Rescuing Dole: Limiting the Intrusion of the Federal Common Law of Foreign Relations into the Foreign Sovereign Immunities Act

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INTRODUCTION

With the proliferation of globalization, and the exportation of industrialization from the United States and other developed nations, catastrophic disasters causing the deaths of thousands or tens of thousands have occurred throughout the world. Often, these disasters spawn litigation that spans the globe and drags on for years, if not decades. In such litigation, the courts of the United States have been a favored fighting ground for injured foreign nationals seeking compensation and justice. However, because "[f]ederal courts are courts of limited jurisdiction," they have struggled to determine when their jurisdiction is properly invoked in these cases. In particular, courts have struggled to respond to a favored litigation strategy of plaintiffs, who file in the state court where a defendant is domiciled, thereby destroying the potential for defendants to remove to federal court based on diversity. In these circumstances, defendants invariably seek to remove the cases to federal courts by demonstrating federal question jurisdiction in order to avail themselves of the federal courts' more lenient standards for dismissing cases based on the doctrine of *forum non conveniens.*

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3. Mulligan, *supra* note 2. Under the definition advanced by the U.S. Supreme Court, “[t]he principle of *forum non conveniens* is simply that a court may resist imposition upon its jurisdiction
particular, defendants will often assert federal question jurisdiction based on the Foreign Sovereign Immunities Act (FSIA) and the federal common law of foreign relations. As federal courts have varied widely in their analyses of this type of jurisdiction, details regarding the corporate structure of the defendants or the foreign government itself may have a major impact on the outcome of a case.

Consider the release of a toxic airborne chemical from an industrial plant associated with a United States corporation, perhaps in the Middle East or in Asia. Due to the nature of the chemical and its release, tens of thousands of people in the immediate vicinity are killed, and hundreds of thousands are injured. In the aftermath of the disaster, injured persons and their relatives bring tort actions against the corporation in the United States, filed in the state courts of its state of incorporation. In response to these actions, the defendant corporation seeks to remove the cases to federal court with the ultimate hope of obtaining a forum non conveniens dismissal.

Because the defendant corporation cannot remove the case to federal court based on diversity jurisdiction, access to the federal court will depend on a multitude of factors. Under the FSIA, as interpreted by the Supreme Court in Dole Food Co. v. Patricson, the defendant corporation will be allowed to remove only if a majority of its shares are directly owned by a foreign government. Therefore, if the foreign sovereign is only a minority owner, or the owner of a parent corporation which in turn owns some part, even the majority, of the defendant corporation, removal under the FSIA will not be allowed. So, the defendant corporation must also attempt to remove the case based on the federal common law of foreign relations.

Suppose further that the industrial plant at issue produces a product vital to the economy of the foreign nation, as does an oil refinery. Under current law, if the case is filed in the Fifth Circuit or the Eleventh Circuit, it may properly be removed based on the economic interests of that

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5. Patrickson v. Dole Food Co., 251 F.3d 795, 803 (9th Cir. 2001).
6. This hypothetical scenario is modeled after the infamous 1984 release of methyl isocyanate from a Union Carbide plant in Bhopal, India, which ultimately resulted in approximately 20,000 deaths and over 200,000 injuries. See In re Union Carbide Corp. Gas Plant Disaster at Bhopal, 634 F. Supp. 842, 844 (S.D.N.Y. 1986) (discussing the factual background of the Bhopal release).
7. See Freeman v. Bee Mach. Co., 319 U.S. 448, 452 n.7 (1943) (stating that “the defendant must be a non-resident of the state in which suit is brought before he can remove to the federal court on the ground of diversity of citizenship”).
9. Id.
foreign sovereign. However, if it is filed in the Ninth Circuit, the case may only be removed if it requires the federal courts to rule on the direct actions of the foreign sovereign. This circuit split creates major implications for the outcome of this type of international litigation. Further, the approach adopted by the Fifth and Eleventh Circuits creates an exception that swallows the Supreme Court holding in *Dole*. The direct prohibition on federal question jurisdiction in tiered ownership situations is essentially rendered meaningless if federal courts can reanalyze the relationship between the foreign sovereign and the defendant corporation under the federal common law of foreign relations and base jurisdiction on "substantial participation" or "vital economic interests," after finding that jurisdiction does not exist under the FSIA. However, because the Supreme Court has also endorsed federal question jurisdiction based on the federal common law of foreign relations, this doctrine must remain valid, while at the same time keeping defendants and lower courts from eviscerating *Dole*.

