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Reevaluating the "Corporate Veil" Metaphor in the Context of International Trade: a Critical Analysis of Hester International Corporation v. Federal Republic of Nigeria

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NOTE

REEVALUATING THE "CORPORATE VEIL" METAPHOR IN THE CONTEXT OF INTERNATIONAL TRADE: A CRITICAL ANALYSIS OF *HESTER INTERNATIONAL CORPORATION v. FEDERAL REPUBLIC OF NIGERIA*

I. INTRODUCTION

The recent case of *Hester International Corporation v. Federal Republic of Nigeria*[1] revisits the often-debated concept of disregarding the corporate entity in the context of international trade. Specifically, the Fifth Circuit's ruling brings into question the standards and procedures used to determine the existence of the "alter ego status" of a government-owned corporation of a foreign state.

This note suggests that the U.S. courts should take a broad view when considering the validity of a corporate entity which is an agent of a foreign state. *Hester* illustrates a judicial willingness to apply the domestic principles of corporate law to an inappropriate situation. A thorough analysis of the Nigerian context will demonstrate the distinctive natures of domestic corporations and Nigerian corporations. Because of such differences, the ruling in *Hester* is inherently flawed. Ultimately,

1. 879 F.2d 170 (5th Cir. 1989).

the courts should not be as hesitant to "pierce the corporate veil" in the international context as they traditionally have been in the domestic sense.

After reviewing the pertinent facts of the *Hester* case, this note will briefly discuss the general nature of corporate entities. Thereafter, the analysis will focus on Nigeria's relationship with its wholly-owned company vis-a-vis the existing case law on international corporate entities and the validity of their limited liability status. Finally, the Fifth Circuit's ruling will be questioned in light of the existing Nigerian context.

II. Statement of the Case

As part of a continuing program to develop the economic infrastructure of Nigeria,[2] the Hester International Corporation (HIC) entered into an agreement on April 9, 1981 with the National Grains Production Company, Limited of Nigeria (NGPC)[3] and the State of Cross River[4] to implement and develop the Bansara Rice Farm Project.[5] The partnership among HIC, NGPC and Cross River dissolved when the Nigerian government refused to guarantee a loan to HIC,[6] thus prompting a financial crisis and the ultimate abandonment of the entire project.

HIC brought a breach of contract suit against the Nigerian government on the basis that NGPC was an alter ego or agent of the Nigerian government and consequently argued that Nigeria was bound by a provision in the agreement to provide "adequate security" for the

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2. *See infra* note 51 and accompanying text.

3. This company was wholly owned by the Federal Republic of Nigeria and its Board of Directors was entirely appointed by the Nigerian government. The main objective of the NGPC was to establish a 4,000 hectare mechanized grain farm in each of the 19 Nigerian states. P. KOEHN, PUBLIC POLICY AND ADMINISTRATION IN AFRICA 98 (1990) [hereinafter KOEHN].

4. This is a political subdivision of the Federal Republic of Nigeria. NGPC is no longer an actual party to the appeal before the 5th Circuit, but was nonetheless a significant presence in determining HIC's frame of mind and the extent, if any, of Nigeria's participation in the Bansara agreement. *Hester*, 879 F.2d at 172.

5. The vehicle for this project was a limited liability joint venture (Bansara Rice Farms, Ltd.) in which NGPC and Cross River each owned 30% of the interest in the project and HIC owned 40%. *Id.* at 171.

6. As part of the agreement HIC was obligated to secure all of the off-shore financing for the project with the stipulation that the Federal Republic of Nigeria would provide an adequate guarantee for any such loan. This concession (the guarantee) was made by NGPC on behalf of Nigeria and did not directly involve the participation of the Nigerian government itself. *Id.* at 171-72.

external financing.[7]

This case entered the federal arena on diversity grounds, and HIC made its claim pursuant to the Commercial Activity Exception of the Foreign Sovereign Immunity Act (FSIA).[8] However, the Fifth Circuit never actually addressed this argument because, in affirming the lower court's decision, NGPC was deemed to be an independent juridical entity and not an alter ego or instrumentality of the Federal Republic of Nigeria. Consequently, HIC's claim against Nigeria failed for lack of subject matter jurisdiction over Nigeria.[9]

III. Historical Perspective

A. *The Nature of the Corporate Entity in General*

It is axiomatic that the corporate form is a legally valid enterprise which inherently enjoys the benefit of limited liability.[10] Not surpris-

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7. *Id.* at 172.

