acts that

A. When (and Why) Does a Foreign State's Control Over an Entity Matter?

In this Section, I ask how courts should think about the control factor in veil piercing decisions. That inquiry involves two questions. The first relates to the alter ego theory, which permits veil piercing upon a finding of complete owner domination, potentially without regard to whether the owner's use of control causes an injury to creditors.¹⁹⁷ Can this alter ego theory be defended (and limited) in any principled way? Second, should it matter whether the sovereign's control over the entity stems from its rights as *owner*, rather than as *sovereign*?

To preface that discussion, it is important to distinguish veil piercing questions from questions associated with agency law principles. For example, a party who contracts with a state-owned entity might seek to hold the state liable on the theory that the state authorized the entity to act on its behalf.¹⁹⁸ In the discussion to follow, I set agency law theories aside, for they raise different questions.¹⁹⁹ Even if it is appropriate to impute the entity's conduct to the state on agency-law grounds,²⁰⁰ the reasons have nothing to

occur elsewhere in connection with non-U.S. commercial activity but that cause a direct effect in the United States. 28 U.S.C. § 1605(a)(2).

197. Courts have rejected the need to demonstrate any link between state control and the plaintiff's injury. *Crystallex Int'l Corp. v. Bolivarian Republic of Venez.*, 932 F.3d 126, 141–42 (3d Cir. 2019). But they have left open the possibility that there must be an underlying equitable justification for an alter ego ruling. *Id.* at 146. The uncertainty perhaps reflects a broader uncertainty about whether veil piercing is itself a legal or equitable doctrine. See, e.g., Bainbridge, *supra* note 14, at 480 n.4 (2001); Sam F. Halabi, *Veil-Piercing's Procedure*, 67 RUTGERS U. L. REV. 1001, 1016 (2015).

198. *Transamerica Leasing, Inc. v. La Republica de Venezuela*, 200 F.3d 843, 849 (D.C. Cir. 2000).

199. In general, an agency relationship exists only if the principal has authorized the agent-entity to act on its behalf and has the right to direct the agent's conduct. See RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. L. INST. 2006) ("Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." (emphasis omitted)).

200. Only a few courts have interpreted *Bancec* "broadly to include not only corporate principles but also common-law rules of agency." RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 452 reporter's note n. 7 (AM. L. INST., Tentative Draft No. 3, 2017). However, I am aware of no courts that have rejected the application of agency law principles to state-owned entities. In such cases, liability is also consistent with international law, which attributes the actions of a legally-separate entity to its state owner when the state "has authorized an act, or has exercised direction and control over it."

do with organizational law. In such cases, liability follows not because the government has abused the corporate form but because the government has authorized the agent to act on its behalf.²⁰¹

The clarification is minor but necessary, because courts applying the alter ego theory often refer to dominated entities as “agents” of the state without intending to invoke agency law. *Bancec* is an early example. Recall that the Court’s alter ego test covers situations “where a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created.”²⁰² Despite the reference to a principal-agent relationship, it is clear that the Court in fact “applied a veil piercing or ‘alter ego’ analysis.”²⁰³ The same is true of most cases involving state-owned entities, notwithstanding occasional references to agency law.²⁰⁴ For the sake of doctrinal clarity, it would be best for courts to clearly “distinguish situations in which liability is imposed . . . because of the existence of the agency relation, in our common-law understanding of that relation, from cases in which the corporate veil . . . is pierced for other reasons of policy.”²⁰⁵ The latter

Int’l L. Comm’n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, Art. 8 cmt. 8, 2001.

201. RESTATEMENT (THIRD) OF AGENCY § 1.01 (AM. L. INST. 2006).

202. *Bancec*, 462 U.S. 611, 629 (1982).

203. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 452 reporter’s note n. 7 (AM. L. INST., Tentative Draft No. 3, 2017).

204. This tendency also exists in cases involving traditional corporations. As the Reporter’s Note to the Restatement (Second) of Agency § 14M puts it:

Unfortunately, however, the courts have not always observed the distinction between these two separate bases for parent’s liability. When liability is fastened upon the parent it is said that the subsidiary is a “mere agent.” The result has been a weakening and muddying of the term “agent” and a failure by courts to state the real reasons for their decisions.