This Note will attempt to create a framework to eliminate or minimize the exception to the holding in *Dole Food Co. v. Patrickson* created by the federal common law of foreign relations. The Supreme Court has held that ownership by a foreign government must be direct in order for an instrumentality to qualify for federal question jurisdiction under the FSIA. Therefore, Part I will introduce and define the loophole that federal question jurisdiction based on the federal common law of foreign relations creates within *Dole's* holding. Part II will discuss the evolution of federal question jurisdiction based on the FSIA, and the standards the Court created in *Dole*. Part III will discuss the current status of the federal common law of foreign relations, and how it affects the Court's holding in *Dole*. Part IV will propose a solution that closes the loophole created by the federal common law of foreign relations.

I. THE FOREIGN SOVEREIGN IMMUNITIES ACT

It is a central tenet of international law and international relations that a sovereign government cannot be made to answer for its actions in the courts of a foreign nation. This is because "[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself." Further, if the

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10. Id.
11. Torres v. S. Peru Copper Corp., 113 F.3d 540 (5th Cir. 1997).
14. "[U]pon the principle of comity foreign sovereigns and their public property are held not to be amenable to suit in our courts without their consent." Guaranty Trust Co. v. United States, 304 U.S. 126, 134 (1938).
actions of one nation were subject to review in the courts of another, there would necessarily be an assertion of power by the reviewing nation and a diminishing of the sovereign power of the other.\textsuperscript{16} "All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself."\textsuperscript{17}

For most of its history, the United States modeled the treatment of foreign governments within its courts on this extremely limited approach.\textsuperscript{18} Thus, "[f]or more than a century and a half, the United States generally granted foreign sovereigns complete immunity from suit in the courts of this country."\textsuperscript{19} However, this foreign sovereign immunity has been recognized as "a matter of grace and comity on the part of the United States," via the political branches, rather than a constitutional requirement.\textsuperscript{20} So, in making determinations of foreign immunity, the judiciary has consistently deferred to the positions taken by the political branches, in particular the executive, on whether to find jurisdiction over both foreign sovereigns and their instrumentalities.\textsuperscript{21}

In 1952, the executive branch adopted the "restrictive theory" of foreign sovereign immunity, wherein a foreign sovereign will not have immunity in the courts of the United States for its commercial actions.\textsuperscript{22} "Under this theory, immunity is confined to suits involving the foreign sovereign's public acts, and does not extend to cases arising out of a foreign state's strictly commercial acts."\textsuperscript{23} However, application of this theory proved difficult for courts, as it was not statutorily defined, and the courts were forced to rely on "suggestions of immunity" from the executive branch.\textsuperscript{24} This practice led to the assertion of diplomatic pressures by foreign governments, and, "[o]n occasion, political considerations led to suggestions of immunity in cases where immunity would not have been available under the restrictive theory."\textsuperscript{25} Further, in cases where the executive branch did not make specific findings or recommendations, courts were forced to interpret past suggestions by that branch as precedent in determining when to allow foreign sovereign immunity.\textsuperscript{26} "Thus, sovereign immunity determinations were made in two

\textsuperscript{16} Id.
\textsuperscript{17} Id.
\textsuperscript{19} Id.
\textsuperscript{20} Id.
\textsuperscript{21} Id.
\textsuperscript{22} Id. at 486-87.
\textsuperscript{23} Id. at 487. This position was adopted by the State Department in a letter from Jack B. Tate, Acting Legal Adviser to the Department of State, to Acting Attorney General Philip B. Perlman, dated May 19, 1952, which is reprinted in 26 Dept. of State Bull. 984-85 (1952) and in Alfred Dunhill of London, Inc. v. Cuba, 425 U.S. 682, 711 (1976).
\textsuperscript{24} Verlinden, 461 U.S. at 487.
\textsuperscript{25} Id.
\textsuperscript{26} Id.
different branches, subject to a variety of factors, sometimes including diplomatic considerations. Not surprisingly, the governing standards were neither clear nor uniformly applied."  

In 1976, Congress enacted the FSIA to remedy this situation. The purpose of the FSIA is to "free the Government from . . . case-by-case diplomatic pressures," clarify standards courts are to apply in determining sovereign immunity, and assure litigants of procedural and substantive due process. "To accomplish these objectives, the [FSIA] contains a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities," as well as exceptions to that immunity. 