8. 28 U.S.C. §1604 provides:

> [S]ubject to existing international agreements to which the United States is a party at the time of the enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. §1605(a)(2) provides:

> [A] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

9. In essence, the 5th Circuit held that Nigeria could not be sued under the Commercial Activity Exception to the FSIA because Nigeria was not a party to the commercial activity in question. It is this point that is questioned by this author's note.

10. "Separate legal personality has been described as an 'almost indispensable aspect of the public corporation.' " First National City Bank v. Banco Para El Comercio Exterior De Cuba, 462 U.S. 611, 625 (1983), *quoting* FRIEDMAN, GOVERNMENT ENTERPRISE: A COMPARATIVE ANALYSIS, IN GOVERNMENT ENTERPRISE: A COMPARATIVE STUDY, 303, 314 (1970) [hereinafter FRIEDMAN]. "Limited liability is the rule, not the exception; and on that assumption large undertakings are rested, vast enterprises are launched, and huge sums of capital are attracted." Anderson v. Abbott, 321 U.S. 349, 362, *reh. denied*, 321 U.S. 804 (1944). It is important to understand that the concept of limited liability suggests that the "owners" of a corporation will not be held liable for the acts of the corporation itself. Applied to the instant case, the 5th Circuit implies that Nigeria, the sole owner of the corporate enterprise (NGPC), will not be held responsible for the breach of contract provoked by the NGPC. *Hester*, 879 F.2d at 181.

ingly, American courts have traditionally been reluctant to disregard this notion of limited liability which is derived from the independent status of the corporate entity.[11] However, when corporations own other corporations,[12] the basic foundation of limited liability begins to wear thin. Judicial opinions continually warn against the use of overused metaphors such as "piercing the corporate veil", "alter ego" status, "sham corporation" and "mere instrumentality" as a substitute for detailed factual inquiries.[13]

Nevertheless, the corporate form and the companion concept of limited liability are in no sense absolute. There are three commonly recognized scenarios in which a private corporation will not be regarded as legally separate from its owners. The first such exception is illustrated by the case of *NLRB v. Deena Artware, Inc.*[14] in which the Supreme Court ruled that a corporate entity can be so extensively controlled by its owner that a relationship of principal and agent is thereby created.[15] Within such a framework, one party (agent or principal) can be held liable for the misgivings of the other.[16]

The second exception to the doctrine of corporate entity involves the equitable principle that the corporate form will be disregarded

11. "This power to pierce the corporate veil, though, is to be exercised 'reluctantly' and 'cautiously' and the burden of establishing a basis for the disregard of the corporate fiction rests on the party asserting such claim." DeWitt Truck Brokers v. W. Ray Fleming Fruit Co., 540 F.2d 681, 683 (4th Cir. 1976), *quoting* Pardo v. Wilson Line of Washington, Inc., 414 F.2d 1145, 1149 (D.C. Cir. 1969) *and* County Maid, Inc. v. Haseotes, 299 F. Supp. 633, 637 (E.D. Pa. 1969).

12. This basically refers to the traditional relationship of a parent corporation and a subsidiary.

13. Judge Cardozo succinctly described the situation in Berkey v. Third Avenue Ry. Co., 244 N.Y. 84, 94, 155 N.E. 58, 61 (1926): "The whole problem of the relation between parent and subsidiary corporations is one that is still enveloped in the mists of metaphors. Metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they end often by enslaving it." More than half a century later, Cardozo's words maintain an enormous influence in judicial circles. *See* First City Bank v. Banco Para El Comercio Exterior De Cuba, 462 U.S. 611, 623: "Justice Cardozo warned. . .against permitting epithets to substitute for rigorous analysis." *See also* Riguelme Valdes v. Leisure Group, Inc., 810 F.2d 1345, 1352 (5th Cir. 1987); United States v. Jon-T Chemicals, Inc., 768 F.2d 686, 691 (5th Cir. 1985); Ramirez de Arellamo v. Weinberger, 745 F.2d 1500, 1516 (D.C. Cir. 1984).

14. 361 U.S. 398 (1960).

15. "Dominion may be so complete, interference so obtrusive, that by the general rules of agency the parent will be a principal and the subsidiary an agent." *Id.* at 403, *quoting Berkey*, 244 N.Y. at 95, 155 N.E. at 61. This particular exception necessarily involves a detailed factual analysis of the relationship between the owners (the alleged principal) and the corporation (the alleged agent).

