

**ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK**

**COMMITTEE ON FEDERAL COURTS**

**TIERING AND THE FOREIGN SOVEREIGN IMMUNITIES ACT AFTER *DOLE***

## **Tiering and the Foreign Sovereign Immunities Act After Dole**

### **Committee on Federal Courts**

#### **I. Introduction**

The Foreign Sovereign Immunities Act (“FSIA”), 28 U.S.C. §§ 1602 et seq., provides the sole basis for jurisdiction in United States courts (federal and state) in actions against foreign states. Reflecting the sovereign immunity and U.S. foreign policy concerns that are raised whenever a foreign sovereign is haled into a U.S. court, the FSIA provides various protections to foreign states, including the presumption of immunity,<sup>1</sup> the right to remove an action to federal court,<sup>2</sup> and the right to a bench trial.<sup>3</sup> While the applicability of the FSIA is clear in suits involving foreign states themselves, the term “foreign state” also includes political subdivisions of states and agencies and instrumentalities of foreign states.<sup>4</sup> An “agency or instrumentality” in turn includes entities, like government-owned corporations, “a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof.”<sup>5</sup>

Until last year circuit courts were split on the question of whether an agency or instrumentality indirectly owned (i.e., through an intermediate corporate entity) by a foreign state qualified as a “foreign state” under the FSIA. In Dole Food Co. v. Patrickson, 123 S. Ct. 1655 (2003), the Supreme Court resolved the issue when it ruled that only agencies and instrumentalities directly owned by a foreign government are “foreign states” for purposes of the FSIA. Therefore, an oil company wholly owned by a foreign state would constitute a foreign

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<sup>1</sup> See 28 U.S.C. §§ 1604-1607.

<sup>2</sup> See 28 U.S.C. § 1441(d).

<sup>3</sup> See id.

<sup>4</sup> See 28 U.S.C. § 1603(a).

<sup>5</sup> 28 U.S.C. § 1603(b)(2).

state, but the oil company's subsidiaries, even if wholly owned, would not. The Dole majority noted that if unrestricted tiering were permitted, a distant subsidiary, with only nominal ties to a foreign sovereign, might be given foreign state status under the FSIA. Justice Breyer, joined by Justice O'Connor, dissented, arguing that the majority's decision would arbitrarily grant foreign state protection to a state-owned corporate parent but deny it to its wholly-owned subsidiary.

The Dole decision went against the weight of circuit authority and has since been criticized. Many foreign governments structure important state-owned enterprises as government-owned corporations, which, in turn, have multiple layers of subsidiaries. Under Dole, only the top tier corporation owned directly by the foreign government is protected by the FSIA—its corporate offspring are not. A preferable alternative would be based on the foreign state's beneficial ownership of the tiered entity—regardless of whether such ownership is direct or indirect. On the one hand, this approach acknowledges that beneficial ownership, rather than direct ownership, is a better test for determining the extent of a foreign sovereign's interest in a particular enterprise. On the other hand, by requiring majority beneficial interest, the approach avoids the dangers of “infinite looping,” whereby an entity with no meaningful relationship to the foreign sovereign might enjoy immunity.

The problem posed by Dole is far from theoretical—foreign governments, no less than private corporations, are increasingly relying on complex corporate forms to structure important interests. Under Dole, these corporations, no matter how important to the foreign government, will not enjoy the protections of the FSIA unless they are directly held by the state itself. We therefore propose that Congress amend section 1603(b) of the FSIA to implement a beneficial interest analysis to define whether a state-owned corporation constitutes a “foreign state.” Such a test would not look at the number of tiers, but at the aggregate beneficial

ownership interest of the foreign government in the enterprise. Under such an analysis, a wholly-owned subsidiary of a state-owned enterprise would constitute a “foreign state” under the FSIA. In the case of a 51-percent owned subsidiary of a 51-percent state-owned enterprise, the beneficial interest would be just over 25 percent. Consequently, the entity in question would not constitute a “foreign state” under the FSIA.

