The Immunity of Foreign Subsidiaries Under the Foreign Sovereign Immunities Act

Melissa Lang* **and Richard Bales†**

INTRODUCTION

A train derails, killing hundreds of people. Representatives of the decedents sue the train company in state court after finding that the accident was a result of a defective part in the brakes. The train company removes to federal court and impleads both the brake manufacturer, a foreign company indirectly owned by a foreign government, and the brake manufacturer's subsidiaries, which manufactured the defective part.

Can the train company proceed with its impleader action against the brake manufacturer's subsidiaries? Is the brake manufacturer's subsidiary immune from litigation under the Foreign Sovereign Immunities Act (FSIA)? The FSIA provides the exclusive means by which a federal court may exercise subject matter jurisdiction over a foreign state and its instrumentalities.[1] The FSIA provides that "[a]ny civil action brought in State court against a foreign state . . . may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending."[2] Whether the foreign company would be afforded immunity by the FSIA depends on whether the company is consid-

* Melissa Lang received her B.A. in History from the University of Cincinnati in 2001, and anticipates receiving her J.D. from Northern Kentucky University, Salmon P. Chase College of Law, in Spring 2004.

† Richard Bales is a Professor of Law at Northern Kentucky University, Salmon P. Chase College of Law.

1. EIE Guam Corp. v. Long Term Credit Bank of Japan, Ltd., 322 F.3d 635 (9th Cir. 2003); Gates v. Victor Fine Foods, 54 F.3d 1457, 1459 (9th Cir. 1995).

2. 28 U.S.C. § 1441(d) (1994).

ered an "agency or instrumentality" because the company is owned by a foreign government.

Prior to 2003, the circuits were split as to whether the FSIA confers federal subject matter jurisdiction on the lower tiers of a multi-tiered subsidiary which is majority owned by a foreign state or its political subdivision, or whether federal jurisdiction should be limited to first-tier subsidiaries.[3] The Ninth Circuit, for example, refused to presume that all levels of a corporation, which are majority owned by a foreign state, enjoy immunity from suit under the FSIA.[4] Instead, the court held that the FSIA grants immunity only to a foreign corporation which is directly owned by a foreign state.[5] This approach is called the "direct ownership" approach. The Seventh Circuit, on the other hand, held that the FSIA grants immunity to foreign corporations which are both directly and indirectly owned by a foreign state.[6] This approach is called the "multi-tier subsidiary" approach.

To illustrate the different outcomes produced by the two approaches, assume that the brake manufacturer in the hypothetical is a corporation that is 75% owned by a foreign government. Both the Ninth and Seventh Circuits agreed that the FSIA would confer federal subject matter jurisdiction on the brake manufacturer (and require dismissal of any suit filed against it) because it is majority owned by the foreign state. However, if the brake manufacturer in turn owns 60% of the shares of the subsidiary which manufactured the defective part, the Ninth Circuit would not have upheld jurisdiction (and would not require dismissal) over the subsidiary, whereas the Seventh Circuit would. This is because the Ninth Circuit interpreted the FSIA's definition of an "agency or instrumentality" of a foreign state as not including the lower tiers of a multi-tiered corporation.[7] Because the Ninth Circuit did not consider lower tiers to be agencies or instrumentalities, the court did not extend immunity beyond the first tier of the corporation.[8] The Seventh Circuit, on the other hand, did not limit immunity to the first tier, but rather extended it to all tiers of the corporation.[9]

---

3. *See, e.g.*, *Gates*, 54 F.3d at 1462.
4. *See id.*
5. *Id.*
6. *See* In re Air Crash Disaster Near Roselawn, Ind. on Oct. 31, 1994, 96 F.3d 932 (7th Cir. 1996).
7. *See Gates*, 54 F.3d at 1461-62.
8. *Id.* at 1462.
9. *Air Crash Disaster Near Roselawn*, 96 F.3d at 941.

In April 2003, the U.S. Supreme Court addressed the circuit split in *Dole Food Co. v. Patrickson*.[10] This decision adopted the Ninth Circuit approach and held that only direct ownership of a majority of a company's shares by a foreign state qualifies that company for immunity.[11] To illustrate, if the recent Supreme Court ruling were applied in the train derailment hypothetical, only the brake manufacturer would be entitled to sovereign immunity. The brake manufacturer's subsidiary, on the other hand, would still be subject to suit in both state and federal court.

While the *Dole* Court resolved the split in authority between the Seventh and Ninth Circuits, the Court did not consider a third approach to the issue. Prior to *Dole*, Judge Kaplan of the Southern District of New York suggested a "beneficial interest" approach to determine whether a lower-tier subsidiary of a foreign government-owned corporation should be allowed protection under the FSIA.[12] The beneficial interest approach would grant immunity only if the foreign state's interest in its subsidiary exceeds 50%.[13] Thus, the beneficial interest approach advances Congressional intent by ensuring that immunity will only be granted where the foreign state holds a substantial interest in a company.[14]

This Article argues that Congress should legislatively overrule the *Dole* decision and adopt the beneficial interest test for determining whether a corporation should enjoy federal subject matter jurisdiction under the FSIA. Part I of this Article explains the purpose of the FSIA and describes its significance concerning litigation with a corporation which could potentially be granted immunity by the Act. Part II describes the pre-*Dole* circuit split as well as the beneficial interest approach proposed by Judge Kaplan of the Southern District of New York. Part III discusses the Supreme Court's *Dole* decision, in which the Court held that the FSIA confers sovereign immunity upon a foreign company which is directly owned by a foreign government. Part IV analyzes the various approaches of determining foreign sovereign immunity.

---

10. 538 U.S. 468 (2003).

11. *Id.*

12. Musopole v. S. African Airways (PTY.) Ltd., 172 F. Supp. 2d 443, 447 (S.D.N.Y. 2001).

13. *Id.*

14. *Id.*

This Article proposes that the courts use a beneficial interest test. This test is consistent with the statutory language and legislative intent of the FSIA. It promotes U.S. foreign policy by ensuring that immunity is extended to—but only to—a corporation in which a foreign nation owns a substantial interest in the corporation. It provides a bright-line, quantifiable rule which courts can use to determine whether a foreign defendant corporation should be granted immunity from suit in U.S. courts. For these reasons, this Article concludes that Congress should enact the beneficial interest test for determining the foreign sovereign immunity of corporations.

