

114TH CONGRESS  
2D SESSION

# S. 3323

To improve the Foreign Sovereign Immunities Act of 1976, and for other purposes.

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IN THE SENATE OF THE UNITED STATES

SEPTEMBER 14, 2016

Mr. GRASSLEY introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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## A BILL

To improve the Foreign Sovereign Immunities Act of 1976, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “State-Owned Entity  
5 Transparency and Accountability Reform Act of 2016”.

6 **SEC. 2. FINDINGS.**

7 Congress finds the following:

8 (1) As Congress expressed when it enacted the  
9 Foreign Sovereign Immunities Act of 1976 (Public  
10 Law 94–583; 90 Stat. 2891), under international

1 law, foreign states are immune from the jurisdiction  
2 of the courts of the United States and of the States,  
3 subject to certain exceptions. One of these excep-  
4 tions, the “commercial activity” exception, generally  
5 subjects foreign states to the jurisdiction of courts  
6 of the United States in actions relating to a foreign  
7 state’s commercial activities.

8 (2) As the Supreme Court observed 7 years  
9 after Congress enacted the Foreign Sovereign Im-  
10 munities Act of 1976, “increasingly . . . govern-  
11 ments throughout the world have established sepa-  
12 rately constituted legal entities to perform a variety  
13 of tasks”. *First National City Bank v. Banco Para*  
14 *El Comercio Exterior de Cuba*, 462 U.S. 611 (1983)  
15 (referred to in this section as “Bancec”). These  
16 state instrumentalities are “typically established as  
17 . . . separate juridical entit[ies], with powers to hold  
18 and sell property and to sue and be sued”. Run by  
19 states as “distinct economic enterpris[es]”, they op-  
20 erate “on an enterprise basis” while enjoying “a  
21 greater degree of flexibility and independence from  
22 close political control than is generally enjoyed by  
23 government agencies. These same features fre-  
24 quently prompt governments in developing countries  
25 to establish separate juridical entities as the vehicles

1 through which to obtain the financial resources  
2 needed to make large-scale national investments”.

3 (3) Because government instrumentalities “es-  
4 tablished as juridical entities distinct and inde-  
5 pendent from their sovereign should normally be  
6 treated as such”, courts have accorded them “a pre-  
7 sumption of independent status” for purposes of as-  
8 sassing jurisdiction under the Foreign Sovereign Im-  
9 munities Act of 1976.

10 (4) However, the Supreme Court explained in  
11 *Bancec* that courts have “consistently refused to  
12 give effect to the corporate form where it is inter-  
13 posed to defeat legislative policies”. As a result,  
14 courts will refuse to presume an instrumentality’s  
15 independence from a foreign state if “a corporate  
16 entity is so extensively controlled by its owner that  
17 a relationship of principal and agent is created” or  
18 respecting the corporate form “would work fraud or  
19 injustice”. *Transamerica Leasing, Inc. v. La*  
20 *Republica de Venezuela*, 200 F.3d 843, 848–49  
21 (D.C. Cir. 2000).

22 (5) As state instrumentalities have developed  
23 over time, their corporate structure has commonly  
24 become more complex. In many cases, the structure  
25 of state instrumentalities has also become more

1       opaque. At the same time, as a result of  
2       globalization, such entities are increasingly involved  
3       in commerce and trade involving companies and con-  
4       sumers of the United States. The result is that com-  
5       panies and consumers of the United States seeking  
6       to sue a foreign state-owned entity under the “com-  
7       mercial activity” exception of the Foreign Sovereign  
8       Immunities Act of 1976 may struggle to determine  
9       which juridical entity—for example, which member  
10      or affiliate of an instrumentality—to sue.

11           (6) As they have grown larger, more opaque,  
12      and more involved in commercial activity with com-  
13      panies and consumers of the United States, state in-  
14      strumentalities have continued aggressively to assert  
15      that they are immune to suit in courts of the United  
16      States.

17           (7) In some cases, courts also have struggled to  
18      determine the correct juridical entity subject to their  
19      jurisdiction based on the “commercial activity” ex-  
20      ception. In others, courts have rejected claims  
21      against instrumentalities for failure to show an  
22      intra-instrumentality alter ego relationship.

23           (8) In light of the sometimes opaque structure  
24      of state instrumentalities and their increasing inter-  
25      actions with companies and consumers of the United

1 States, it is necessary to preserve potential claims of  
2 people of the United States against such entities  
3 based on their commercial activities. Therefore, for  
4 purposes of determining jurisdiction under the  
5 “commercial activity” exception to the Foreign Sov-  
6 ereign Immunities Act of 1976 only, companies and  
7 consumers of the United States should not be re-  
8 quired to prove an alter ego relationship between  
9 members of an instrumentality to establish subject-  
10 matter jurisdiction, as follows.

11 **SEC. 3. AMENDMENT.**

12 Section 1603(d) of title 28, United States Code, is  
13 amended—

14 (1) by inserting “(1)” before “A”; and

15 (2) by adding at the end the following:

16 “(2) For purposes of section 1605(a)(2), a commer-  
17 cial activity of an agency or instrumentality of a foreign  
18 state shall be attributable to any corporate affiliate of the  
19 agency or instrumentality that—

20 “(A) directly or indirectly owns a majority of  
21 shares of the agency or instrumentality; and

22 “(B) is also an agency or instrumentality of a  
23 foreign state.”.

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