## **II. Background**

### **A. Foreign Sovereign Immunity Prior to the FSIA**

In The Schooner Exchange v. McFaddon, 11 U.S. 116 (1812), Justice Marshall articulated the doctrine of foreign sovereign immunity, opining that:

One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.<sup>6</sup>

In the years following The Schooner Exchange, the Supreme Court embraced a broad view of foreign sovereign immunity, including where the sovereign’s activities were purely commercial.<sup>7</sup>

The expansive conception of foreign sovereign immunity was jettisoned in 1952 in favor of what became known as the “restrictive theory.” In that year, the Department of State issued the so-called “Tate Letter” which narrowed the scope of foreign sovereign immunity:

[T]he widespread and increasing practice on the part of governments of engaging in commercial activities makes necessary

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<sup>6</sup> 11 U.S. at 137. For an overview of foreign sovereign immunity upon which this section is based, see Andrew Loewenstein, The Foreign Sovereign Immunities Act and Corporate Subsidies of Agencies or Instrumentalities of Foreign States, 19 Berkeley J. Int’l L. 350, 353-56 (2001).

<sup>7</sup> See, e.g., Berizzi Bros., Co. v. The Pesaro, 271 U.S. 562 (1926) (denying jurisdiction over a state-owned commercial vessel because it was used for so-called public purposes including advancing trade and providing funds for the national treasury).

a practice which will enable persons doing business with them to have their rights determined in the courts. For these reasons, it will hereafter be the Department's policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity.<sup>8</sup>

Under the restrictive theory, foreign governments were presumed to enjoy immunity. However, such immunity could be countered by a showing that the relevant government activity was commercial in nature.

In light of judicial deference to the Executive Branch in matters touching upon foreign relations, the Department of State's ad hoc decision as to whether a foreign sovereign would enjoy immunity or not was frequently determinative.<sup>9</sup> With substantial interests on the line, foreign governments sometimes pressured the Department of State into recommending sovereign immunity even where the facts of the case did not so dictate.<sup>10</sup>

#### B. The Foreign Sovereign Immunities Act

In order to de-politicize the determination of whether a foreign sovereign would enjoy immunity in a given case, and to avoid the case-by-case and sometimes contradictory decision-making of the Department of State, Congress enacted the FSIA in 1976.<sup>11</sup> The FSIA codified the rules for determining sovereign immunity and effectively shifted the immunity determination from the Executive Branch to the Judicial Branch so as to “serve the interests of justice” and “protect the rights of both foreign states and litigants in United States courts.”<sup>12</sup>

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<sup>8</sup> Letter of Jack B. Tate, Acting Legal Adviser to Philip B. Perlman, Deputy Attorney General, May 19, 1952 (quoted in Loewenstein, supra note 6, at 355).

<sup>9</sup> See Loewenstein, at 355-56.

<sup>10</sup> See id.

<sup>11</sup> See, e.g., Jane H. Griggs, Note, International Law—The Foreign Sovereign Immunities Act: Do Tiered Corporate Subsidiaries Constitute Foreign States?, 20 W. New. Eng. L. Rev. 387, 395-96 (1998).

<sup>12</sup> 28 U.S.C. § 1602.

In addition to the FSIA, Congress enacted statutes governing jurisdiction<sup>13</sup> and removability<sup>14</sup> in actions brought against foreign states. Districts courts therefore have original jurisdiction over cases against foreign states without regard to the amount in controversy.<sup>15</sup> Foreign states may also remove actions against them in state court to federal court, without obtaining the consent of other defendants.<sup>16</sup> A foreign state is not required to submit to a trial by jury.<sup>17</sup> The purpose of expanding the federal courts' role in cases involving foreign sovereigns was to promote "uniformity in decision," which was deemed desirable "since a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences."<sup>18</sup> Similarly, the purpose of permitting cases involving foreign states to be tried by the court instead of a jury was "to promote a uniformity in decision where foreign governments are involved."<sup>19</sup>

The determination of whether an entity is or is not a foreign state is thus critical.