16. *NLRB v. Deena*, 361 U.S. at 403.

when doing otherwise would result in fraud or injustice.[17] This exception also requires a thorough investigation of facts on a case-by-case basis as well as a consideration of the far-reaching implications of recognizing the corporate entity in a particular situation. Although a court which is well-versed in the intricacies of a given case is in a far superior position to make such an analysis, I will attempt to make such an argument below with regard to the *Hester* case due to an apparent void in the Fifth Circuit's opinion.[18]

An additional exception, which is typically considered a subset of the fraud/injustice argument, is that courts will not give effect to a corporation which is created to defeat public policy.[19]

Finally, the presumption of a corporation's independent status can be overcome if the corporate entity is found to be abusing the corporate form.[20]

B. The Corporate Entity in the Context of International Trade

The landmark Supreme Court case involving corporate instrumentalities of a foreign state is *First National City Bank v. Banco Para El Comercio Exterior De Cuba. (Bancec)*[21] Specifically, this case purports to set the standard for determining whether a governmental entity is separate from the government itself. In 1960, the Cuban government established Bancec as an official institution for foreign trade with full juridical capacity of its own. While Bancec was attempting to collect on a letter of credit issued by defendant Citibank, the Cuban government seized and nationalized all of Citibank's assets through a "Bank

17. *See* Taylor v. Standard Gas Co., 306 U.S. 307, 322 (1939); Pepper v. Litton, 308 U.S. 295, 310 (1939). With regard to the latter case, it is important to realize that the court allowed for equitable subordination on the basis that there was a fraudulent conveyance made possible by the nature of the corporate form; in such a case there is no need to even consider an "alter ego" argument since the fraud alone will suffice as a justification for disregarding the corporate entity.

18. *See infra* notes 48-49 and accompanying text.

19. In Bangor Punta Operations, Inc. v. Bangor & Aroostook R. Co., 417 U.S. 703, 713 (1974), the Supreme Court observed: "Although a corporation and its shareholders are deemed separate entities for most purposes, the corporate form may be disregarded in the interests of justice where it is used to defeat an overriding public policy." *See also* Anderson v. Abbott, 321 U.S. 349 (1944).

20. *See* Walkovsky v. Carlton, 18 N.Y.2d 414, 223 N.E.2d 6 (1966) in which the court suggests that if certain formalities such as the corporate books, bank accounts, officers and directors, meeting minutes, etc. are used in a peculiar manner, there might be grounds for disregarding the corporate entity.

21. 462 U.S. 611 (1983).

Nationalization Law."[22] Subsequently, when Bancec brought suit against Citibank on the letter of credit in Federal District Court, Citibank asserted a right to set off the value of its seized Cuban assets against the claim. The ultimate issue in the case was whether the acts and liabilities of the foreign sovereign government of Cuba could be attributed to the state-owned banking entity, Bancec.[23]

The Supreme Court ruled that Bancec was not an entity independent from the Cuban government. In doing so, the Court outlined the common features attributed to an ordinary, separate government instrumentality, as far as such an ideal can exist. This "Bancec Test" is as follows: The instrumentality is set up as a separate juridical entity; The instrumentality is primarily responsible for its own finances; and The instrumentality is not subject to the same budgetary constraints with which ordinary government agencies must comply.[24]

Bancec serves as a model for defining the so-called typical separate government-owned entity which is afforded a presumption of independent status. However, the actual facts of *Bancec* paint a scenario which has little in common with the *Hester* case. The former involves a U.S. corporation seeking a remedy against a corporation of a foreign state for actions of the foreign state itself. The latter implicates a breach of contract remedy against the foreign state (Nigeria) for actions taken by the state-owned corporation (NGPC).[25] Nevertheless, *Bancec* does reiterate the three general exceptions to the corporate entity doctrine[26] and applies them to the realm of corporations owned by foreign states. Thus, while *Bancec* is useful as a starting point to place the *Hester* opinion in perspective, consideration of other more recent federal case law is also necessary to properly analyze the Fifth Circuit's ruling in *Hester*.

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22. *Id.* at 614.

23. *Hester*, 879 F.2d at 177 (*construing Bancec*).

24. *Bancec*, 462 U.S. at 624. According to the Court, "[t]hese distinctive features permit government instrumentalities to manage their operations on an enterprise basis while granting them a greater degree of flexibility and independence from close political control than is generally enjoyed by government agencies. These same features frequently prompt governments in developing countries to establish separate juridical entities as the vehicles through which to obtain the financial resources needed to make large-scale national investments." *Id.* at 624-625.

25. Therefore, the two cases differ not only in terms of the type of action brought but also in terms of the parties involved in the suit.

26. *See supra* notes 14-20 and accompanying text.

IV. Analysis of the Fifth Circuit's Ruling in *Hester*

The *Hester* case in and of itself does not represent a dramatic shift in the law of corporations. However, it does serve to magnify the vulnerability of the current domestic law in light of the global economic situation[27] and prompts a reexamination of the process courts use to determine the independent status of a foreign state-owned corporation.