RESTATEMENT (SECOND) OF AGENCY § 14M reporter’s note (AM. L. INST. 1958). Some cases do analyze agencies theories separately in the sovereign context. *See, e.g.,* *Transamerica Inc. v. La Republica de Venez.*, 200 F.3d 843, 849–50 (D.C. Cir. 2000); *S & Davis Int’l, Inc. v. Yemen*, 218 F.3d 1292, 1299 (11th Cir. 2000). However, even in these exceptions, the analysis of agency law often collapses into an “alter ego” inquiry into domination, as the court investigates whether the sovereign observed traditional corporate formalities. Thus, in *S & Davis International*, the court’s agency-law discussion references the lack of proof that the state-owned entity had “papers of incorporation and corporate structure, . . . a board of directors[,] . . . financial accounts in its own name,” etc. *S & Davis Int’l*, 218 F.3d at 1299.

205. RESTATEMENT (SECOND) OF AGENCY § 14M reporter’s note (AM. L. INST. 1958). Note that the FSIA may not permit jurisdiction over foreign states based on a theory of apparent authority. *Compare* *First Fid. Bank v. Gov’t of Ant. & Barb.*, 877 F.2d 189 (2d Cir. 1989) (recognizing jurisdiction based on apparent authority), *with* *Phaneuf v. Republic of Indon.*,

(and larger) subset of veil piercing cases is the subject of the discussion below.

1. *A more principled justification for the alter ego theory*

Bancec's alter ego theory permits veil piercing where an entity is "so extensively controlled by its owner that a relationship of principal and agent is created."²⁰⁶ The disjunctive test is somewhat unusual; as noted, when faced with a non-sovereign shareholder, courts sometimes frame the inquiry in disjunctive terms but typically recognize that control alone will not suffice unless the control results in some harm to third parties.²⁰⁷ In the sovereign context, however, courts routinely emphasize that "domination" of the entity will suffice to disregard the separate legal personhood of a government instrumentality.²⁰⁸

Despite embracing the alter ego theory, *Bancec* offered no explicit rationale for why extensive control, without more, justifies disregarding the entity's separate legal status. Moreover, as in the traditional context involving non-sovereign owners, the multi-factor tests courts invoke to guide alter ego analysis can border on the incoherent.²⁰⁹ For instance, no policy of importance to U.S. law is implicated by a foreign state's failure to observe "ordinary

106 F.3d 302 (9th Cir. 1997) (ruling that the commercial activity exception to sovereign immunity requires a showing of actual authority).

206. *Bancec*, 462 U.S. at 629. Although *Bancec*'s articulation of the control inquiry refers to the creation of a principal-agent relationship, it "is in fact most similar to the 'alter ego' or 'piercing the corporate veil' standards applied . . . to determine whether the actions of a corporation are attributable to its owners." *Doe v. Holy See*, 557 F.3d 1066, 1080 (9th Cir. 2009). In principle, agency law is distinct and potentially allows for liability in situations where an alter ego theory would not. *Transamerica*, 200 F.3d at 849. However, the cases often blend the inquiry together. See *Bridas S.A.P.I.C. v. Gov't of Turkm. (Bridas I)*, 345 F.3d 347, 358 (5th Cir. 2003); *Walter Fuller Aircraft Sales, Inc. v. Republic of Phil.*, 965 F.2d 1375, 1382 (5th Cir. 1992).

207. See *supra* notes 74, 109.

208. See *Alejandro v. Telefonica Larga Distancia, de P.R., Inc.*, 183 F.3d 1277, 1284 (11th Cir. 1999) ("[W]hen a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created, the [*Bancec*] Court observed that one may be held liable for the actions of the other."); *Dewhurst v. Telenor Inv. AS*, 83 F. Supp. 2d 577, 589 (D. Md. 2000) (noting that, although parent corporation had no completely controlled subsidiary, "the court may pierce the corporate veil if doing so would avoid fraud or injustice"); *DRC, Inc. v. Republic of Hond.*, 71 F. Supp. 3d 201, 214–17 (D.D.C. 2014); *LNC Invs., Inc. v. Republic of Nicar.*, 115 F. Supp. 2d 358, 365–66 (S.D.N.Y. 2000) (noting fraud or injustice as a separate ground for piercing the corporate veil).