The FSIA defines a "foreign state" as follows:

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity--

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<sup>13</sup> See 28 U.S.C. § 1331.

<sup>14</sup> See 28 U.S.C. § 1441(d).

<sup>15</sup> See id.

<sup>16</sup> See id. Cf. Nolan v. Boeing Co., 919 F.2d 1058, 1064-65 (5th Cir. 1990) (28 U.S.C. § 1441(d) authorizes a foreign state to remove an action regardless of the citizenship of the remaining parties and without their consent), cert. denied, 499 U.S. 962 (1991).

<sup>17</sup> See 28 U.S.C. § 1441(d).

<sup>18</sup> H.R. Rep. No. 94-1487, at 13 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6611. The lack of an amount in controversy requirement was also designed to "encourage the bringing of actions against foreign states in Federal courts."

<sup>19</sup> Id.

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

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

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.<sup>20</sup>

The legislative history of the FSIA suggests that the term “agency or instrumentality” was intended to be read broadly:

[E]ntities which meet the definition of an “agency or instrumentality of a foreign state” could assume a variety of forms, including a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, an export association, a governmental procurement agency or a department or ministry which acts and is suable in its own name.<sup>21</sup>

In light of the statutory language and legislative history, the question arose whether the definition of an “agency or instrumentality” extended only to entities that are directly majority state-owned (i.e., “first-tier”) or also to those that are majority owned by an entity that is itself majority owned by a state (i.e., “second-tier” and below). This ambiguity became known as the “tiering” problem.

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<sup>20</sup> 28 U.S.C. § 1603.

<sup>21</sup> H.R. Rep. No. 94-1487, 94th Cong. 2d Sess. (1976), reprinted at 1976 U.S.C.C.A.N. 6604, 6614.

### III. Dole Food Co. v. Patrickson

In Dole Food Co. v. Patrickson, the Supreme Court held that the FSIA does not permit tiering.<sup>22</sup> In so deciding, the Court sided with the minority of circuits that had rejected tiering.

#### A. Pre-Dole Circuit Split

During the first twenty years of the FSIA, the majority of circuit courts, as well as other courts, held that tiered corporations were foreign states and thus entitled to the protections of the statute.<sup>23</sup> The Seventh Circuit held that the FSIA applied to an entity indirectly owned by the Italian and French governments, relying on the FSIA's legislative history and "crystal clear" congressional intent that tiering be permitted.<sup>24</sup> And the Fifth Circuit, citing the In re Air Crash Disaster case, held that because the "plain language of the statute...draws no distinction between direct and indirect ownership," tiering was permitted.<sup>25</sup> Various district courts followed the reasoning of the tiering decisions.<sup>26</sup>

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<sup>22</sup> 123 S.Ct. 1655 (2003).

<sup>23</sup> See Griggs, *supra* note 11, at 403-05. The Seventh Circuit noted that "nearly all courts which have confronted indirect or 'tiered' ownership situations have considered majority state-owned corporations to be 'agencies or instrumentalities of foreign states' under the FSIA, even where the state ownership was indirect." In re Air Crash Disaster Near Roselawn, Ind. on October 31, 1994, 96 F.3d 932, 939 (7th Cir. 1996). Circuit courts ruling in favor of tiering included the Fifth, Seventh, D.C., and, as discussed *infra*, possibly the Second. See Delgado v. Shell Oil Co., 231 F.3d 165 (5th Cir. 2000), *cert. denied*, 532 U.S. 972 (2001); In re Air Crash Disaster; Gilson v. Republic of Ireland, 682 F.2d 1022, 1026 (D.C. Cir. 1982) ("clear" that a subsidiary corporation indirectly owned by Ireland was a foreign state under the FSIA). See also Gould, Inc. v. Pechiney Ugine Kuhlmann, 853 F.2d 445, 447 (6th Cir. 1988) (applying FSIA to entity indirectly majority owned by French government).

<sup>24</sup> In re Air Crash Disaster, 96 F.3d at 940.