A. *Hester's Strict Reliance on Direct Control*

The *Hester* opinion relies on *Kalamazoo Spice Extraction Company v. Provisional Military Government of Socialist Ethiopia* (*Kal-Spice*)[28] as a prime illustration of a situation where a government exercises direct control over an instrumentality so as to preclude the independent status of that instrumentality. In 1966, Kal-Spice formed and incorporated the Ethiopian Spice Extraction Share Company (ESESCO) under the laws of Ethiopia and commenced significant extraction and trading in the spice industry.[29] In 1975, the governmental party, the Provisional Military Government of Socialist Ethiopia (PMGSE), expropriated without compensation a substantial portion of Kal-Spice's stock interest[30] in ESESCO and thereby gained majority control of this entity.[31] In order to substantiate its claim against PMGSE (for the expropriation) under the Commercial Activity Exception of FSIA,[32] Kal-Spice needed to somehow impute the U.S. contacts

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27. *Hester* is relevant in the sense that the international economic arena is constantly changing and the laws must adapt to reflect these changes: Nigeria, with its 114 million inhabitants, is Africa's most populous nation. Furthermore, it is extremely rich in natural resources. However, it remains one of the world's poorest nations with a per capita gross national product of only $308. In fact, Nigeria is one of only 42 countries considered to be a "low income economy" by the World Bank. Johns, *A U.S. Policy For Nigeria: Supporting Political and Economic Freedom*, HERITAGE FOUNDATION REPORTS, No. 730 at 1 (1989). Given Nigeria's recent attempt to bridge the gap between its wealth of natural resources and the poverty of its population (*see infra* note 51 and accompanying text), our legal system should look to help, rather than hinder, such mutually beneficial investment opportunities between the U.S. and Nigeria.

28. 616 F. Supp. 660 (D.C. Mich. 1985).

29. *Id.* at 661.

30. Up until this point, Kal-Spice owned 80% of this stock and exerted control over the operation of the company. *Id.* It was estimated that Kal-Spice's stock interest had been reduced from 80% to 40% by virtue of the government's expropriation decree. *Id.* at 662.

31. Although PMGSE was purported to have obtained only 51% of the stock, Kal-Spice alleged that without majority ownership and control, its stock would be virtually worthless. *Id.* at 663.

32. *See supra* note 8 and accompanying text.

of ESESCO to PMGSE, the named defendant.[33] Consequently, the Federal District Court of Michigan had to determine whether PMGSE exerted sufficient control over ESESCO so as to overcome the presumption of ESESCO's independent status.

The *Kal-Spice* court had no difficulty finding that PMGSE exercised sufficient control over ESESCO, thus negating its independent status. Specifically, the *Kal-Spice* court articulated the following elements which constituted such direct control: PMGSE appointed a majority of the board of directors; PMGSE required that all checks in excess of $25,000 be signed by one of these government appointed directors; the Ministry of National Resources Development, the governmental agency assigned to supervise ESESCO, approved all invoices for shipments exceeding $13,000; and several ESESCO invoices for shipments contained the seal of PMGSE.[34] After considering these factors in aggregate, this court concluded that the independent status of ESESCO should be disregarded and that Kal-Spice could impute the activities of ESESCO in the United States to the Ethiopian government so as to give Kal-Spice a viable medium for litigating its claim against PMGSE for expropriating the stock.[35]

Kal-Spice serves as a model for analyzing whether government control of an instrumentality is so extensive as to overcome the presumption of that instrumentality's independent status. Although the Nigerian government did not necessarily exhibit the requisite control over the day-to-day operations of the NGPC in the instant case,[36] it is arguable that a strict adherence to the *Kal-Spice* formula is both inappropriate and counterproductive. In essence, direct management of daily corporate operations is not the only way for a foreign state to exert "control" over an instrumentality. A thorough analysis of the totality of the circumstances of the instant case reveals such alternative possibilities of inferring control.

B. *Equitable Principles and the FSIA*

In reference to Nigeria's 100% ownership of NGPC, the Fifth

33. *Kal-Spice*, 616 F.Supp. at 666.

34. *Id.*

35. "To continue to recognize the separate legal status of ESESCO under these circumstances would insulate the PMGSE from liability for its expropriation of Kal-Spice's property interest in ESESCO while permitting the PMGSE, through ESESCO, to profit from its commercial activities in the United States." *Id.* Therefore, in addition to the primary argument that PMGSE exerted sufficient control, this case also involves a consideration of avoiding injustice or inequity.

36. *Hester*, 879 F.2d at 181.