209. See *supra* notes 75–76 and accompanying text.

corporate formalities.”²¹⁰ Nor is it helpful to observe that a state-owned entity’s “profits go to the government.”²¹¹ Because foreign states will often be extensively involved in entity operations,²¹² the risk is that *Bancec*’s alter ego test will withdraw the protections of limited liability when doing so advances no discernible policy embedded in U.S. law.

Despite this risk, it is possible to confine *Bancec*’s alter ego test to an appropriate set of cases. The majority opinion in *Bancec* explicitly links veil piercing to cases in which the corporate form “is interposed to defeat legislative policies.”²¹³ And, without trying to define the full set of relevant statutory policies, the majority opinion makes clear that the FSIA plays a central role. Thus, the *Bancec* majority emphasized that a decision to respect *Bancec*’s separate legal status would let the Cuban government “obtain relief in our courts that it could not obtain in its own right without waiving its sovereign immunity and answering for” its expropriation of the defendant’s assets.²¹⁴ The Cuban government was the real beneficiary of the U.S. lawsuit.²¹⁵ But if Cuba itself had sued U.S. courts, Citibank could have filed a counterclaim, at least for an amount up to the value of the Cuban claim.²¹⁶ Cuba’s decision to interpose a nominally separate entity as plaintiff sought to escape the FSIA’s judgment that a foreign state “should not obtain the benefits of litigation before U.S. courts while avoiding any legal liabilities claimed against it and arising from that same transaction or occurrence.”²¹⁷ Under the circumstances, to respect the entity’s separate legal status “would permit governments to

210. *Kirschenbaum v. 650 Fifth Ave. & Related Props.*, 830 F.3d 107, 130 (2d Cir. 2016).

211. *Crystallex Int’l Corp. v. Bolivarian Republic of Venez.*, 932 F.3d 126, 148 (3d Cir. 2019). The fact that the Third Circuit devoted only three sentences to this issue suggests the court recognized the inanity of the question, derived from the Supreme Court’s opinion in *Rubin v. Islamic Republic of Iran*, 138 S. Ct. 816 (2018).

212. *Infra* Section II.B.

213. *Bancec*, 462 U.S. 611, 630 (1982).

214. *Id.* at 632.

215. *Id.*

216. 28 U.S.C. § 1607 (permitting setoff up to this amount and also allowing counterclaims in a greater amount when the counterclaim arises out of the same transaction or occurrence or when the sovereign otherwise lacks immunity); *Nat’l City Bank of N.Y. v. Republic of China*, 348 U.S. 356, 364 (1955) (“It is recognized that a counterclaim based on the subject matter of a sovereign’s suit is allowed to cut into the doctrine of immunity.”).

217. H.R. REP. NO. 94-1487, at 23 (1976).

avoid the requirements of international law simply by creating juridical entities whenever the need arises.”²¹⁸

Bancec’s specific holding is tied to the rule that a foreign government that files suit in U.S. courts waives sovereign immunity with regard to certain counterclaims.²¹⁹ But the principle is a broader one. A foreign state’s control over an entity matters, and justifies an alter ego finding, when the state uses this control to subvert the FSIA’s statutory scheme. In cases arising out of commercial activity, perhaps the most fundamental policy of the FSIA is that foreign sovereigns, and their agencies and instrumentalities, should not leverage immunity to gain unfair advantages over private commercial enterprises. This logic underpinned the shift from absolute to restrictive immunity under international law and motivated the U.S. government’s embrace of restrictive immunity in 1952.²²⁰ At minimum, the logic requires foreign states and state-owned entities engaged in commercial activities affecting the United States to place at risk assets associated with those activities.²²¹

In at least two scenarios, a state’s control over an entity may come into conflict with this requirement. First, the state’s control may be such that it is effectively able to direct the entity’s day-to-day commercial activity.²²² When this is the case, there is no reason to treat the entity’s assets as distinct from those belonging to the state itself. To draw that distinction is to permit the state to use the corporate form to circumvent the FSIA.²²³ Second, even if the state

218. *Bancec*, 462 U.S. at 633.