I. THE FOREIGN SOVEREIGN IMMUNITIES ACT

The Foreign Sovereign Immunities Act of 1976 was enacted to determine whether a foreign state-owned corporation sued in U.S. courts by a domestic plaintiff should be granted immunity.[15] Historically, all foreign states were granted absolute sovereign immunity from suit in U.S. courts.[16] However, starting in the mid-1900s, U.S. views on immunity began to change.[17] The practices ranged from absolute immunity to a theory of restrictive immunity, which was finally codified in the Foreign Sovereign Immunities Act.[18] An overview of this progression is discussed below.

A. THE ABSOLUTE THEORY OF SOVEREIGN IMMUNITY

Originally, it was the job of the State Department to make formal suggestions to the courts to aid in determining whether a foreign state should enjoy immunity from suit in U.S. courts.[19] These decisions were made pursuant to recommendations made by the Executive Branch.[20] Until 1952, the State Department requested absolute immunity to all nations which were friendly

15. Andrew Loewenstein, *The Foreign Sovereign Immunities Act and Corporate Subsidies or Instrumentalities of Foreign States*, 19 BERKELEY J. INT'L L. 350 (2001).

16. Jane H. Griggs, Note, *The Foreign Sovereign Immunities Act: Do Tiered Corporate Subsidiaries Constitute Foreign States?*, 20 W. NEW ENG. L. REV. 387, 389 (1998).

17. *Id.* at 394-95.

18. 28 U.S.C. §§ 1330, 1441(d), 1602-1611 (2000).

19. Clinton L. Narver, *Putting the "Sovereign" Back in the Foreign Sovereign Immunities Act: The Case for a Time of Filing Test for Agency or Instrumentality Status*, 19 B.U. INT'L L.J. 163, 168 (2001).

20. *Id.*

with the United States.[21] Eventually this process became more political than legal because the Executive Branch was under pressure from foreign states.[22] Oftentimes immunity was granted due to political considerations in situations where immunity would not normally have been extended.[23] However, when a foreign state failed to ask the State Department for immunity, the courts were required to make the ultimate decision to grant or withhold immunity.[24] Because immunity could be decided either by the Executive or Judicial Branch, and as a result of the lack of a clear standard which each branch should follow in making its determination, decisions were inconsistent.[25]

This confusion began to fester when the Supreme Court established the theory of absolute immunity for foreign states in its 1812, *Schooner Exchange v. McFaddon*.[26] The Court determined that U.S. courts could not exercise jurisdiction over a French sailing vessel found in U.S. waters.[27] Lower federal courts read this opinion to mean that foreign states were entitled to an absolute immunity over their public governmental acts as well as their commercial activities.[28] Over one hundred years later the Court reaffirmed its decision to confer absolute immunity on foreign states in *Berizzi Bros. Co. v. Pesaro*.[29] In this case, the Supreme Court found that an Italian ship, which carried both passengers and cargo, was immune from suit in U.S. courts.[30] Thus, the Court established a theory of absolute immunity concerning a foreign state's public activities to which courts would adhere for 140 years.[31]

B. THE THEORY OF RESTRICTIVE IMMUNITY

During the first half of the twentieth century, legal commentators began to notice that a theory of restrictive immunity

21. Verlinden B.V. v. Cent. Bank of Nig., 461 U.S. 480, 486 (1983).
22. *Id.* at 487.
23. *Id.*
24. *Id.*
25. *Id.* at 488.
26. 11 U.S. 116 (1812).
27. *Id.* at 125.
28. Narver, *supra* note 19, at 167.
29. 13 F.2d 468 (D.N.Y. 1926), *cert. denied*, 271 U.S. 562 (1926).
30. 271 U.S. at 576.
31. Danny Abir, *Foreign Sovereign Immunities Act: The Right to a Jury Trial in Suits Against Foreign Government-Owned Corporations*, 32 STAN. J. INT'L L. 159, 164 (1996).

was becoming increasingly prevalent internationally.[32] American commentators began to advocate for a more restrictive theory of immunity, which limited immunity to the public acts of foreign sovereigns.[33] Under this theory, the private and commercial activities of a foreign sovereign were not protected.[34]

In a famed 1952 letter Jack Tate, Legal Advisor to the State Department, announced to the American judiciary that the United States would formally adopt a restrictive theory of immunity.[35] This theory granted immunity for a nation's public acts, but did not extend immunity to private acts.[36] In support of the decision to adopt the new theory, Tate cited reasons such as the growing international reliance on a restrictive theory of immunity, as well as increasing U.S. involvement in international trade.[37]

Although the State Department strove to adhere to this new policy, determinations were still frequently made on a political, rather than legal basis.[38] This often resulted in inconsistent determinations of immunity.[39] For example, in *Victory Transport, Inc. v. Comisaria General de Abasteccimientos y Transportes*,[40] the Second Circuit, noting that the State Department had not commented on immunity, denied immunity on a contract for the transport of grain because the transport of grain was not a public act; however, in *Isbrandtsen Tankers, Inc. v. President of India*,[41] the Second Circuit, noting that the State Department had "suggested" that immunity was appropriate, granted immunity on a contract dispute for the transport of grain.

Courts also had trouble developing a bright line rule which would distinguish between the public and commercial, or private, activities of a foreign state.[42] For example, in *Mexico v. Hoffman*,[43] the Supreme Court refused to extend immunity to a sailing vessel owned by, but not in the possession of, the Mexi-

32. Narver, *supra* note 19, at 168.
33. *Id.* at 169.
34. *Id.*
35. Letter from Jack B. Tate, Acting Legal Adviser, United States Department of State, to Acting Attorney General (May 19, 1952), *reprinted in* Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682, 711 app. 2 (1976).
36. *Id.*
37. *Id*; *see also* Narver, *supra* note 19, at 169.
38. Narver, *supra* note 19, at 169.
39. *Id.*
40. 336 F.2d 354 (2d Cir. 1964).
41. 446 F.2d 1198, 1201 (2d Cir. 1971).
42. *See* Abir, *supra* note 31, at 164.
43. 324 U.S. 30 (1945).

can government.[44] The Court justified this decision by stating:

> Every judicial action exercising or relinquishing jurisdiction over the vessel of a foreign government has its effect upon our relations with that government. Hence it is a guiding principle in determining whether a court should exercise or surrender its jurisdiction in such cases, that the courts should not so act as to embarrass the executive arm in its conduct of foreign affairs. In such cases the judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction.[45]

In an effort to eliminate the confusion, Congress enacted the Foreign Sovereign Immunities Act in 1976.[46]

C. THE FOREIGN SOVEREIGN IMMUNITIES ACT OF 1976

Congress enacted the FSIA in an attempt to remedy the problems discussed above. It designed the FSIA to alleviate the pressure placed on the State Department in making decisions regarding whether a foreign defendant is immune from litigation in U.S. courts by shifting the burden to the judiciary.[47] Similarly, Congress intended that the FSIA, through its definition of "foreign state," would establish standards for determining immunity, thus promoting uniformity in cases involving foreign governments.[48]

The FSIA codifies the restrictive theory of sovereign immunity.[49] It is the sole means by which a federal court may establish jurisdiction over a foreign state,[50] and is triggered when a U.S. plaintiff files suit in a U.S. court against a foreign state, or a foreign state-owned corporation.[51]

The immunity clause 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 . . . ."[52] Section 1603 of the Act provides that the term "foreign state"

> includes a political subdivision of a foreign state *or an agency or instrumentality* of a foreign state . . . . "An agency or instrumentality of a

---

44. *See id.*
45. *See id.* at 35 (internal citations omitted).
46. 28 U.S.C. § 1604 (1994).
47. Loewenstein, *supra* note 15, at 355-56.
48. H.R. REP. NO. 94-1487, at 15 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604.
49. *Id.*; Verlinden B.V. v. Cent. Bank of Nig., 461 U.S. 480, 487 (1983).
50. Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434-49, 455 (1989).
51. *See generally* Abir, *supra* note 31.
52. 28 U.S.C. § 1604 (1994).

> 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 owned by a foreign state or political subdivision thereof*, and (3) which is neither a citizen of the United States . . . nor created under the laws of any third country.[53]

Once the foreign defendant establishes a prima facie case that it is a "foreign state" as defined by the Act, it is permitted to remove the action to federal court pursuant to the FSIA.[54] If found to be a "foreign state" under the Act, and not subject to one of the exceptions set forth in § 1605,[55] the defendant is immune from suit, and the action is dismissed.[56]

Section 1605 contains several exceptions to the general grant of immunity. This Section withholds immunity, for example, if the foreign state has waived immunity or if the suit is based on commercial activity within the United States conducted by the foreign state. The withholding of immunity does not mean, however, that the foreign state is subject to suit in the United States in the same way as other defendants; instead, the FSIA entitles the foreign state to a bench trial.[57] The bench

---

53. 28 U.S.C. § 1603 (a)-(b) (emphasis added).

54. 28 U.S.C. § 1441(d).

55. The FSIA provides:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
>
> (1) in which the foreign state has waived its immunity . . .;
>
> (2) . . . the action is based upon commercial activity carried on in the United States by the foreign state . . .;
>
> (3) in which rights in property taken in violation of international law are in issue and that property . . . is present in the United States in connection with a commercial activity carried on in the United States by the foreign state . . .;
>
> (4) in which rights in property in the United States acquired by succession or gifts or rights in immovable property situated in the United States are in issue; (5) . . . money damages are sought against a foreign state for personal injury or death, or damage to or loss of property . . .
>
> (6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties . . .;
>
> (7) . . . in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking.

28 U.S.C. § 1605

56. 28 U.S.C. § 1604.

57. *See* Brief for Petitioner at 5, Dole Food Co. v. Patrickson, 538 U.S. 468

trial constitutes a further attempt to establish uniformity in proceedings against "foreign state" defendants, and advances this goal in two ways.[58] First, the court's decision rests entirely upon the judge, instead of a jury decision whose findings may be inconsistent with other juries presented with similar cases. Second, subjecting a foreign defendant to a trial by jury would not promote uniformity in decisions because the defendant would be subject to potentially adverse biases held by members of the jury.[59] For these reasons, the FSIA confers immunity on a foreign state; or, when an exception to the immunity applies, provides a foreign state with the right to a non-jury trial in federal court.[60]

Typically, however, if the defendant is not immune from suit under the FSIA, it will move to dismiss on a theory of *forum non conveniens*.[61] This doctrine authorizes a trial court to deny venue, even though the court has jurisdiction, when the court believes that the action may be more appropriately and justly tried in a court in another forum.[62] If the motion is granted, the suit will be dismissed, and short of bringing the action in another country, the plaintiffs will not have any remedy.

Consequently, under the FSIA, a suit may be dismissed before the parties are even able to begin discovery.[63] In this event, an injured party may have no means of recovery against a foreign-owned company, particularly if it is impractical for the plaintiff to bring the suit in the defendant's country. The FSIA, however, was only enacted to provide a framework upon which courts can rely to determine immunity.[64] The American public's interest in avenging a wrong committed upon a particular plaintiff was not considered when the Act was drafted.[65] Instead, by enacting the FSIA, Congress sought to create a standard which

---

(2003) (Nos. 01-593, 01-594).

58. 28 U.S.C. § 1441(d).

59. Narver, *supra* note 19, at 171.

60. In re Ski Train Fire in Kaprun, Aus. on Nov. 11, 2000, 198 F. Supp. 2d 420, 424 (S.D.N.Y. 2002).

61. *See, e.g.*, Monegasque de Reassurances S.A.M. (Minde Re) v. Nak Naftogaz of Ukr., 158 F. Supp. 2d 377, 380-81 (S.D.N.Y. 2001) (noting that the FSIA does not limit the authority of federal courts to decline jurisdiction on the basis of *forum non conveniens*).

62. Sibaja v. Dow Chem. Co., 757 F.2d 1215, 1218 (11th Cir. 1985).

63. *See, e.g.*, Kelly v. Syria Shell Petrol. Develop. B.V., 213 F.3d 841 (5th Cir. 2000) (affirming district court's denial of stay pending discovery and grant of motion to dismiss under FSIA).

64. *See* Loewenstein, *supra* note 15, at 356.