Section 1604 of the FSIA provides that "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." These stated exceptions include actions in which the foreign state has waived its immunity, either explicitly or impliedly, and actions that are based upon commercial activities that either take place within the United States or cause a direct effect in the United States. When one of these exceptions applies, "the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances." The FSIA also provides a jurisdictional element, whereby "[t]he district courts shall have original jurisdiction . . . of any nonjury civil action against a foreign state . . . as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity under sections 1605-1607 of this title." In addition, the FSIA expressly provides that its standards are controlling in both "the courts of the United States and of the States," and "thus clearly contemplates that such suits may be brought in either federal or state courts." However, "[i]n view of the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area,' the [FSIA, in 28 U.S.C. section 1441(d)] guarantees foreign states the right to remove any civil action from a state court to a federal

27. Id. at 488.
29. Verlinden, 461 U.S. at 488.
30. Id.
32. Id. § 1605(a)(1).
33. Id. § 1605(a)(2).
34. Id. § 1606.
35. Id. § 1330(a).
36. Id. § 1604.
Even after the enactment of the FSIA, courts still had difficulties in determining when the activities of a foreign government were commercial and thus not entitled to immunity. Related to this issue, it proved even more difficult for courts to determine when instrumentalities of those governments were entitled to the protections of the FSIA. Thus, a circuit split developed within the federal appellate courts over the degree of ownership a foreign government was required to hold in a subsidiary corporation in order for that subsidiary to be properly considered an instrumentality of the state, and therefore entitled to utilize the removal provisions of section 1441(d).

The Fifth and Seventh Circuits developed a “tiered ownership” approach in holding “that an entity that is owned by an agency or instrumentality is [also] an agency or instrumentality because it is owned by a ‘foreign state,’ [therefore] allowing subsidiaries of state-owned corporations to come within the Act’s protection by virtue of indirect, or ‘tiered,’ ownership by the actual foreign state.” The Ninth Circuit, in a more narrow interpretation, held that “‘foreign state’ clearly refers to foreign states themselves, not their controlled corporations, thus ‘limiting an instrumentality to the first tier of ownership: those entities owned directly by the foreign state itself or by a political subdivision.” In resolving the circuit split, the Supreme Court turned to corporate law to affirm the position of the Ninth Circuit and hold that “only direct ownership of a majority of shares by the foreign state satisfies the statutory requirement.”

A basic tenet of American corporate law is that the corporation and its shareholders are distinct entities. An individual shareholder, by virtue of his ownership of shares, does not own the corporation’s assets and, as a result, does not own subsidiary corporations in which the corporation holds an interest. A corporate parent which owns the shares of a subsidiary does not, for that reason alone, own or have legal title to the assets of the subsidiary; and, it follows with even greater force, the parent does not own or have legal title to the subsidiaries of the subsidiary. The fact that the shareholder is a foreign state does not change the analysis.

Therefore, “[a] corporation is an instrumentality of a foreign state under the FSIA only if the foreign state itself owns a majority of the
corporation's shares."\textsuperscript{45} And, under section 1441, the corporation will be able to assert federal question jurisdiction and remove an action to federal court only where it is an instrumentality of the foreign state, which requires direct ownership of a majority share by the foreign state.

However, this holding is undermined by the current circuit split regarding the federal common law of foreign relations. Currently in three circuits, subsidiaries that are now expressly disqualified as instrumentalities of a foreign state for purposes of the FSIA may still remove claims to federal courts by asserting federal question jurisdiction based on the federal common law of foreign relations.\textsuperscript{46} Further, analogous to the overruled "tiered approach," this federal question can be asserted by showing a sufficient ownership and economic interest in the subsidiary by a foreign government.\textsuperscript{47}

II. FEDERAL QUESTION JURISDICTION BASED ON THE FEDERAL COMMON LAW OF FOREIGN RELATIONS

A. BASICS OF FEDERAL QUESTION JURISDICTION

The original basis of federal question jurisdiction is the U.S. Constitution.\textsuperscript{48} "The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the Laws of the United States, and Treaties made . . . under their authority; . . . and between a State, or the citizens thereof, and foreign States, citizens or subjects."\textsuperscript{49} Under this provision, federal question jurisdiction is to be interpreted broadly, in favor of granting jurisdiction to the federal courts rather than the state courts. "[W]hen a question to which the judicial power . . . is extended by the constitution, forms an ingredient of the original cause, it is in the power of Congress to give the Circuit Courts jurisdiction of that cause, although other questions of fact or of law may be involved in it."\textsuperscript{50}

However, federal question jurisdiction has been limited by Congress since the enactment of the Constitution.\textsuperscript{51} Today, "[t]he district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."\textsuperscript{52} In addition, this