<sup>25</sup> Delgado, 231 F.3d at 176.

<sup>26</sup> See, e.g., In re Clearsky Shipping Corp., No. Civ. A. 96-4099, 1999 WL 1021825, at \*4 -\*5 (E.D. La. Nov. 8, 1999) (following In re Air Crash Disaster prior to the Fifth Circuit's Delgado decision); Millicom Int'l Cellular, S.A. v. Republic of Costa Rica, 995 F. Supp. 14, 18 n.5 (D.D.C. 1998) (relying on Gilson and In re Air Crash Disaster).



The Ninth Circuit was the one circuit court to reject tiering.<sup>27</sup> In Gates v. Victor Fine Foods,<sup>28</sup> California-based Golden Gate Fresh Foods abruptly shut down its pork production plant, fired all of its workers, and terminated its benefits plan. Golden Gate’s workers filed suit, alleging violations of several statutes. Golden Gate was owned by Fletcher Fine Foods, which in turn was owned by the Alberta Pork Producers Development Corporation, an entity created by the Canadian government.<sup>29</sup> The court held that Alberta Pork was an agency or instrumentality of Canada. However, it held that Fletcher Fine Foods was not. This determination was based on the court’s finding that a contrary result would render the term “or political subdivision thereof” in section 1603(b)(2) superfluous. It concluded that Fletcher Fine Foods was owned by an agency and instrumentality but that it did not qualify as an agency or instrumentality in its own right. The Ninth Circuit also expressed concern that permitting entities owned by agencies or instrumentalities to qualify as agencies or instrumentalities “would provide potential immunity for every subsidiary in a corporate chain, no matter how far down the line, so long as the first corporation is an organ of the foreign state or political subdivision or has a majority of its shares owned by the foreign state or political subdivision.”<sup>30</sup> Gates was followed by various district courts.<sup>31</sup>

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<sup>27</sup> In Federal Insurance Co. v. Richard I. Rubin & Co., 12 F3d 1270, 1285 n.12 (3d Cir. 1993), cert. denied, 511 U.S. 1107 (1994), a single judge noted in dictum that tiering might be prohibited by the FSIA.

<sup>28</sup> 54 F.3d 1457 (9th Cir.), cert. denied, 516 U.S. 869 (1995).

<sup>29</sup> See id. at 1459.

<sup>30</sup> Id. at 1462.

<sup>31</sup> See, e.g., Dewhurst v. Telenor Invest AS, 83 F. Supp. 2d 577, 594 (D. Md. 2000); Martinez v. Dow Chem. Co., Nos. Civ. A. 95-3212, 95-3214, 1996 WL 502461, at \*2 (E.D. La. Sept. 4, 1996). See also S. Ocean Seafood Co. v. Holt Cargo Sys., Inc., No. Civ. A. 96-5217, 1997 WL 539763, at \*5 n.9 (E.D. Pa. Aug. 11, 1997) (rejecting tiering based on dictum in Federal Ins. Co.).

New York courts struggled with the tiering question. In O’Connell Machinery Co. v. M.V. “Americana”,<sup>32</sup> the Second Circuit examined whether the entity Italia Di Navigazione, S.p.A. (doing business as the “Italian Line”) was a “foreign state” for purposes of the FSIA. The majority of the Italian Line’s shares were owned by the Società Finanziaria Marittima, which in turn was under the direct control of the Istituto per la Ricostruzione Industriale, a public financial entity that coordinates the management of commercial enterprises with the Italian government.<sup>33</sup> The Second Circuit Court of Appeals upheld the district court’s holding that the Italian Line qualified as an agency or instrumentality of the Republic of Italy. It noted that “[t]he fact that the Italian Government saw fit to double-tier its administrative agencies did not compel a holding to the contrary.”<sup>34</sup> In reaching this conclusion, the Second Circuit did not parse the language of 1603(b), with the result that district courts disagreed whether the Court had definitively held tiering to be permissible, although the majority of reported Southern District decisions on the question held in favor of tiering.<sup>35</sup>

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<sup>32</sup> 734 F.2d 115 (2d Cir.), cert. denied, 469 U.S. 1086 (1984).