65. *Id.*

would allow the Executive branch to conduct successful, and consistent, foreign policy.[66] Because it is not in the best interest of foreign policy to allow frivolous suits against foreign governments and government-owned corporations, it is best to satisfy potential plaintiffs by providing a consistent determination of when corporations will be protected under the FSIA.

Although the FSIA aims to provide a bright-line rule for the application of sovereign immunity, it fails because the language is ambiguous. The Act effectively gives immunity to a "foreign state." However, the definition of "foreign state" is ambiguous. The FSIA defines "foreign state" as "includ[ing] a political subdivision of a foreign state or an agency or instrumentality of a foreign state."[67] The ambiguity lies in whether an "agency or instrumentality" *is* a foreign state or whether an "agency or instrumentality" is merely *included* in, or part of, a foreign state. Until the U.S. Supreme Court decision in *Dole Food Co. v. Patrickson*,[68] the circuits were split over this very issue.

II. THE PRE-*DOLE* CIRCUIT SPLIT

Although the FSIA was enacted to provide a standard which could be relied upon when determining sovereign immunity, the courts are inconsistent in their interpretations of the Act.[69] A uniform interpretation of the FSIA is important because it will effectuate Congress' intent to ensure consistent foreign policy.[70] The Seventh and Ninth Circuits created the split when they reached differing interpretations of the ambiguous wording of the FSIA. In *Gates v. Victor Fine Foods*,[71] the Ninth Circuit limited sovereign immunity to the first tier of a multi-tiered corporation which is majority owned by a foreign government. However, in 1996, one year after the Ninth Circuit's opinion in *Gates*, the Seventh Circuit extended immunity to the lower tiers of a multi-tiered government-owned corporation in *In re Air Crash Disaster Near Roselawn, Indiana on October 31, 1994*.[72] An analysis of both approaches follows.

66. *Id.* The enactment of the FSIA was not intended to prohibit the State Department from asserting sovereign immunity for heads of state on behalf of the President. *See* Lafontant v. Aristide, 844 F. Supp. 128 (E.D.N.Y. 1994).

67. 28 U.S.C. § 1603 (a)-(b).

68. 538 U.S. 468 (2003).

69. *See infra* Part III.A-C.

70. *See supra* notes 47-48 and accompanying text.

71. 54 F.3d 1457 (9th Cir. 1995).

72. 96 F.3d 932 (7th Cir. 1996).

A. THE NINTH CIRCUIT ONLY PROTECTS THE FIRST TIER OF A CORPORATION

Until the Ninth Circuit issued its opinion in *Gates v. Victor Fine Foods*,[73] courts presumed that all levels of a multi-tiered corporation owned by a foreign state fell under the classification of "foreign state" for purposes of the FSIA; in such cases, federal courts would invoke subject matter jurisdiction and dismiss the case.[74] However in *Gates*, a landmark decision, the Ninth Circuit found that an indirectly-owned subsidiary of a "foreign state" was not itself a "foreign state," and therefore was not afforded immunity under the FSIA.[75]

The Alberta Pork Producers Development Corporation (Alberta Pork) was established pursuant to a Canadian statute[76] to facilitate the marketing and promotion of hogs raised in Alberta, Canada.[77] Alberta Pork acquired Fletcher Fine Foods (FFF), which was parent to Golden Gate Fresh Foods (GGFF), a California pork processing plant, operating under the name Victor Fine Foods.[78] GGFF provided a welfare benefit plan to its employees.[79] When the company closed without notice of its decision to discontinue the welfare benefits plan, the employees filed a class action against GGFF, Alberta Pork, and FFF alleging a violation of the Worker Adjustment and Retraining Notification Act[80] and the Consolidated Omnibus Budget Reconciliation Act of 1985.[81] Alberta Pork and FFF moved to dismiss for lack of subject matter jurisdiction pursuant to the FSIA.[82] There was no dispute as to whether Alberta Pork met the first two elements under the FSIA to be considered an agency or instrumentality of the Province of Alberta.[83] The problem arose in determining whether FFF was similarly protected from suit by the FSIA as an organ of a foreign state or a political subdivision, or majority owned by a foreign state or its political subdivision.[84]

---

73. *Gates*, 54 F.3d at 1457.
74. *See generally* Griggs, *supra* note 16.
75. *Gates*, 54 F.3d at 1457.
76. The Alberta Marketing of Agricultural Products Act, 10 Rev. Stats. of Alberta [R.S.A.], Ch. M-5.1 (1980).
77. *Gates*, 54 F.3d at 1459.
78. *Id.*
79. *Id.* at 1461.
80. 29 U.S.C. § 2101.
81. 29 U.S.C. §§ 1161-1168.
82. Gates v. Victor Fine Foods, 54 F.3d 1457, 1459 (9th Cir. 1995).
83. *Id.* at 1460.
84. *Id.*

The Ninth Circuit held that FFF was not an agency or instrumentality of a foreign state, and advanced four reasons why FFF was not protected under the FSIA.[85] First, the court looked to the language of the statute to determine whether an "agency or instrumentality of a foreign state" was itself a "foreign state."[86] Second, the court analyzed the Congressional Record, and found that Congress did not intend "agency or instrumentality" to be synonymous with "foreign state."[87] Third, the court found that if Congress had intended to allow successive tiering of a corporation, it would have expressly done so.[88] Fourth, the court concluded that FFF could only be an "agency or instrumentality of a foreign state" if the majority of its shares was directly owned by a foreign state.[89]

The Ninth Circuit first reasoned that a close reading of the statutory language implies that an "agency or instrumentality" was not itself a "foreign state" for purposes of the Act.[90] The statute provides that a foreign state "includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state."[91] The *Gates* court theorized that the word "includes" does not equate an "agency or instrumentality" with a foreign state.[92] Instead, the "agency or instrumentality" enjoys the protection bestowed upon a foreign state under the FSIA, but is not itself a foreign state.[93] Further, an "agency or instrumentality of a foreign state" 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."[94] In combining both definitions, a strict statutory interpretation would not allow successive tiering of a corporation because the "agency or instrumentality" must be owned by the foreign state or a political subdivision thereof, or the foreign state must hold a majority interest in the corporation.[95] Thus, according to the Ninth Circuit, FFF was not an "agency or instrumentality" because it is not directly owned by a foreign state

85. *Id.*
86. *Id.* at 1462.
87. *Id.*
88. *Gates*, 54 F.3d at 1462.
89. *Id.* at 1461-62.
90. *See id.* at 1461.
91. 28 U.S.C. § 1603.
92. *See Gates*, 54 F.3d at 1462.
93. *Id.*
94. 28 U.S.C. § 1603 (a)-(b).
95. *Gates*, 54 F.3d at 1462, citing 28 U.S.C. § 1603(b)(2).

or a political subdivision thereof.[96] Rather, FFF was owned by an "agency or instrumentality of a foreign state."