219. 28 U.S.C. § 1607.

220. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES ch. 5, subch. A, intro. note (AM. LAW INST. 1987) (“[A]s governments increasingly engaged in state-trading and various commercial activities, . . . immunity deprived private parties that dealt with a state of their judicial remedies, and gave states an unfair advantage in competition with private commercial enterprise.”); *Competence of Courts in Regard to Foreign States*, Comment to art. 11, 26 AM. J. INT’L L. 451, 598 (Supp. 1932) (“[W]hen a State engages in business in competition with private persons or corporations, this competition is unfair if the State is not answerable in the courts of the State where the business is transacted.”).

221. 28 U.S.C. § 1610.

222. As noted, agency-law principles might also support liability in some of these cases. See *supra* note 199.

223. In many such cases, ignoring the corporate form will also have little effect. When an entity’s conduct is imputed to the state itself, recall that sovereign immunity will rarely allow the creditor to reach state assets not related to the liability-generating activity. See *supra* notes 169–170 and accompanying text.

is not directly involved in a particular commercial activity, its domination of the entity may be so complete that it is impossible to distinguish the state's assets and liabilities from those of the entity. Here, domination permits both the state and the entity to opportunistically manipulate assets and liabilities to the disadvantage of creditors. In such a case, veil piercing is appropriate to prevent such opportunism.

One might object that I am treating *Bancec*'s test as conjunctive, requiring domination *and* fraud, rather than disjunctive. That is not what *Bancec* says, and it is not how most courts understand *Bancec*.²²⁴ But instead I am suggesting that, fairly read, *Bancec* understands the alter ego theory to be confined to a narrow set of cases in which the owner's domination creates opportunities to subvert the FSIA. If that reading seems to conflict with the formal test articulated in *Bancec*, the tension dissolves upon careful reading of the cases, which tend to respect an entity's separate legal status unless doing so would allow the sovereign to exploit the corporate form in some way relevant to the purposes of sovereign immunity law.²²⁵ Nevertheless, the cases are dominated by lengthy inquiries into the sovereign's day-to-day control over the enterprise, without much discussion of whether this control implicates the policies underlying the FSIA.²²⁶ Because states will often be extensively

224. However, courts do occasionally acknowledge that an alter-ego ruling may require an underlying equitable justification. *See supra* note 197.

225. *See, e.g., Bancec*, 462 U.S. 611, 633 (1982) ("Cuba cannot escape liability for acts in violation of international law simply by retransferring the assets to separate juridical entities."); *Kalamazoo Spice*, 616 F. Supp. at 666 (attributing entity's U.S. contacts to the Ethiopian government, which had expropriated the plaintiff's majority stake in the entity, because to do otherwise would let the government immunize itself from liability while using the entity as a front "to profit from its commercial activities in the United States"); *S & Davis Int'l, Inc. v. Republic of Yemen*, 218 F.3d 1292 (11th Cir. 2000) (basing veil piercing decision on a finding that an agency relationship existed, when a government ministry had effectively led the state-owned entity's counterparty to believe it was contracting directly with the government); *McKesson Corp. v. Islamic Republic of Iran*, 52 F.3d 346 (D.C. Cir. 1995) (holding that state-owned entity and the government were in agency relationship in case where the government had attracted foreign investors to contribute capital and expertise to the entity and then expropriated that investment).

226. *Kirschenbaum v. 650 Fifth Ave. & Related Props.*, 830 F.3d 107, 130 (2d Cir. 2016) (plaintiffs' evidence is "insufficient to demonstrate Iran's disregard for Alavi's separate corporate form much less Iran's exercise of *day-to-day* control over Alavi") (citation omitted); *Transamerica v. Venezuela*, 200 F.3d 843, 848 (D.C. Cir. 2000) ("[C]ontrol is relevant when it significantly exceeds the normal supervisory control exercised by any corporate parent over its subsidiary and, indeed, amounts to complete domination . . ."); *Dewhurst v. Telenor Invest AS*, 83 F. Supp. 2d 577, 589-90 (D. Md. 2000) (noting that plaintiffs had not shown

involved in firm affairs,²²⁷ this inquiry risks producing results that undermine the statute. One improvement, then, would be to make clear that it is the use of control to subvert the FSIA that justifies an alter ego finding, not the mere fact of owner domination.