<sup>33</sup> See id. at 116.

<sup>34</sup> Id.

<sup>35</sup> See Parex Bank v. Russian Savs. Bank, 81 F. Supp. 2d 506, 507 (S.D.N.Y. 2000) (citing O’Connell as “controlling authority” permitting tiering). See also Filler v. Hanvit Bank, 247 F. Supp. 2d 425, 428 (S.D.N.Y. 2003) (permitting tiering without mentioning O’Connell), vacated in light of Dole, Nos. 01 Civ. 9510, 01 Civ. 8251 (MGC), 2003 WL 2179978 (S.D.N.Y. July 25, 2003); Musopole v. South African Airways (Pty.) Ltd., 172 F. Supp. 2d 443, 445-47 (S.D.N.Y. 2001) (same); Filetech S.A. v. France Telecom, S.A., 212 F. Supp. 2d 183, 190 (S.D.N.Y. 2001) (same); Lehman Bros. Comm. Corp. v. Minmetals Int’l Non-Ferrous Metals Trading Co., 169 F. Supp. 2d 186, 189-92 (S.D.N.Y. 2001) (same); Daly v. Castro Llanes, 30 F. Supp. 2d 407, 415-17 (S.D.N.Y. 1998) (tacitly permitting tiering). But see In re Ski Train Fire in Kaprun, Austria on November 11, 2000, 198 F. Supp. 2d 420, 424-27 (S.D.N.Y. 2002), (distinguishing O’Connell on the grounds that in O’Connell the Italian Line was owned by an organ of the Italian government rather than by an agency or instrumentality); Hyatt Corp. v. Stanton, 945 F. Supp. 675, 684 (S.D.N.Y. 1996) (rejecting tiering and holding that O’Connell is “limited to its facts and should not be applied more broadly”); Gardiner Stone Hunter Int’l v. Iberia Lineas Aereas de Espana, S.A., 896 F. Supp. 125, 130 (S.D.N.Y. 1995) (rejecting tiering without mentioning O’Connell).

B. The Dole Decision

Dole, like the Fifth Circuit’s Delgado decision, concerned Israeli chemical companies that were alleged to have exposed workers to a harmful pesticide. Unlike in Delgado, however, the precise ownership interest at each tier was not specified in the Court’s opinion, although the decision makes clear that the chemical companies were several tiers removed from direct Israeli ownership: “Israel wholly owned a company called Israeli Chemicals, Ltd.; which owned a majority of shares in another company called Dead Sea Works, Ltd.; which owned a majority of shares in Dead Sea Bromine Co., Ltd.; which owned a majority of shares in Bromine Compounds, Ltd..”<sup>36</sup>

Justice Kennedy, writing for the majority, framed the question before the Court as “whether Israel owned shares in the Dead Sea Companies as a matter of corporate law, irrespective of whether Israel could be said to have owned the Dead Sea Companies in everyday parlance.” The majority’s rubric was therefore formal corporate structure (“owned shares”) as opposed to the substantive ownership status (ownership in “everyday parlance”) of the entities in question.

The Court noted that a “basic tenet of American corporate law is that the corporation and its shareholders are distinct entities” and that “[t]he fact that the shareholder is a foreign state does not change the analysis.” Given that corporate veil piercing is “the rare exception” to be applied only in “exceptional circumstances,” Israel’s control of indirectly-owned corporations was irrelevant, because “[c]ontrol and ownership...are distinct concepts.”<sup>37</sup>

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<sup>36</sup> Dole, 123 S.Ct. at 1660.

<sup>37</sup> Id.