The Ninth Circuit's second argument was that a strict interpretation of the Act suggests that Congress did not intend "agencies or instrumentalities of a foreign state" to be synonymous with "foreign state."[97] The remainder of the statute takes great care to differentiate between the two.[98] For example, the House Report states:

> Where ownership is divided between a foreign state and private interests, the entity will be deemed to be an agency or instrumentality of a foreign state only if a majority of the ownership interests (shares of stock or otherwise) is owned by a foreign state *or by a foreign state's political subdivision.*[99]

If Congress had intended that "foreign state" was the same as "agency or instrumentality," then it would also have intended to equate "foreign state" with "political subdivision."[100] The Ninth Circuit found, however, that this was highly unlikely for two reasons. First, if "political subdivision" is synonymous with "foreign state" then there was no need to mention "political subdivision."[101] However, the literal meaning of "political subdivision" implies that it is a part of a larger body.[102] This larger body referred to in the definition of "political subdivision" is a "foreign state," as it is logical that a "foreign state" would have a "political subdivision."[103] Thus, just as a "political subdivision" is not the same as a "foreign state," an "agency or instrumentality" is also not synonymous with "foreign state."[104]

This rationale led the court to hold that in order for an entity to enjoy immunity under the FSIA, a "foreign state" must directly own a majority of its shares.[105] By definition, an "agency or instrumentality" must be majority owned by a "foreign state." An "agency or instrumentality" cannot, itself, be a "foreign state."[106] Thus, a wholly-owned subsidiary of an

96. *Id.* at 1462-63.
97. *Id.* at 1462.
98. *Id.*
99. H.R. REP. NO. 94-1487, at 15 (1976), *reprinted in* 1976 U.S.C.C.A.N 6604, 6614 (emphasis added).
100. *See Gates*, 54 F.3d at 1462.
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.* at 1461-62.
106. *Gates*, 54 F.3d at 1462.

"agency or instrumentality," which is not itself a "foreign state" is not immune from suit in U.S. courts because it is not an "agency or instrumentality" of that state.[107] Accordingly, a second-tier subsidiary which is owned by an agency or instrumentality of a foreign state is not protected under the FSIA because it is not itself an "agency or instrumentality of a foreign state," but a subsidiary of an "agency or instrumentality of a foreign state."[108]

The Ninth Circuit's third argument for holding that FFF was not an agency or instrumentality of a foreign state was based on Congressional intent. The court reasoned that, had Congress intended to allow successive tiering of a corporation in order to invoke the immunities in the FSIA, Congress could have expressly done so in the Act.[109] Thus, to read the Act differently would provide blanket immunity for all corporations that are partially owned by a foreign state, or a subdivision thereof, regardless of how far down the chain of ownership the entity may fall. The court was reluctant to confer such a broad view of sovereign immunity when the court could not find this intent in the language itself.[110]

The Ninth Circuit's fourth argument for holding that FFF was not an agency or instrumentality of a foreign state was based on Alberta's ownership interest in FFF.[111] The court analyzed the company's direct ownership to determine whether FFF was an agency or instrumentality of Canada.[112] FFF could only be an "agency or instrumentality" if the majority of its shares were owned by "a foreign state or political subdivision thereof."[113] Because Alberta Pork owned 100% of FFF's shares, and Alberta Pork was deemed an "agency or instrumentality" of the province of Alberta, FFF was not owned by a "foreign state," and therefore was not awarded immunity under the FSIA.[114] Thus, the Ninth Circuit concluded that a wholly-owned subsidiary of an "agency or instrumentality of a foreign state" is not itself a foreign state, and therefore is not afforded protection under the FSIA.[115]

---

107. *Id.*
108. *Id.*
109. *Id.*
110. *Id.*
111. *See id.*
112. *Gates*, 54 F.3d at 1462.
113. *Id.*
114. *Id.* at 1462-63.
115. *Id.*

For example, the Ninth Circuit noted that Congress intended the terms "organ" and "agency or instrumentality" to be broadly construed.[116] The court cited to language in the legislative record which spoke about the definition of an "agency or instrumentality of a foreign state."[117] A House report noted:

> entities 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 [sic] in its own name.[118]

The court further noticed that Congress was careful to distinguish between foreign states, political subdivisions, and agencies or instrumentalities of foreign states and political subdivisions.[119] Had Congress intended "agency or instrumentality" to be synonymous with "foreign state," it could have easily drafted the language to read that an entity must be owned by a foreign state, political subdivision, or agency or instrumentality of a foreign state or political subdivision. Additionally, the court feared that the opposite reading, such as that subscribed to by the Seventh Circuit, would expand the immunity beyond Congress' intent because it would allow an endless chain of "nth"-tier subsidiaries to claim immunity under the FSIA.[120]

B. THE SEVENTH CIRCUIT PROTECTS LOWER TIERS OF A CORPORATION

The Seventh Circuit, joined by the Fifth[121] and Sixth[122] Circuits, found that an "agency or instrumentality," by virtue of its status as a "foreign state," would enjoy immunity under the FSIA unless it falls into one of the exceptions defined in 28 U.S.C. § 1605.[123] Thus, where a second-tier subsidiary which is majority owned by an "agency or instrumentality of a foreign state" is also an "agency or instrumentality" of the foreign state,

116. *Id.* at 1460.
117. *Id.*
118. H.R. REP. NO. 94-1487, at 15-16 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6614.
119. *Gates*, 54 F.3d at 1462.
120. *Id.*
121. Delgado v. Shell Oil Co., 231 F.3d 165, 182 (5th Cir. 2000).
122. Gould, Inc. v. Pechiney Ugine Kuhlmann, 853 F.2d 445, 449 (6th Cir. 1988).
123. Alberti v. Empressa Nicaraguense De La Carne, 705 F.2d 250, 253 (7th Cir. 1983).