\textsuperscript{45} Id. at 477.
\textsuperscript{46} See de Perez v. AT&T, 139 F.3d 1377, 1380 (11th Cir. 1997); Torres v. S. Peru Copper Corp., 113 F.3d 540, 543 (5th Cir. 1997); Phil. v. Marcos, 806 F.2d 344, 352-53 (2d Cir. 1986). For example, if State X owned ninety percent of the shares of Corporation A, which in turn owned ninety percent of the shares of Corporation B, Corporation B would not be an instrumentality of State X under the FSIA, but could be under the federal common law of foreign relations.
\textsuperscript{47} See de Perez, 139 F.3d at 1377-78; Torres, 113 F.3d at 543; Marcos, 806 F.2d at 353-54.
\textsuperscript{48} U.S. Const. art. III, § 2, cl. 1.
\textsuperscript{49} Id.
\textsuperscript{50} Osborn v. President, Dirs. & Co. of Bank, 22 U.S. 738, 823 (1824).
\textsuperscript{52} Id.
congressional limitation on federal question jurisdiction is to be interpreted as limiting the jurisdiction of the federal courts where there are jurisdictional issues that overlap with the state courts. This is known as the "well-pled complaint" rule, such that "a suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution."53

Finally, although the jurisdiction of the federal courts is thus limited, plaintiffs may not defeat federal jurisdiction by disguising the federal claims within their complaint.

An action may "arise under" a law of the United States if the plaintiff's right to relief necessarily turns on construction of federal law.... Although the plaintiff is generally considered the "master of his complaint" and is free to choose the forum for his action, this principle is not without limitation. A plaintiff will not be allowed to conceal the true nature of a complaint through "artful pleading."54

B. ARISING UNDER LAWS, TREATIES, AND CONSTITUTION

In most instances, a determination of what is meant by the term "the Constitution, laws, or treaties of the United States" is relatively straightforward.55 Generally, this will mean a direct application of federal law, such as where a federal statute specifically creates or authorizes jurisdiction—for example, 28 U.S.C. section 1441(d).56 However, in certain areas stare decisis dictates that federal common law must be applied.57 For example, the constitutional holdings of the United States Supreme Court can be considered federal common law, as all other courts are bound by these decisions. Thus, while the Court has asserted that "[t]here is no federal general common law,"58 there must necessarily be federal common law in certain arenas.

[The United States Supreme] Court has... held that a few areas, involving "uniquely federal interests," are so committed by the Constitution and laws of the United States to federal control that state law is pre-empted and replaced, where necessary, by federal law of a content prescribed (absent explicit statutory directive) by the courts—so-called "federal common law."59

For example, "obligations to and rights of the United States under its

56. Id. § 1441(d) ("Any civil action brought in a State court against a foreign state... may be removed by the foreign state to the district court.").
57. See Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 425 (1964) ("[T]he Court did not have rules like the act of state doctrine in mind when it decided Erie R.R. Co. v. Tompkins.").
contracts are governed exclusively by federal law." In addition, interpretation of collective-bargaining agreements, evidentiary privileges in federal question cases, Native American rights, and "disputes between States concerning their rights to use the water of an interstate stream" are all areas that fall under federal common law. And, most importantly to this Note, "[t]he Supreme Court has held that the area of international relations is governed exclusively by federal law." ^C. FEDERAL COMMON LAW OF FOREIGN RELATIONS

While it has never been clearly defined by the Supreme Court, the existence of the federal common law of foreign relations has been recognized by the Court. "[A]n issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law." The rationale behind requiring that decisions affecting foreign relations be made at the federal level is to avoid discrepancies in the treatment of foreign sovereigns by different states, as "[r]ules of international law should not be left to divergent and perhaps parochial state interpretations." Further, the federal common law of foreign relations has been clearly defined by the Court of Appeals for the Second Circuit. "A cause of action arises under federal law if the dispositive issues stated in the complaint require the application of federal common law. The word 'laws' in [28 U.S.C. section] 1331 should be construed to include laws created by federal judicial decisions as well as by congressional legislation." ^D. TREATMENT BY FEDERAL APPELLATE COURTS

Under the precedent established by the U.S. Supreme Court in Banco Nacional v. Sabbatino, various federal circuit courts have struggled to define exactly when the federal common law of foreign relations will allow federal question jurisdiction in accordance with the well-pled complaint rule. The Second Circuit was the first appellate
court to attempt to define the limits on this type of jurisdiction in Philippines v. Marcos.\footnote{Marcos, 806 F.2d at 353.}