Consequently, the Court concluded that “only direct ownership of a majority of shares by the foreign state satisfies the statutory requirement [of the FSIA].”<sup>38</sup>

Justice Breyer, joined by Justice O’Connor, dissented. Justice Breyer found the language of the FSIA to be ambiguous at best.<sup>39</sup> He noted, for example, that the inclusion in section 1603(b)(2) of the term “‘other ownership interest’ might, or might not, refer to the kind of majority-ownership interest that arises when one owns the shares of a parent that, in turn, owns a subsidiary.”<sup>40</sup> Justice Breyer therefore turned to the underlying purpose of the FSIA and concluded that it was intended to give federal courts broad jurisdiction over foreign states. He rhetorically asked, “Given these purposes, what might lead Congress to grant protection to a Foreign Nation acting through a Corporate Parent but deny the same protection to the Foreign Nation acting through, for example, a wholly owned Corporate Subsidiary?”<sup>41</sup> The answer, he maintained was that “nothing at all would lead Congress to make such a distinction.”<sup>42</sup> Breyer argued that the majority’s reading of the FSIA catapulted form over substance, and noted that foreign states frequently employ complicated corporate structures to control key state-owned industries.

#### **IV. Criticism of Dole**

Dole is susceptible to criticism on a variety of grounds. Textually, it is unclear how the Court’s decision can be reconciled with FSIA section 1603(a), which defines “foreign state” to include agencies and instrumentalities of a foreign state. If that definition is applied in section 1603(b)(2), an instrumentality would include a subsidiary of an instrumentality—a

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<sup>38</sup> Id. at 1660 (emphasis added).

<sup>39</sup> See id. at 1664-65.

<sup>40</sup> Id. at 1664.

<sup>41</sup> Id. at 1666.

second-tier corporation. Dole also arguably reads section 1603(b)(2)’s reference to “other ownership interest” out of the statute.

Moreover, Dole’s bright-line rule of direct ownership, while making the determination of agency or instrumentality status simple, often leads to arbitrary or incongruous results. As noted supra, one of the purposes of the FSIA was to promote uniformity of treatment of foreign states. With the exception of Gates and a handful of other cases, “[m]ost judges [have] felt that American courts should not concern themselves with how a foreign government chooses to structure its agencies or instrumentalities.”<sup>43</sup> Indeed, “[w]hy should it matter to an American court whether, for example, Mexico chooses to exercise its state monopoly over the oil industry through a single corporation (as Mexico did before 1982), or through a holding company and four operating subsidiaries (as Mexico did after 1982)?”<sup>44</sup>

One of the implicit concerns in Dole (and one explicitly mentioned in Gates<sup>45</sup>) was that permitting tiering might bring under the FSIA corporate entities many tiers down, with no meaningful connection to a foreign state. While Dole answers this concern, it creates another; namely, that important state-owned companies will not be covered by the FSIA, despite the reality that litigation involving such companies may substantially impact foreign state interests. For example, under Dole, a 51% state-owned enterprise would be covered by the statute, while the wholly-owned subsidiary of a wholly state-owned company would not. Whether the foreign state has a greater interest in a first-tier corporation that is only majority-owned than in a second-tier corporation that is wholly-owned is at least open to question. Indeed, prior to Dole an

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<sup>42</sup> Id. (emphasis in original).

<sup>43</sup> Joseph W. Dellapenna, Refining the Foreign Sovereign Immunities Act, 9 Willamette J. Int’l L. & Disp. Resol. 57, 89 (2001).

<sup>44</sup> Id. at 89.

<sup>45</sup> See Gates, 54 F.3d at 1462.

A.B.A. Working Group strongly endorsed presumptive sovereign immunity for corporations indirectly majority owned by foreign states, because some states utilize a tiered corporate structure “to manage and control important areas of national interest, such as natural resources.”<sup>46</sup> The Working Group added that “[t]he strength of a foreign state’s sovereign interests in an area does not necessarily dissipate when it employs more complicated legal structures resembling those used by modern private businesses.”<sup>47</sup> Yet Dole forbids such analysis in favor of a rigid black and white rule against tiering.