Circuit in *Hester* was over-anxious in accepting the Eleventh Circuit's somewhat analogous ruling in *Hercaire International, Inc. v. Argentina*[37] without performing a substantive analysis of the issues presented in *Hester*. Because *Hercaire* is nothing more than persuasive law[38], it behooves the *Hester* court to give equal consideration to the arguments articulated by the *Hercaire* trial court.[39] In light of the specific conditions implicated in *Hester*, the principles espoused by the *Hercaire* lower court should be applied so as to elicit a more equitable result.

In *Hercaire*, an American corporation (Hercaire) sought the execution of a judgment received against Argentina for a breach of contract. In an attempt to collect on its judgment, Hercaire seized an aircraft which was owned by Aerolineas Argentina, a corporation wholly owned by Argentina.[40] The central question, as posed by the Eleventh Circuit, was whether the assets of this foreign state's wholly-owned national airline were subject to execution to satisfy a judgment against the foreign state, even though the airline was not a direct party to the litigation and was not involved in the breach of contract underlying the litigation.[41]

The lower court considered a broad range of sources in finding that Aerolineas was not to be afforded separate juridical existence for the purposes of the judgment in question. The lower court first considered that various agencies and instrumentalities of foreign states have been recognized under FSIA as part of the foreign state itself.[42] As emphasized by the *Hercaire* lower court, this often works to the advantage of the state-owned instrumentality in the sense that courts will shield these foreign agencies from harm by including them within the definition of a foreign state so as to invoke sovereign immunity.[43] It would be a serious violation of equitable principles to allow the agencies of a foreign state to use this "shield" only when it works to their

37. 821 F.2d 559 (11th Cir. 1987).

38. Eleventh Circuit law is not binding in the Fifth Circuit.

39. 642 F. Supp. 126 (S.D. Fla. 1986).

40. This fact, first noted by the trial court at 642 F. Supp. 128, was undisputed by all the parties.

41. *Hercaire*, 821 F.2d at 559. The actual breach of contract involved military parts supplied to Argentina during the Falkland War Crisis in 1982. *Id.* at 560.

42. Arango v. Guzman Travel Advisors Corporation, 621 F.2d 1371 (5th Cir. 1980) found that an airline which was completely owned by the Dominican Republic was actually a foreign state. This argument is even more relevant to *Hester* because Fifth Circuit law is binding on this court.

43. *Hercaire*, 642 F. Supp. at 130. *See also* Alberti v. Empresa Nicaraguese De la Carne, 705 F.2d 250 (7th Cir. 1983); Carey v. National Oil Corporation, 592 F.2d 673 (2d Cir. 1979).

advantage, but to disregard it when it hinders their interests.[44]

Secondly, the trial court in *Hercaire* pointed out that the actual text of FSIA[45] defines a foreign state as including "an agency or instrumentality that is an organ of a foreign state or a majority of whose shares is owned by the foreign state."[46] The *Hercaire* trial court concluded that since Argentina owned all the shares of Aerolineas, the latter's assets were those of Argentina.[47]

In reversing the District Court, the Eleventh Circuit in *Hercaire* bases its entire argument on the *Bancec* model of a typical instrumentality as well as the common exceptions.[48] As previously discussed, this is a somewhat limited model which should be used only as a starting point and is in no way intended to be an exhaustive list.[49] In effect, the Eleventh Circuit erred when it refused to address these valid arguments made by the *Hercaire* lower court and effectively ignored the actual text of FSIA in making its decision. Likewise, the Fifth Circuit has erred by strictly relying on *Hercaire* to dismiss the issue of Nigeria's 100% ownership of NGPC.[50]

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44. "It would be unfair to allow agencies to remove the statutory cloak when they find it convenient, and then to replace it when the weather once again turns foul. Statutory garb is permanent. This Court considers an agency or instrumentality of a foreign state as the foreign state itself for all purposes under the FSIA." *Hercaire*, 642 F. Supp. at 130.

45. HIC brought its claim under FSIA, and the Fifth Circuit maintained that they did not reach this argument because HIC failed to prove that NGPC was an agent of the Federal Republic of Nigeria. Nevertheless, the text of FSIA itself can be used as an aid in determining agency or alter ego status.

46. 28 U.S.C. §§ 1603(b)(1) and (2).

47. *Hercaire*, 642 F. Supp. at 130.

48. *See supra* notes 24 and 26 and accompanying text.

49. The *Bancec* court stated:

> Our decision today announces no mechanical formula for determining the circumstances under which the normally separate juridical status of a government instrumentality is to be disregarded. (footnote omitted) Instead, it is the product of the application of internationally recognized equitable principles to avoid the injustice that would result from permitting a foreign state to reap the benefits of our courts while avoiding the obligations of international law.