that subsidiary is subject to federal subject matter jurisdiction under the FSIA. [124]

This principle was explained in *In re Air Crash Disaster Near Roselawn, Indiana on October 31, 1994.*[125] There, American Eagle flight 4184 developed icing problems and crashed, killing sixty-eight passengers.[126] The victims' families filed a wrongful death claim against Avions de Transport Regional, G.I.E. (ATR), the company which manufactured the airplane.[127] ATR was indirectly owned by the French and Italian governments.[128] Because ATR was either named as a defendant or a third party defendant in all of the suits, ATR sought to remove the case to federal court pursuant to the FSIA.[129]

The plaintiffs argued that ATR did not qualify as a "foreign state" and therefore the suit was not removable to federal court.[130] To determine whether ATR was subject to immunity under the FSIA, the district court analyzed the ownership structure.[131] ATR was created in 1982 as a joint venture by the Italian and French governments, and was ultimately established under French law.[132] Aerospatiale, Societe Nationale Industrielle, S.A. (SNIA) was the French national aerospace company.[133] The French government owned 91.42% of SNIA.[134] Alenia was a subdivision of Finmeccanica SpA, which was 62.14% owned by the Italian Instituto Per La Riconstruzione (IRI).[135] IRI was a holding company which was 100% owned by the Italian government.[136] Thus, the French and Italian governments indirectly owned 75% of ATR.[137]

---

124. In re Air Crash Disaster Near Roselawn, Ind. on Oct. 31, 1994, 96 F.3d 932, 941 (7th Cir. 1996).

125. *Id.*

126. *Id.* at 935.

127. *Id.*

128. *Id.* at 936.

129. *Id.*

130. *Air Crash Disaster Near Roselawn*, 96 F.3d at 936.

131. *Id.* at 935.

132. *Id.*

133. *Id.*

134. *Id.* at 936 (stating that 62.16% was owned directly by the French government and 20% through a company named Sogepa and "Credit Lyonnais Industria own[ed] the remaining 17.81%, which [was] owned by Credit Lyonnais, 52% of which [in turn was] owned by the French government").

135. *Id.* at 935-36.

136. *Air Crash Disaster Near Roselawn*, 96 F.3d at 935-36.

137. *Id.*

The court extended immunity under the FSIA because ATR was indirectly owned by the French and Italian governments.[138] In reaching this conclusion, the court first looked to the language of the statute.[139] The court found that Congress intended the FSIA to include entities other than the actual foreign state, as evidenced by the Congressional House Reports that stated, "entities which meet the definition of an 'agency or instrumentality of a foreign state' could assume a variety of forms, including . . . a transport organization such as a[n] . . . airline."[140]

The Seventh Circuit also noted that Congress intended the FSIA to protect foreign governments, as well as separately incorporated entities such as airlines or shipping lines in concluding that the FSIA extended immunity to entities other than foreign governments.[141] The Seventh Circuit cited to language in the Congressional Record that said agencies or instrumentalities could assume "a variety of forms" including "a transport organization such as an airline."[142] For example, the court centered the majority of its argument around Congress' use of an airline as an example of an entity that might be covered by the FSIA.[143] Thus, the court interpreted this language as granting immunity to entities that are directly owned by a foreign state or political subdivision of a foreign state.[144]

Second, because ATR was owned by two separate governments, the court had to decide whether governments could "pool" their interests to create a majority ownership.[145] This was significant because each government owned roughly half of ATR's shares. The court relied on the decisions of other jurisdictions, which reasoned that the statute did not specify that the majority interest must be owned by one state, to determine that pooling was allowed.[146]

Third, the Court considered whether the lower tiers of a corporation could establish foreign state status.[147] The plaintiffs argued that ATR could not remove to federal court because although it was owned by a foreign state, its ownership was indi-

138. *Id.* at 939.
139. *Id.* at 936.
140. *Id.*
141. *Id.*
142. *Air Crash Disaster Near Roselawn*, 96 F.3d at 936.
143. *See generally id.*
144. *Id.* at 937.
145. *Id.*
146. *Id.* at 938.
147. *Id.* at 939.

rect.[148] Although SNIA was an instrumentality of a foreign state, Alenia was a subsidiary of an instrumentality of a foreign state.[149] Thus, the plaintiffs argued that § 1603(b) required that both entities be owned directly by a foreign state.[150] To support their argument, plaintiffs cited to the Ninth Circuit's decision in *Gates v. Victor Fine Foods*, which held that an indirectly-owned subsidiary of a foreign state was not entitled to immunity under the FSIA.[151]

Contrary to the *Gates* decision, the Seventh Circuit found that the word "includes" in the Act mandated a broad definition of "foreign state."[152] The Seventh Circuit disagreed with the Ninth Circuit when it found that the word "includes" requires that the phrase "agency or instrumentality" is synonymous with "foreign state."[153] Therefore, an entity that is majority owned by an "agency or instrumentality" of a foreign state is synonymous with an entity that is majority owned by a "foreign state."[154] Consequently, if a foreign state "includes" an "agency or instrumentality of a foreign state" then a corporation that is majority owned by a foreign state "includes" a corporation that is owned by an "agency or instrumentality of a foreign state."[155]

Consequently, the court held that an indirect or tiered majority ownership is sufficient to qualify an entity as a foreign state. Shortly thereafter, the Fifth Circuit also followed this reasoning.[156] The Sixth Circuit similarly held that a corporation indirectly owned by a foreign state qualifies as an agency or instrumentality of a foreign state for purposes of the FSIA.[157] According to these circuits, the FSIA does not draw a distinction between direct and indirect ownership, and therefore does not expressly impose a requirement of direct ownership by a foreign state upon an entity in order to acquire immunity under the FSIA.[158]

148. *Air Crash Disaster Near Roselawn*, 96 F.3d at 939.
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.* at 940.
153. *Id.* at 939.
154. *Air Crash Disaster Near Roselawn*, 96 F.3d at 939.
155. *Id.*
156. *See generally* Delgado v. Shell Oil Co., 231 F.3d 165 (5th Cir. 2000).
157. *See generally* Gould, Inc. v. Pechiney Ugine Kuhlmann, 853 F.2d 445 (6th Cir. 1988).
158. *Id.*

C. THE SPLIT WITHIN THE SOUTHERN DISTRICT OF NEW YORK

The Second Circuit has not yet ruled on this issue, and district courts within the circuit are split.[159] An innovative approach has emerged from the Southern District of New York. Two recent inconsistent decisions from the Southern District of New York suggest a possible solution to the problem.