In Marcos, the Republic of the Philippines filed a complaint in state court seeking a preliminary injunction prohibiting the sale of certain New York real estate alleged to be beneficially owned by the defendants, the former president of the Republic and his wife.\footnote{Id. at 352 (quoting Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 425 (1964)).} Based on the extreme importance of the case to the government of the Republic of the Philippines, the court held that “[i]ssues involving ‘our relationships with other members of the international community must be treated exclusively as an aspect of federal law.’”\footnote{Id. at 354.} Further, the court held that:

[F]ederal jurisdiction is present in any event because the claim raises, as a necessary element, the question whether to honor the request of a foreign government that the American courts enforce the foreign government’s directives.... The question whether to honor such a request by a foreign government is itself a federal question to be decided with uniformity as a matter of federal law, and not separately in each state... regardless of whether the overall claim is viewed as one of federal or state common law.\footnote{See id.}

Thus, at a minimum, claims brought by foreign governments will be considered requests from that government requiring a decision by the U.S. government, and will confer federal question jurisdiction to the federal courts within the Second Circuit based on the federal common law of foreign relations.\footnote{See Torres v. S. Peru Copper Corp., 113 F.3d 540 (5th Cir. 1997).}

After Marcos, the Fifth Circuit was the next appellate court to consider the issue of federal question jurisdiction based on the federal common law of foreign relations.\footnote{Id. at 541.} In Torres v. SPCC, after being harmed by sulfur dioxide emissions from a smelting and refining plant, Peruvian citizens filed a state court action against the controlling corporations alleging various state law tort claims.\footnote{Id. at 540-41.} The defendant corporations removed to federal court.\footnote{Id. at 542.} The district court denied the Peruvian citizens’ motion to remand the action to state court and dismissed the action, after which the Peruvian plaintiffs appealed.\footnote{Id. at 541.} The appellate court found that the district court had jurisdiction to hear the case because although the plaintiffs asserted only state law tort claims, the complaint implicated important foreign policy concerns as the action struck at
Peru's vital economic and sovereign interests.80

The court articulated several principles to support its analysis. First, 
"[t]he Supreme Court has authorized the creation of federal common law in the area of foreign relations."81 Second, "[t]he mining industry in Peru, of which SPCC is the largest company, is critical to that country's economy, contributing up to 50% of its export income and 11% of its gross domestic product. Furthermore, the Peruvian government has participated substantially in the activities for which SPCC is being sued."82 Therefore, the court wrote:

This action ... strikes not only at vital economic interests but also at Peru's sovereign interests by seeking damages for activities and policies in which the government actively has been engaged. On the record before us, we must conclude that the plaintiffs' complaint raises substantial questions of federal common law by implicating important foreign policy concerns.83

Thus, the Court of Appeals for the Fifth Circuit held that in addition to claims brought as requests by foreign governments, suits that were brought against foreign industries determined to be "vital economic interests" and where foreign governments "participated substantially" in that industry, would be subject to the federal common law of foreign relations.84

The Court of Appeals for the Eleventh Circuit was the next court to consider this area of law.85 In de Perez v. AT&T, foreign individuals injured by a gas pipeline explosion in Venezuela brought multiple suits in Georgia state courts alleging state law causes of action.86 The defendants removed the cases to the federal district court.87 The district court consolidated the cases, denied plaintiffs' motion to remand to state court, and ultimately dismissed the actions on forum non conveniens grounds.88 As the basis for their removal actions, the defendants relied on Torres to claim that the district court had federal question jurisdiction based on the federal common law of foreign relations.89 However, in reversing the actions of the district court, the Eleventh Circuit held that the district court should have remanded the cases because it did not in fact have federal question jurisdiction.90

80. Id. at 543.
81. Id. at 542 n.7.
82. Id. at 543.
83. Id.
84. Id.
85. De Perez v. AT&T, 139 F.3d 1368 (11th Cir. 1997).
86. Id. at 1371.
87. Id.
88. Id.
89. Id.
90. Id. at 1372.
The court based its decision on an analysis of the case at issue utilizing the standards set out in *Torres* by the Fifth Circuit.91 "The cases addressing this area of federal common law generally involve disputes in which a foreign government, or its instrumentality, is a named party to the lawsuit, or where the actions of a foreign government are a direct focus of the litigation."92 However, "[t]he Fifth Circuit has extended the area of federal jurisdiction based on the federal common law of foreign relations to disputes between private parties that implicate the 'vital economic and sovereign interests' of the nation where the parties' dispute arose."93