Bancec, 462 U.S. at 633-634.

50. The courts generally agree that one-hundred percent ownership is an insufficient basis for applying the alter ego theory to pierce the corporate veil in the domestic context: "Alter ego status is tautological with actual control of the subservient entity. Unrestricted ownership of that entity provides a logical backdrop for domination, although ownership alone will not support alter ego finding." *Riguelme*, 810 F.2d at 1354. *See also John-T Chemicals*, 768 F.2d at 691. However, specific factors in foreign nations such as Nigeria tend to limit the application of this legal principle.

C. *A Consideration of Nigeria's Socio-Economic Framework*

While this note does not advocate a full reversal of the traditional approach of sovereign immunity and the presumption of independent status of foreign state-owned corporations, it does question the extreme amount of deference given to the sovereign government in *Hester*. Specifically, Nigeria's legal structures have been accorded full recognition and validity even though a thorough investigation of the conditions present in Nigeria raises serious questions which would affect this ruling.

One fact that must be considered is that Nigeria is a relatively underdeveloped country seeking to enter the realm of modern industry and international trade. For example, the current government of Nigeria has maintained a strong effort to utilize American capital and technology in developing its agricultural economy. A 1980 meeting between then Vice-President Walter Mondale and top Nigerian officials resulted in a bilateral agreement which called for cooperative governmental efforts to expand agricultural trade and encourage and facilitate participation by American private businesses in joint farming ventures in Nigeria (such as the Bansara Rice Farm).[51]

While the collective aspirations of this nation are understandable and admirable, we must be careful not to take anything for granted in analyzing the economic, corporate and governmental structures of a nation in such a rudimentary stage of development.[52] Consequently, any direct comparison to domestic American government-corporate relationships is inherently flawed and unacceptable. The facts of *Hester* should be analyzed within the context of the Nigerian socio-economic framework,[53] and then the appropriate law should be applied to such facts.[54] The distinct nature of Nigerian legal-corporate relationships places the instant case beyond the realm of traditional domestic corporate law. Specific conditions prevailing within Nigeria, especially with regard to corruption, justify a reconsideration of the status-quo mentality exhibited by the *Hester* court.

In deciding on NGPC's status (independent or not), the Fifth Cir-

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51. KOEHN, *supra* note 3, at 99. This cooperative accord reflected a possible attempt to extend the previous political relationship of the two countries to the economic and financial fields. NIGERIAN FOREIGN POLICY, ALTERNATIVE PERCEPTIONS AND PROJECTIONS 47 (T. Shaw and O. Aluko eds. 1983).

52. *See supra* note 27.

53. *See infra* note 66 and accompanying text.

54. As indicated by the Fifth Circuit, the appropriate law to be applied is that of American and international law and not that of the chartering state. *Hester*, 879 F.2d at 177.

cuit fell into the same trap as did the lower court[55] - they utilized the domestic corporate context where it had no application.[56] For instance, the Fifth Circuit alludes to the trial court's finding that NGPC's government-owned stock was available for public purchase.[57] However, they did not consider what meaning, if any, this had in the Nigerian context. Was there actually a viable market facility for such securities? Were there willing buyers? Or was this merely a facade used to protect the Nigerian government by setting up a corporate shell? Although these questions are not easily answered, the courts are nevertheless obligated to consider such pertinent background information. In all probability, the stock was not readily available for public purchase. The susceptibility of the Nigerian marketplace to unscrupulous manipulation is well-documented.[58] Furthermore, the ominous level of poverty in Nigeria dispels the notion of a "public market" for corporate stock.[59] Thus, the *Hester* court's conclusion that HIC properly maintained its independent status from Nigeria is significantly weakened.

The Fifth Circuit in *Hester* also misconstrued the finding of fact that NGPC's 200 employees were not employees of Nigeria and were not bound by the civil service rules and regulations.[60] This "fact" is misleading in the Nigerian context. Unlike the established legal-governmental structures which are in place in the United States, the situation in Nigeria tends to be extremely informal. Personal contacts in Nigeria play a significant role in work efficiency and career success.[61] Administrative affairs are greatly influenced by personal preferences, loyalty considerations and face-to-face interactions.[62] Significant administrative decisions are frequently made on an ad hoc basis without use of written documentation.[63] Such a climate gives rise to suspicion with regard to the allegedly separate status of the Nigerian government and parastatal corporations such as NGPC. Within such an informal framework, the American perception of the "corporate" entity and all of its implications has little, if any, significance.