2. *Control as sovereign versus control as owner*

A second implication relates to the manner in which the sovereign wields control. Veil piercing doctrine has been roundly criticized as incoherent even when the owner is not a sovereign.²²⁸ Multi-factor inquiries into whether the shareholder kept adequate records and observed other formalities seem disconnected from any relevant policy. But in the sovereign context, this inquiry becomes even more artificial.²²⁹ When applying the alter ego doctrine, courts routinely insist that what matters is whether the government inserts itself into the day-to-day operations of the entity,²³⁰ examining organizational structure, corporate formalities, and other familiar (if criticized) factors.²³¹ But sovereigns have many ways to control state-owned entities.²³² The fact of control matters, not the source.

In general, the cases are consistent with this proposition. For example, in declining to respect PDVSA's separate legal status, neither the district court nor the court of appeals distinguished between the dividends, taxes, royalty payments, legally-mandated

evidence of extensive control and that the parent and subsidiary corporations "maintain their own separate accounting books and records, as well as conduct their own Board meetings."); *Doe v. Holy See*, 557 F.3d 1066, 1079 (9th Cir. 2009) (noting that plaintiff "does not allege day-to-day, routine involvement of the Holy See in the affairs of the Archdiocese"); *DRC, Inc. v. Republic of Hond.*, 71 F. Supp. 3d 201, 215 (D.D.C. 2014) (noting that FHIS "appears to enjoy significant autonomy in the conduct of its daily operations").

227. See *supra* Sections I.A.2-3.

228. See *supra* note 78.

229. See *Bridas I*, 345 F.3d 347, 360 n.11 (5th Cir. 2003) (listing twenty-one separate factors for the district court potentially to consider on remand).

230. See, e.g., *EM Ltd. v. Banco Central de la Republica Arg.*, 800 F.3d 78, 91 (2d Cir. 2015); *Holy See*, 557 F.3d at 1079 (9th Cir. 2009); *Foremost-McKesson, Inc. v. Islamic Republic of Iran*, 905 F.2d 438, 447-48 (D.C. Cir. 1990); *Hester Int'l. Corp. v. Federal Republic of Nigeria*, 879 F.2d 170, 179-80 (5th Cir. 1989).

231. *Walter Fuller Aircraft Sales, Inc. v. Republic of Phil.*, 965 F.2d 1375, 1382 (5th Cir. 1992) ("[W]e look to the ownership and management structure of the instrumentality, paying particularly close attention to whether the government is involved in day-to-day operations . . .").

232. See *supra* Section I.B.1.

contributions, and other mechanisms by which the Venezuelan government extracted value from the firm.²³³ Some cases, however, arguably imply a need to distinguish acts the sovereign takes as *owner* from acts it takes as *sovereign*. In *Bridas II*, for example, the court refused to consider the government's imposition of an export ban targeting a foreign-owned corporation in evaluating whether respecting the entity's separate legal status would result in fraud or injustice.²³⁴ Despite acknowledging that the government imposed the ban "[t]o force Bridas's submission" to its demand for more money,²³⁵ the court dismissed the export ban as an act taken in the exercise of "sovereign powers . . . not a wrong based on misuse of the corporate organizational form."²³⁶

One can interpret this as a statement about causation: the export ban's harm was independent of—neither caused nor exacerbated by—the government's ownership rights over the entity. So understood, the court correctly disregarded the ban. If a shareholder robs a corporation's creditor at gunpoint, why should this justify disregarding the corporate form? However, *Bridas II* arguably implies a bit more—that the creditor must point to a specific misuse of the government's power as owner.²³⁷ But it makes little sense to distinguish between powers exercised as sovereign and powers exercised as owner. The decision to pierce the corporate veil implies nothing about the validity of the sovereign's public acts, nor does it require the court to make any other determination forbidden under U.S. law.²³⁸ The relevant

233. *Crystallex Int'l Corp. v. Bolivarian Republic of Venez.*, 333 F. Supp. 3d 380, 409–11 (D. Del. 2018); *Crystallex Int'l Corp. v. Bolivarian Republic of Venez.*, 932 F.3d 126, 146–48 (3d Cir. 2019).