Here, the Eleventh Circuit clearly set forth the appropriate factors for analyzing federal question jurisdiction based on the federal common law of foreign relations.94 The factors in this jurisdictional inquiry include whether: (1) "the injuries occurred on foreign soil," (2) "the government's policy decisions or actions are brought into question by the suit," (3) "the foreign government was involved in the alleged wrongdoing," and (4) "the action strikes at the heart of the economic and sovereign interests of the foreign nation."95

After applying these four factors, the Eleventh Circuit held that "the evidence regarding Venezuela's interest in the plaintiffs' action is too speculative and tenuous to confer federal jurisdiction over this case. . . . Although this litigation might significantly affect AT&T's business operations in Venezuela, it is not clear that the lawsuit threatens the economic vitality of Venezuela itself."96 However, while it applied the *Torres* factors to the case, the Eleventh Circuit seemed to reject the Fifth Circuit's conclusion that a complaint that indirectly alleges involvement of the foreign government will meet the standard for federal question jurisdiction required by the well-pled complaint rule.97

[W]e think it significant, for purposes of this case, that the Venezuelan government has taken no position on whether this lawsuit proceeds in the United States or in Venezuela. Without such an indication from the foreign nation, we are reluctant to find that the plaintiffs' private cause of action sounding in Georgia tort law implicates important foreign policy on the face of the plaintiffs' pleadings. It seems more likely to us that any issues involving the participation of the Venezuelan government, or its corporate entities, will arise in the form of a defense by AT&T. Federal question jurisdiction, however, cannot be based

91. Id.
92. Id. at 1377.
93. Id. (quoting *Torres v. S. Peru Copper Corp.*, 113 F.3d 540, 543 n.8 (5th Cir. 1997)).
94. Id.
95. Id.
96. Id. at 1378.
97. Id.
The final appellate court to consider the issue of federal question jurisdiction based on the federal common law of foreign relations was the Court of Appeals for the Ninth Circuit. In Patrickson v. Dole Food Co., Latin American workers brought a class action suit against multinational fruit and chemical companies who allegedly exposed the workers to a toxic pesticide. This suit was filed in Hawaiian state court, and was removed by the defendants in reliance on Philippines v. Marcos. The district court then denied the plaintiffs' motion for remand and dismissed the case based on forum non conveniens. On appeal, the Ninth Circuit held that federal question jurisdiction did not exist, given that the case, as framed by the plaintiffs, did not require the evaluation of any act of state or the application of any principle of international law.

Thus, in Patrickson v. Dole Food Co., the Ninth Circuit limited the application of the federal common law of foreign relations to cases in which acts of state by a foreign government are in question, or when violations of international law are alleged in the complaint. Further, in its opinion, the Ninth Circuit criticized the holdings of the other appellate courts, particularly the Second Circuit in Philippines v. Marcos.

Marcos ... broadly suggest[s] that federal-question jurisdiction could "probably" be premised on the fact that a case may affect our nation's foreign relations, whether or not federal law is raised by the plaintiff's complaint: "[A]n action brought by a foreign government against its former head of state arises under federal common law because of the necessary implications of such an action for United States foreign relations." This reads far too much into Sabbatino.

Determining that Congress had not specifically extended federal question jurisdiction to all cases in which the federal common law of foreign relations might become an issue, the court interpreted this as congressional silence where it could have acted, and strictly interpreted the well-pled complaint rule. "We therefore decline to follow Marcos, Torres, and de Perez insofar as they stand for the proposition that the federal courts may assert jurisdiction over a case simply because a

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98. Id.
100. The pesticide was dibromochloropropane, or DBCP, which was banned for general use in the United States by the Environmental Protection Agency in 1979. Id.
101. Id.
102. Id.
103. Id.
104. Id. at 803.
105. Id. at 801-02.
106. Id. (quoting Phil. v. Marcos, 806 F.2d 344, 354 (2d Cir. 1986)).
107. Id. at 803.
foreign government has expressed a special interest in the outcome.\footnote{108}

III. NORMATIVE APPROACH TO FEDERAL QUESTION JURISDICTION BASED ON THE FEDERAL COMMON LAW OF FOREIGN RELATIONS IN LIGHT OF THE SUPREME COURT HOLDING IN DOLE