Neither the lower court nor the Fifth Circuit took the differences

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55. 681 F. Supp. at 371. The lower court found "that the exhibits do not establish an alter ego or agency relationship between Nigeria and NGPC, with regard to the issue of attribution of liability among entities of a foreign state." *Id.*

56. *See infra* note 71.

57. *Hester*, 879 F.2d at 179.

58. KOEHN, *supra* note 3, at 122.

59. *See supra* note 27.

60. *Hester*, 879 F.2d at 179.

61. KOEHN, *supra* note 3, at 22.

62. *Id.*

63. *Id.*

between Nigeria and the U.S. into consideration when applying the law to *Hester*. On the contrary, they erroneously presumed the existence of "American-type" corporate-legal structures in Nigeria. While they have succeeded in maintaining the status quo and preserving the tradition of sovereign immunity and independent corporate status, these courts have committed a grave mistake. In short, the American courts are far too anxious to transfer the domestic reluctance to "pierce the corporate veil" to the international scene. Such an attitude has serious implications not only for American foreign capital investors, but also for the Third World nations which so desperately rely on them for their most basic developmental needs.

D. *HIC's Expectations*

The *Hester* court's ultimate conclusion is also flawed in its failure to consider HIC's subjective intentions at the time it entered into the Bansara Rice Project.[64] The Fifth Circuit is quick to point out that the stipulation in the Bansara agreement that Nigeria would provide an adequate guarantee was not given by the Federal Republic of Nigeria - in essence, Nigeria was not directly involved in the agreement in any way. Rather, it was NGPC and Cross River, HIC's partners in the Bansara Rice Farms, Ltd., who were responsible for the presence of this provision. Nevertheless, the provision was included in the agreement, and regardless of who proposed it, it is necessary to determine what effect this particular stipulation had on HIC's decision to enter into the agreement.

It is no secret that large capital investments in developing countries are risky ventures at best.[65] And as this case illustrates, they are potentially disastrous. Consequently, no rational corporate investor would jeopardize a substantial portion of its assets without taking every available precaution. Host nations often guarantee debt obtained by a foreign investor in order to reduce the risk of such investment. This mechanism is wholly logical: since a host nation is most likely to derive a substantial benefit from the foreign investment, it should bear its fair

64. *See supra* note 5.

65. "Despite the tentative signs of improving relations between the U.S and the Third World, tensions will not soon disappear. Feelings of economic nationalism continue to run high in the developing countries. And foreign investors will likely find the terms for investment tighter than they would like." McClenahen, *A Welcome Mat For U.S. Investment?*, Industry Week, March 8, 1982 at 89. As a further acknowledgement of the political and economic risks of large scale investments in Third World nations, many U.S. firms are turning to the Overseas Private Investment Corporation (OPIC) to help them reduce and/or insure against such risks. *Id.*

share of the burden of risk.

Although HIC certainly dealt with limited liability ventures in its usual course of business and was undoubtedly familiar with the implications of doing so, each company and each case must be evaluated within its own specific circumstances. It is not far-fetched to imagine that HIC did not consider NGPC to fall under the common definition of a domestic corporate entity. As discussed previously, the socio-economic climate of Nigeria places the "corporate entity" in a different context - one whose "veil" should be pierced more readily. The regard to be afforded a parastatal entity such as the NGPC should take into account the pervasive customs in Nigeria. Among such customs is the tendency of public decision makers at all levels to accept substantial economic considerations from foreign and local firms in exchange for the award of a contract, allocation of public housing or use rights, or non-enforcement of a law or regulation.[66] The operation of such "customs" and HIC's participation within such a climate lends support to the argument that HIC had reason to believe it was not dealing with a "corporation" in the American domestic context. Furthermore, the fact that the security provision was included in writing in the agreement strengthens this argument.[67]

The final prong of this expectations argument involves analyzing the concept of apparent authority. "Agency" and "apparent authority" are legal terms of art which must be considered carefully with a high degree of attention given to specific facts and the particular context. The presence of the political subdivision of Cross River was a crucial factor in *Hester*.[68] Although Nigeria never directly bestowed agency on Cross River through written or spoken word, the mere act of creating this political subdivision can be construed as a manifestation of authority. Furthermore, it was well-known by all the parties involved in the *Hester* case that NGPC was created and wholly owned by the Federal Republic of Nigeria. The *Hester* court's attempt to argue that the Nigerian government was "uninvolved" in the underlying agreement is misguided.[69] In a nation like Nigeria, the act of creating an agricul-

66. KOEHN, *supra* note 3, at 273.

67. Obviously, the Nigerian government never refuted the written agreement (until the litigation at hand) which they undoubtedly were familiar with due to their contact with the NGPC board. Although this does not make for conclusive law, it is somewhat dispositive of Nigeria's frame of mind at the time of the formation of Bansara Rice Farms, Ltd. This seems to represent a knowingly deceptive business practice.