234. *Bridas II*, 447 F.3d 411, 417 (5th Cir. 2006).

235. *Id.* at 415.

236. *Id.* at 417.

237. *Id.* at 416 (asserting that Bridas "had to demonstrate that the Government used its control over Turkmenneft to commit a 'fraud or injustice'"). Likewise, in discussing *Bancec's* alter ego prong, the court emphasized that "the [g]overnment . . . exercised its power as a parent entity to deprive Bridas of a contractual remedy." *Id.* at 420; see also *First Inv. Corp. of the Marshall Islands v. Fujian Mawei Shipbuilding, Ltd.*, 703 F.3d 742, 755 (5th Cir. 2012) (citing *Bridas II* and noting that "it is not sufficient for it merely to point out an injustice that would result from an adverse decision. Rather, [the creditor] must show how the [sovereign] manipulated [the entity's] corporate form to perpetuate a fraud or injustice").

238. The act of state doctrine generally prevents federal courts declaring invalid an official act taken by a foreign state within its own territory. See *W.S. Kirkpatrick & Co. v. Env't Tectonics Corp., Int'l.*, 493 U.S. 400, 405 (1990). But by its terms, the doctrine would not

question is whether, by interposing the entity between itself and a creditor, the sovereign seeks to subvert the FSIA, enrich itself at a creditor's expense, or accomplish some other forbidden purpose.²³⁹ There is no meaningful difference between, say, a dividend payment that leaves a state-owned corporation insolvent and a confiscatory tax (or mandatory contribution to social programs) that produces the same result. In both cases, a decision to respect the corporate form would allow the sovereign to reap the benefits of limited liability while inverting the usual priority structure, in which the corporation's creditors have a prior claim.²⁴⁰ Again, it is the fact of control, and the purpose for which the state uses control, that matters.

B. Implications for Traditional and "Reverse" Veil Piercing Cases

As explained in Part II, imputing a state-owned entity's liabilities to the state itself need not have dire consequences.²⁴¹ Because of foreign sovereign immunity, states do not rely as heavily on organizational law to shield their assets from claims by creditors of the entity. Of course, the fact that a creditor has asked the court to pierce the veil implies that the creditor perceives some benefit from this remedy. Moreover, *Bancec's* concern for comity and reciprocity suggests that veil piercing should remain the exception, not the rule.²⁴² Nevertheless, the consequences of veil piercing often will be relatively modest. Despite the natural reluctance to impose liability on a foreign state, courts may in fact be too reluctant to pierce the veil.

This is especially true when the creditor has not bargained for an arbitration clause or a waiver of execution immunity.²⁴³ In that case, the primary risk is that future courts will treat the veil piercing

forbid a court to use such an act as a basis for disregarding the separate legal status of a state-owned entity.

239. See, e.g., *DRC, Inc. v. Republic of Hond.*, 71 F. Supp. 3d 201, 218 (D.D.C. 2014).

240. In places, *Bridas II* appears to recognize that acts taken in the exercise of "sovereign powers" can justify disregarding the entity's separate legal status. Thus, the court emphasized not only that the government had substituted a thinly-capitalized entity for the original state counterparty, but that it had also passed laws immunizing many of the new entity's assets from seizure and limiting the government's own exposure to liability. *Bridas II*, 477 F.3d at 417, 420.