The Supreme Court has not expressly considered the federal common law of foreign relations since \textit{Sabbatino}, despite a clear opportunity to do so in \textit{Dole Food Co. v. Patrickson}. Thus, the circuit courts currently have different standards for determining when claims will create federal question jurisdiction per the federal common law of foreign relations. However, in order to avoid undermining the decision of the Supreme Court in \textit{Dole}, this type of jurisdiction must be available only in limited circumstances. This is due to the overlap in substantive law between the FSIA and the federal common law of foreign relations. Defendants in transnational litigation will often assert federal question jurisdiction based upon both the FSIA and the federal common law of foreign relations, with the determination of jurisdiction on each claim dependent upon a number of overlapping or similar factors. Therefore, use of the federal common law of foreign relations to grant federal question jurisdiction—where the federal common law of foreign relations is interpreted broadly, as in the approach by the Fifth and Eleventh Circuits—has the potential to undermine the holding of the Supreme Court in \textit{Dole}.

As discussed previously, in \textit{Dole}, the Court held that federal question jurisdiction under sections 1330 and 1441 of the FSIA is limited to situations in which a foreign government has a direct ownership in a corporation, which can then be considered an instrumentality of a foreign state.\footnote{109} In other words, based upon this ruling the foreign government must have a direct and immediate interest in the outcome of the litigation. Therefore, allowing federal question jurisdiction to be based on activities in which the foreign government has "participated substantially" or that implicate "vital economic interests" under the federal common law of foreign relations as adopted by the Fifth and Eleventh Circuits creates an opportunity for defendant corporations to avoid being bound by the holding in \textit{Dole}, contrary to the intent of Congress in enacting the FSIA. However, as the Supreme Court recognized the validity of the federal common law of foreign relations in \textit{Sabbatino},\footnote{110} the limitations on this basis of federal question jurisdiction cannot be so restrictive as to effectively eliminate it.\footnote{111}

\footnote{108} \textit{Id.}
\footnote{111} Other commentators have taken the position that there should be little or no allowance of federal question jurisdiction based solely on the federal common law of foreign relations. \textit{See Andrew}
After analysis of the different approaches to federal question jurisdiction based on the federal common law of foreign relations, there remains the task of creating an overall approach to the issue that can be used by all federal courts. This normative approach to the application of the federal common law of foreign relations must begin with the basic elements that each court to consider the issue has agreed will establish federal question jurisdiction. Additionally, this overall approach must be based on the underlying purposes of the doctrine, while remaining consistent with both the purposes of the FSIA and the limitations of Dole.

A. LAWSUITS BROUGHT BY FOREIGN SOVEREIGNS

The first such basis must be where a lawsuit is brought directly by a foreign sovereign. By filing suit within the United States, a foreign nation asserts that its interests are implicated, and Congress has determined that federal courts are the proper jurisdictions for these actions. Therefore, "the text and structure of the FSIA demonstrate Congress' intention that the FSIA be the sole basis for obtaining jurisdiction over a foreign state in our courts." Because the FSIA is directly applicable in these situations, the federal common law of foreign relations will not be reached by courts in determining jurisdiction. But, federal question jurisdiction must attach in these situations, and so the plaintiff foreign sovereign will have access to the federal courts.

B. LAWSUITS IMPLICATING THE ACT OF STATE DOCTRINE

The second basis will be a lawsuit that necessarily implicates the Act of State doctrine, such that ruling on the case will require courts to pass judgment upon the acts of a foreign sovereign within its own borders. Where the "complaint turns on the validity or invalidity of any act of a foreign state," federal question jurisdiction based on the federal common law of foreign relations must attach. Further, "the scope of the act of state doctrine must be determined according to federal law." The cases discussed demonstrate the key reason for the existence of the federal common law of foreign relations: the necessity for uniformity in the

C. Baak, COMMENTS: The Illegitimacy of Protective Jurisdiction over Foreign Affairs, 70 U. Chi. L. Rev. 1487, 1488 (2003) (arguing that the federal common law of foreign relations is an example of "protective jurisdiction").
114. See Baak, supra note 111, at 1492–94 (discussing the Act of State doctrine).
116. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427 (1964). "[A]n issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law." Id. at 425.
actions of the United States regarding foreign affairs. Therefore, each appellate court to consider the issue has determined that the Act of State doctrine is a valid means of basing federal question jurisdiction on the federal common law of foreign relations. Where a court is required to consider the direct actions of a foreign sovereign, federal question jurisdiction must attach.