68. *See supra* note 4.

69. *Hester*, 879 F.2d at 178-79.

tural corporation is so monumental[70] that the government cannot be completely removed from any subsequent transaction entered into by that instrumentality. Had the Fifth Circuit taken this broad perspective, they would have concluded that HIC was, in fact, an agent of Nigeria.

V. IMPLICATIONS OF THE *HESTER* RULING

This case presents an extremely relevant topic in light of the current economic development in the international arena. Numerous underdeveloped countries are in need of American capital to help finance the implementation of major projects and support the growth and development of their infrastructures. Implicit in these investment schemes is the participation of international development corporations such as HIC, which often enter into partnerships with enterprises closely linked to the host developing nations.[71]

However, the attitude reflected in the Fifth Circuit's opinion in *Hester* threatens to stagnate investment in these needy countries. This decision represents an inclination to transfer the domestic hesitation to "pierce the corporate veil" into the international market. This is significant because there is substantial room for a foreign host government to take advantage of overseas investors who are restrained by the application of their domestic legal principles. Basically, such investors are at the mercy of the potentially deceptive practices of developing countries and their governments.[72] The only way to avoid such problems and maintain an amicable foreign investment climate is to encourage the U.S. courts to approach the issue of "alter ego" status with an open mind and a view towards the idiosyncratic nature of "corporate" structures in host Third World countries.

In addition, the *Hester* opinion opens the door for underdeveloped

70. Due to an agricultural trade deficit, rising food prices and the bleak prospect of further dependence on Western nations for basic food supplies, Nigeria's Third National Development Plan (1975-1980) declared agricultural development as the country's highest priority. KOEHN, *supra* note 3, at 86.

71. The benefits of such mechanisms are obvious:

> [P]ublic enterprise, largely in the form of development corporations, has become an essential instrument of economic development in the economically backward countries which have insufficient private venture capital to develop the utilities and industries which are given priority in the national development plan. Not infrequently, these public development corporations. . . directly or through subsidiaries, enter into partnerships with national or foreign private enterprises, or they offer shares to the public.

FRIEDMAN, *supra* note 10, at 333, 334.

72. *See supra* notes 61-63 and 66-67 and accompanying text.

governments to practice these deceptive tactics. In essence, foreign governments will be able to maintain the shield of the corporate form so long as they avoid the appearance of controlling day-to-day operations as specified by *Hester*'s strict adherence to *Kal-Spice* and *Bancec*. Consequently, a government like the Federal Republic of Nigeria is practically rewarded (and protected) for continuing its system of illicit contacts, informal procedures, corruption and bribes so long as they avoid crossing the bright line of "direct control" as it is defined in American corporate law.

Although the Commercial Activity Exception[73] of FSIA purports to protect the rights of the American investors in such developing countries, it is limited in the sense that it cannot take effect if the foreign governments are allowed to hide behind their ill-conceived "corporate agencies."

VI. CONCLUSION

Hester International Corporation v. Federal Republic of Nigeria is not a landmark case by any stretch of the imagination. In fact, the Fifth Circuit acted well within its official bounds in finding that HIC's claim against Nigeria lacked jurisdiction based on the theory that NGPC was a separate juridical entity. In short, the opinion can be described as "legally sound". However, in light of our dynamic international market, the opinion serves to warn the legal community of the potential danger in retaining the traditional rules of the domestic corporate entity in the global context.

The U.S. judicial system must begin to recognize the inherent differences between domestic government-corporate relationships and those which exist in the foreign market place. Despite the judicial unwillingness to "pierce the corporate veil" in the domestic context, basic differences in this international arena warrant a different outcome.

To begin with, *Hester*'s strict reliance on the limited principles illustrated by *Bancec* and *Kal-Spice* preclude any consideration of the realities that exist in Third World countries. Such a close-minded attitude threatens the United States' role in assisting these developing countries. Furthermore, the *Hester* court ignores the equitable principles of law that surface in the international context. Basically, *Hester* enables Third World countries such as Nigeria to invoke American corporate principles only when it suits their needs. The third, and probably most egregious flaw in the *Hester* ruling pertains to the actual political-legal climate which prevails in Nigeria. Clearly, our domestic corporate

73. *See supra* note 8.

law has no application in such an informal and volatile atmosphere. Finally, the expectations which HIC developed as a result of Nigeria's business climate and the activities of the Nigerian government demand a reconsideration of the policies invoked by the *Hester* court.

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