Musopole v. South African Airways (PTY.) Ltd.,[160] involved a plaintiff who claimed an employee of South African Airways, Ltd. (SAA) harassed her when the employee refused to let her board an airplane.[161] The plaintiff sued in New York state court alleging tort and contract claims against SAA.[162] SAA then removed the case to the Southern District of New York, alleging foreign state status under the FSIA.[163]

Judge Kaplan of the Southern District of New York found that SAA qualified for immunity under the FSIA because

159. *Compare* Musopole v. S. African Airways (PTY.) Ltd., 172 F. Supp. 2d 443 (S.D.N.Y. 2001), *with* In re Ski Train Fire in Kaprun, Aus. on Nov. 11, 2000, 198 F. Supp. 2d 420, (S.D.N.Y. 2002). This Article will discuss only Judge Kaplan's *Musopole* decision in detail. It should be noted, however, that Judge Scheindlin held the complete opposite of Judge Kaplan in *In re Ski Train*. In that case, plaintiff's children and grandchildren died in a ski train accident because of alleged negligent upkeep of a tunnel by the defendant. *Id.* at 421-22. The defendant was Gletscherbahnen Kaprun AG (GBK), a ski resort operator that also owned the train and tunnel where the decedents were killed. *Id.* GBK moved to have the case brought in federal court under the FSIA because it was indirectly owned by the Austrian government. *Id.* at 422. GBK's parent corporation was Elektrizitaeswirtschaft AG (OE AG), an Austrian power generation and tourism conglomerate which owned 45% of GBK. *Id.* The Village of Kaprun owned 33.98% of GBK. *In re Ski Train*, 198 F. Supp. 2d at 422. Thus, GBK argued that when the two interests were pooled, it was majority owned (78.98%) by the Austrian government. *Id.* at 423. Judge Scheindlin disagreed because although OE AG was found to be an "agency or instrumentality" of the Austrian government, it was not found to be a "foreign state" which could, itself, have an "agency or instrumentality" such as GBK. *Id.* at 426. Further, the Village of Kaprun's ownership of 33.98% of GBK's shares was not sufficient to make GBK an "agency or instrumentality of a foreign state." *Id.* at 426-27.

Judge Scheindlin relied solely on the arguments advanced by the Ninth Circuit in *Gates v. Victor Fine Foods* in refusing to extend to GBK the status of "agency or instrumentality" because GBK was not directly owned by the Austrian government. Judge Scheindlin recognized that his decision in this case created a split within the Southern District of New York by deciding contrary to Judge Kaplan's previous decision in *Musopole*. *See In re Ski Train*, 198 F. Supp. 2d at 425. Judge Scheindlin did not attempt to distinguish *In re Ski Train* from *Musopole*, but merely stated that his statutory interpretation was "better" than the interpretation employed by Judge Kaplan. *Id.*

160. *See Musopole*, 172 F. Supp. 2d at 443.

161. *Id.* at 444.

162. *Id.*

163. *Id.*

Transnet Ltd., a South African corporation controlled by South Africa's Minister for Public Enterprises, owned 80% of SAA's shares.[164] Both parties agreed that SAA was neither a political subdivision nor an organ of the South African government.[165] The dispute was over whether SAA was an agency or instrumentality of Transnet.[166] If so, SAA would also enjoy immunity from suit under the FSIA.

Before arriving at this conclusion, Judge Kaplan looked to both the Seventh and Ninth Circuits for guidance. Judge Kaplan relied heavily on the *Gates* decision, but nonetheless reached the opposite conclusion.[167] The argument for allowing jurisdiction was that Transnet was, undisputedly, an agency or instrumentality of the South African government, thus a "foreign state."[168] Because Transnet, the first-tier subsidiary, was an "agency or instrumentality," and it owned 80% of SAA's stock, then SAA likewise enjoyed immunity as an "agency or instrumentality" of the South African government.[169]

Judge Kaplan noted that the Ninth Circuit questioned whether this was the result Congress intended in drafting the statute.[170] The *Gates* court reasoned that the statutory language provided that a foreign state "includes" an agency or instrumentality, not that it *is* an agency or instrumentality.[171] The *Musopole* court reasoned that, had Congress intended a second-tier subsidiary to fall under the immunity offered by FSIA, then it would have expressly stated so in the act by using clear language.[172]

Judge Kaplan also relied on the Seventh[173] and Ninth[174] Circuits opinions which examined parts of the Congressional Record to determine Congress' intent. However, Judge Kaplan was more concerned with a different section of the record. He concluded that Congress enacted the FSIA to provide federal jurisdiction and a non-jury trial to a foreign state where the outcome of the trial might affect "the ability of the executive branch

164. *Id.* at 447.
165. *Id.*
166. *Musopole*, 172 F. Supp. 2d at 444.
167. *Id.* at 445-46.
168. *Id.* at 444.
169. *Id.* at 447.
170. *Id.* at 446.
171. *See supra* notes 75, 85, 90-108 and accompanying text.
172. *See Musopole*, 172 F. Supp. 2d at 446.
173. *See generally* In re Air Crash Disaster Near Roselawn, Ind. on Oct. 31, 1994, 96 F.3d 932 (7th Cir. 1996).
174. *See generally* Gates v. Victor Fine Foods, 54 F.3d 1457 (9th Cir. 1995).

to conduct successful foreign policy."[175] Judge Kaplan found this to be significant, because a trial by jury might not be fair if the members of the jury are particularly biased against a foreign defendant because of its nationality.[176] To allow the first, but not second tier, of a foreign corporation federal jurisdiction may defeat congressional intent where the foreign government indirectly holds a majority interest in the second-tier subsidiary because the government will still be subject to the problems involved with a jury trial if it is not immune from suit, or allowed a non-jury trial.[177] Thus, drawing the line after the first tier is an arbitrary distinction because it would not serve Congress' intent in enacting the FSIA.