C. INTERNATIONAL LAW VIOLATIONS

The third basis for establishing federal question jurisdiction based on the federal common law of foreign relations will be where violations of international law are alleged on the face of the complaint. The Ninth Circuit, in *Patrickson v. Dole Food Co.*, the most limited interpretation of the federal common law of foreign relations, suggests that where the complaint requires the application of principles of international law, federal question jurisdiction will attach. Because these complaints raise the same foreign policy concerns as the Act of State doctrine, where the United States must speak with one voice in making determinations of international law, federal question jurisdiction will attach in these cases.

Each appellate court to consider the issue has reached a consensus that lawsuits brought by foreign governments, lawsuits implicating the Act of State doctrine, and lawsuits alleging violations of international law are valid means for federal question jurisdiction to attach based upon the federal common law of foreign relations. In addition, each of these means of demonstrating jurisdiction is consistent with the holdings of the Supreme Court in both *Sabbatino* and *Dole*, as well as Congress's purpose in enacting the FSIA.

D. HYBRID APPROACH TO ACTIVITIES IN WHICH A FOREIGN SOVEREIGN HAS A SUBSTANTIAL INTEREST

Finally, and most importantly based on the circuit split that has formed around this issue, lawsuits that are brought directly against an entity controlled by or closely related to a foreign government must be considered, and a determination of the threshold at which federal question jurisdiction will attach must be made. This use of the federal common law of foreign relations must also be consistent with both the holding of the Supreme Court in *Dole* and the congressional purposes behind the FSIA. In addition, this approach must comply with the well-
pled complaint rule in regards to economic interests of the foreign nation.

Therefore, a hybrid approach to federal question jurisdiction based on the federal common law of foreign relations appears to provide the optimal method for determining when this type of jurisdiction should attach. First, federal question jurisdiction based on the federal common law of foreign relations should attach where the actions of a corporation directly owned by a foreign sovereign are at issue, under the same analysis required for jurisdiction under the FSIA per *Dole*. Second, where a foreign sovereign substantially and effectively controls the actions of a corporation, either through tiered ownership, substantial minority ownership, or a sufficiently close relationship to demonstrate an exertion of control by the sovereign, federal question jurisdiction based on the federal common law of foreign relations should be allowed where the complaint also truly implicates vital economic interests of the foreign nation. This approach will ensure that the holding of the Supreme Court in *Dole* is not undermined, or simply bypassed, with an expansive use of the federal common law of foreign relations, yet also ensures that lawsuits where the vital economic interests of a nation are at issue, and that genuinely implicate the foreign relations of the United States, are heard in the federal courts in accordance with the Court’s holding in *Sabbatino*. In addition, this approach emphasizes the “discretion” that federal judges have in determining federal question jurisdiction after *Merrell Dow Pharmaceuticals Inc. v. Thompson*. Further, this approach addresses criticisms of *Dole* that requiring direct ownership does not recognize ownership and control practices in foreign nations, and will require reorganization by foreign corporations solely to comply with the holding. Thus, by requiring that the foreign sovereign have control over the corporation seeking federal question jurisdiction, and that the vital economic interests of that sovereign be affected, federal question jurisdiction based on the federal common law of foreign relations will be limited to situations where either the commercial actions of a sovereign are at issue, or the commercial well-being of a sovereign is at issue. This limited application is consistent with both the purposes of the federal

121. *Dole* requires that the foreign government have a direct ownership interest in a majority of the corporate shares in order for the jurisdictional elements of the FSIA to be applicable. *Dole Food Co. v. Patrickson*, 538 U.S. 468, 474 (2003).

122. See *supra* note 46 for a tiered ownership structure that would be significant under this hybrid approach to federal common law of foreign relations jurisdiction.

123. For example, such control may be demonstrated by the internal national laws of the foreign sovereign.


common law of foreign relations, as well as the restrictive nature of FSIA jurisdiction per Supreme Court's holding in *Dole*.

**CONCLUSION**

The federal common law of foreign relations is a valid means of creating federal question jurisdiction. However, the current application of this doctrine within the federal courts is highly variable from circuit to circuit, and the approach adopted by the majority of the courts that have considered the issue is inconsistent with the holding of the Supreme Court in *Dole*. Therefore, an approach that consolidates the positive aspects of each approach, reconciles the federal common law of foreign relations with the FSIA as interpreted in *Dole*, and is consistent with the congressional purpose in limiting and controlling the case load within the federal courts must be created. Therefore, courts should grant federal question jurisdiction based on the federal common law of foreign relations via application of a hybrid theory, requiring foreign governments to have a substantial, but not majority, ownership interest in any subsidiary, in addition to a vital economic interest in the outcome of the case.