Finally, defense attorneys contend that Dole will permit plaintiffs to forum shop and sue subsidiaries of state-owned corporations in the most pro-plaintiff state courts.<sup>48</sup> The availability of more favorable fora will in turn increase the number of suits filed against foreign sovereigns.<sup>49</sup>

## **V. Towards a Neutral Principle – Beneficial Ownership**

The Dole Court was rightly concerned that if unrestricted tiering were permitted, an entity with only distant ties to a foreign sovereign might be considered a “foreign state” under the FSIA.<sup>50</sup> However, Dole’s mechanical rule paints the reality of foreign sovereign-owned entities with too broad a brush. While a foreign sovereign’s interest in an entity might diminish after the first tier, this is not necessarily so. A better test, which we propose here, would be to

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<sup>46</sup> Working Group of the A.B.A., “Reforming the Foreign Sovereign Immunities Act,” 40 Colum. J. Transnat’l L. 489, 523 (2002).

<sup>47</sup> Id.

<sup>48</sup> See Donald Falk, Partner at Mayer, Brown, Rowe & Maw, quoted in Supreme Court Says Foreign Banana Workers’ Suit Belongs in State Court, Andrews Toxic Chemicals Litigation Reporter, May 1, 2003.

<sup>49</sup> See id.

<sup>50</sup> For example, under a regime of unrestricted tiering, a sixth-level tiered entity would be considered a “foreign state” as long as it (and every other higher tier) were majority-owned by the tier above it.

examine the foreign sovereign's beneficial interest in the entity in question, without regard to the number of tiers involved. Where the beneficial interest of a foreign sovereign is greater than half, the entity would be considered a "foreign state" for FSIA purposes. Where the beneficial interest is 50% or less, the entity would not be considered a "foreign state" for FSIA purposes.

Accordingly, we propose amending section 1603(b)(2) as follows:

(b) An "agency or instrumentality of a foreign state" means any entity--

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

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

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

Thus, if State A owns 100 percent of an oil holding company that in turn owns 100 percent of several subsidiaries—the subsidiaries would qualify as instrumentalities because the underlying state interest is still 100 percent—under Dole, the subsidiaries would not be considered instrumentalities; under the proposed beneficial ownership test they would.

Alternatively, suppose that State B owns 99 percent of a transportation holding company that in turn owns 51 percent of an airline. Under both Dole and a beneficial interest test, the holding company would be considered an agency or instrumentality. However, under Dole, the airline would not be considered an instrumentality, because it is not directly owned by the state. Under a beneficial ownership test, the airline would be an instrumentality because the state interest is 99 percent of 51 percent—50.49 percent.

Suppose, however, that State B owns 51 percent of a holding company which in turn owns 51 percent of an airline. Under Dole, the airline would not be considered an instrumentality because it is not directly majority-owned by State B. Under a beneficial ownership test, the airline would also not be considered an instrumentality because the beneficial interest in the state is 51 percent of 51 percent—26.01 percent.

Judge Kaplan proposed such a beneficial interest test in Musopole v. South African Airways (Pty.) Ltd.<sup>51</sup> The entity in question in that case, South African Airways, was 80% owned by Transnet Ltd., which in turn was wholly owned by the South African Ministry for Public Enterprises. He noted that “there can be little doubt that the interests of the foreign sovereign are implicated to an extent sufficient to bring the case within the intended ambit of the [FSIA].”<sup>52</sup> Responding to the plaintiff’s argument that permitting tiering would permit “infinite looping,” (i.e., that nth level tiers, with no meaningful link to a sovereign state, could potentially be immune under the FSIA), Judge Kaplan noted that the FSIA could be read to embrace a beneficial interest analysis:

One might well read the statute, for example, as bringing second- and lower-tier subsidiaries of a foreign nation within the definition of “foreign state” provided that the foreign government beneficially owns a majority of the shares of the entity in question. This would bring within the statute, for example, an nth-tier subsidiary, all of the shares of which were held by a company at the bottom of a long chain of foreign government subsidiaries, all of the shares of each of which was held by the company above it, all the way up the chain to the foreign government itself, but exclude from its protection [a subsidiary 51% owned by a parent company in turn 51% owned by a foreign government].<sup>53</sup>

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<sup>51</sup> 172 F. Supp. 2d 443 (S.D.N.Y. 2001).