241. See *supra* notes 170–73 and accompanying text.

242. See *supra* note 92.

243. See *supra* notes 176–78 and accompanying text.

issue as settled in a setting where the consequences to the sovereign are much more dramatic—as when a creditor asks a court to give preclusive effect to a veil piercing ruling in a jurisdiction where the law of sovereign immunity offers less protection.²⁴⁴ But this result is not required. Courts outside the United States do not automatically recognize the judgments of U.S. courts²⁴⁵ and may be especially unlikely to do so in settings where recognition involves significant stakes for foreign governments. Even under U.S. law, preclusion doctrine is sufficiently flexible for courts to deny preclusive effect to a finding made in a lawsuit that involved significantly lower stakes.²⁴⁶ Again, I am not suggesting that veil piercing should be routine, nor advocating for a doctrine that looks materially different from the normal setting involving non-sovereign shareholders. But to the extent that courts view veil piercing as especially problematic in the sovereign context, they should recognize that this instinct may overstate the importance of organizational law in protecting sovereign assets.²⁴⁷

However, matters look quite different when a creditor of the sovereign seeks to reach assets belonging to a state-owned entity. Concerns for comity and reciprocity are still relevant. But because sovereign immunity does not afford state-owned entities the same protections,²⁴⁸ organizational law plays a more important role in preserving the entity's access to credit and in allowing foreign states to pursue economic development and other objectives.²⁴⁹ This is obvious when an entity is neither majority-owned by a

244. See *supra* notes 174–75 and accompanying text.

245. Baumgartner, *supra* note 175.

246. Under U.S. law, for example, a court's decision to pierce the veil will not automatically benefit another creditor (i.e., not the creditor who obtained the judgment). In such cases, preclusion turns on whether the defendant had sufficient incentive to litigate in the first action. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 330–31 (1979).

247. In addition, state-owned entities may bargain for additional protection for their sovereign owners. Bond indentures, for instance, commonly include “no recourse against others” clauses protecting shareholders and other third parties. See Glenn D. West & Natalie A. Smeltzer, *Protecting the Integrity of the Entity-Specific Contract: The “No Recourse Against Others” Clause – Missing or Ineffective Boilerplate?*, 67 BUS. LAW. 39 (2011). Courts often interpret such clauses narrowly to bar only contract claims. *LaSalle National Bank v. Perelman*, 141 F. Supp. 2d 451, 459–63 (D. Del. 2001). Moreover, courts might refuse to give such a clause effect when a veil piercing claim is premised on a shareholder's intentional wrongdoing. See West & Smeltzer, *supra*. Despite these limitations, “no recourse against others” clauses can offer some protection against veil piercing claims. *Id.*

248. See *supra* Section I.B.2.b.

249. *Bancec*, 462 U.S. 611, 625–26 (1982).

foreign state, nor controlled by the state to an extent sufficient to make it an “organ” of the state. In that case, the entity is not an agency or instrumentality of the foreign state and cannot assert sovereign immunity at all.²⁵⁰ But even if it qualifies as an agency or instrumentality, the entity will receive less protection.²⁵¹ It will, by definition, experience the risk of losing assets that would otherwise have been unavailable to creditors. In this context, veil piercing should be reserved for exceptional cases in which the decision to respect the corporate form will enable the state to subvert the FSIA, immunizing itself for conduct for which the statute would otherwise impose liability.

CONCLUSION

Recognizing that sovereign states are different from other owners of limited liability entities need not imply radical revisions to organizational law. Still, the differences are fundamental. Sovereign states do not need organizational law as much, or in the same ways, as other owners. Because the law of foreign sovereign immunity automatically confers significant owner protections, there is an argument that courts should be more willing, rather than less, to pierce the veil in this context. A principled veil piercing doctrine, however, should impute an entity’s conduct and liabilities to the sovereign only when it has used its control to defraud a creditor or to subvert the policies embedded in the FSIA. Moreover, courts should be less willing to pierce the veil when the entity’s contracts include clauses, especially arbitration clauses and waivers of sovereign immunity, that will significantly expand the sovereign’s potential losses. If there is a need for special solicitude in this context, it is to protect state-owned entities from creditors of their sovereign owners. Such entities depend more heavily on organizational law for protection, and considerations of comity and reciprocity provide additional reason to respect their separate legal status.

250. See *supra* notes 183–88 and accompanying text.

251. See *supra* notes 188–90 and accompanying text.