<sup>52</sup> Id. at 447.

<sup>53</sup> Id. (emphasis in original).



A beneficial interest test, Judge Kaplan added, “would be entirely consistent with the overall policy of the [FSIA, and] would have the added virtue of giving effect to the substance of a foreign government’s interest rather than to the form of ownership.”<sup>54</sup>

Ultimate beneficial ownership is also what appears to have drawn the Seventh Circuit’s decision in In re Air Crash Disaster. While the company at issue in that case, Avions de Transport Regional, G.I.E. (“ATR”), was several tiers removed from its sovereign parents, Italy and France, the court ruled that through intermediaries “France and Italy retain indirect ownership of approximately 75% of ATR.”<sup>55</sup> What was critical to the Seventh Circuit’s analysis was the states’ majority beneficial ownership in the enterprise, not how the states chose to structure that ownership interest.

Indeed, it was precisely a question of the structure of a majority beneficial ownership that led the Republic of Ireland to submit an amicus brief in the Dole case. In 1985, Ireland purchased insolvent insurance company ICI. Due to certain requirements of Ireland’s law, and based on the government’s belief that speed and initial secrecy were essential to the acquisition, Ireland purchased ICI (later renamed Icarom PLC) through a wholly-owned shell corporation “whose only function is to act as [Ireland’s] nominee in holding bare legal title to Icarom’s stock.”<sup>56</sup> Under Dole, Icarom would not qualify as an instrumentality, notwithstanding Ireland’s avowed state interest in the company. Under a beneficial interest test, both the shell corporation and Icarom would enjoy instrumentality status.<sup>57</sup>

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<sup>54</sup> Id.

<sup>55</sup> 96 F.3d at 936.

<sup>56</sup> Amicus Brief of the Republic of Ireland and Icarom PLC, Dole Food Co. v. Patrickson, 123 S. Ct. 1655 (2002), available at 2002 WL 1987396, at \*\*5-6.

<sup>57</sup> While a detailed examination of sovereign immunity law in other nations is beyond the scope of this Report, it is important to note that this Report’s proposal would not produce a marked difference in U.S. sovereign immunity law from that of other nations. This proposal would not

## VI. Conclusion

While Dole eliminated the ambiguity of FSIA's section defining a "foreign state," it introduced a host of new difficulties. Most significant among these is that Dole's rigid rule requiring the direct ownership of agencies and instrumentalities does not comport with reality. Numerous foreign sovereigns utilize complicated corporate structures to manage important state-owned industries such as oil extraction or air transport. In placing a premium on corporate structure at the expense of substance, Dole ignores a foreign state's interest in an enterprise unless the relationship is structured as one of direct ownership.

A better solution would be to amend the FSIA so that entities that are majority beneficially owned by a foreign sovereign are considered "foreign states" under the FSIA and thus entitled to presumptive immunity. Such a solution would perfectly balance the concerns of both sides in the tiering debate. On a theoretical level, the approach recognizes that beneficial ownership is a better indicator of state interest than mere corporate structure. On a practical level, the approach acknowledges that many foreign sovereigns structure important state-owned corporate interests as subsidiaries of one or more parent companies. Finally, a beneficial ownership analysis would be truer to the original aims of the FSIA—to promote uniformity in the immunity determination by channeling cases involving foreign states to the federal courts.

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result in second tier entities engaged in commercial activities being immune from jurisdiction to suit in the U.S. Rather, it would afford such entities relevant FSIA protections, such as removal rights and the right to a bench trial. Of course, in European civil law countries, an agency or instrumentality would not be subject to jury trial (since the civil law system does not have civil jury trials). And while there is a dearth of case law in the subject, European states, in applying principles of customary international law as well as the European Convention on State Immunity, May 16, 1972, C.E.T.S. no. 074, art. 27, would probably adjudge even indirectly-held entities immune so long as these were found to perform sovereign "functions."

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