In dicta, Judge Kaplan suggested that the line might be drawn by looking to the government's beneficial interest in a company rather than the actual interest.[178] For example, if a government owned 51% of the shares in a given company, and that company owned 51% of its subsidiary, then the government's beneficial interest would only amount to 26%.[179] In this case, the second tier would not be considered an "agency or instrumentality" because the government only enjoyed approximately a one-quarter interest in the company. However, if the court considered the percentage of actual ownership, the government would hold an actual 51% interest, and federal courts might hold jurisdiction over the company depending on whether the court follows the Seventh or Ninth Circuit. Judge Kaplan declined to formulate this rule, however, because, the fact that the South African government owned 80% of SAA's shares through Transnet was immaterial to the analysis.[180] Thus, Judge Kaplan sustained federal question jurisdiction.[181]

To illustrate the beneficial interest approach, assume that Peru owns 51% of a brake manufacturer. If the brake manufacturer owns 51% of a subsidiary that manufactured a faulty part, then Peru would indirectly own 26.01% (0.51 x 0.51) of the subsidiary.[182] In contrast, if Bolivia owned 75% of Company C, which in turn owned 80% of Company D, Bolivia's beneficial in-

175. *See Musopole*, 172 F. Supp. 2d at 446.
176. *Id.*
177. *Id.* at 447.
178. *Id.*
179. *Id.*
180. *Id.*
181. *Musopole*, 172 F. Supp. 2d at 447.
182. *See id.* Beneficial interest = (percentage of ownership of Nation A) x (percentage of ownership of Nation B).

terest in Company D would be 60% (0.75 x 0.80) and the court would grant immunity. Because Peru has less than a 50% interest in the subsidiary, allowing the subsidiary protection under the FSIA is inconsistent with Congress' intent to "ensure that a federal forum was available where the interests of foreign nation are involved in litigation that might affect the Executive Branch's ability to conduct successful foreign policy."[183] However, Bolivia holds more than a 50% interest in Company D. Accordingly, Bolivia holds a substantial beneficial interest in the outcome of any litigation against Company D, and therefore Company D will be granted immunity.

Thus, prior to *Dole* there was a three-way split of authority. There were two opposing approaches advanced by the circuit courts.[184] In its 1995 decision in *Gates v. Victor Fine Foods*, the Ninth Circuit refused to extend immunity past the first tier of a government-owned corporation. The opposite side of the issue is explained by the Seventh Circuit in *In re Air Crash Disaster Near Roselawn, Indiana.* The third approach, advanced by Judge Kaplan of the Southern District of New York, suggested a third approach—the beneficial interest test—to determine whether a lower tier of a foreign-owned corporation should enjoy immunity from litigation under the FSIA.

III. THE SUPREME COURT OPINION, *DOLE FOOD CO. V. PATRICKSON*

In 2003, the U.S. Supreme Court decided a case that arose in the Ninth Circuit, *Dole Food Co. v. Patrickson.*[185] The case involved banana workers from Costa Rica, Ecuador, Guatemala and Panama who sued the Dole Food Company in state court for Dole's use of a pesticide known to cause, among other things, sterility, liver damage, and miscarriages.[186] Dole removed the action to federal court and impleaded two Israeli companies (Dead Sea Companies), which had manufactured some of the pesticides used by Dole.[187] The two Israeli companies moved for

183. *Id.*

184. *Compare Gates*, 54 F.3d 1457 (9 th Cir. 1995); *with* In re Air Crash Disaster Near Roselawn, Ind. on Oct. 31, 1994, 96 F.3d 932 (7th Cir. 1996).

185. 538 U.S. 468 (2003).

186. Patrickson v. Dole Food Co., Inc., 251 F.3d 795, 798 (9th Cir. 2001), *aff'd*, 123 S. Ct. 1655 (2003).

187. *Dole*, 123 S. Ct. 1655, at 1658-59.

dismissal pursuant to the FSIA.[188] Following its decision in *Gates v. Victor Fine Foods*, the Ninth Circuit ruled that the Dead Sea Companies were neither organs nor instrumentalities of the state of Israel.[189] In doing so, the court upheld its previous decision to limit immunity to wholly-owned subsidiaries of a foreign government.[190]

The primary issue before the Supreme Court was whether Dole could proceed with its impleader action against the Dead Sea Companies although the State of Israel only indirectly owned the defendant companies.[191] The answer turned on the interpretation of the FSIA. The issue was whether the Dead Sea Companies were "agencies or instrumentalities" of Israel, and therefore accorded the status of a foreign state under the FSIA, because they were indirectly owned by the Israeli government at the time the suit was filed. If so, the companies would be immune from suit, and the FSIA would require dismissal of the action.

The Court, in a 7-2 opinion authored by Justice Kennedy, affirmed the decision of the Ninth Circuit and held that a company must be directly owned by a foreign government in order to be afforded agency or instrumentality status for purposes of the FSIA.[192] The Court arrived at its conclusion using the statutory text and elementary principles of corporate law.[193]

First, the Court relied upon statutory language when it concluded that, in order to be deemed an agency or instrumentality of a foreign state, a foreign government must directly own the company.[194] The Court noted that the determination of whether a corporation is an agency or instrumentality of a foreign state depends on whether the corporation is owned by a foreign state.[195] For example, § 1603(b)(2) refers to ownership of

188. *Id.* at 1659.
189. *Patrickson*, 251 F.3d at 806-07.
190. *Id.*
191. The second question before the Court was "whether a corporation's instrumentality status is defined at the time of an alleged tort or other actionable wrong or, on the other hand, at the time suit is filed." *Dole*, 123 S. Ct. at 1658. On this issue the Court ruled that "instrumentality status is determined at the time of the filing of the complaint." *Id.* at 1663. Thus, to be an "agency or instrumentality" the company must be majority owned by a foreign government at the time the complaint is filed. *See id.*
192. *Dole*, 123 S. Ct. at 1662.
193. *Id.* at 1659-62.
194. *Id.*
195. *Id.* at 1660.

"shares."[196] Additionally, the Court noted that the words "other ownership interest" when read together with "shares" must be interpreted to mean ownership interests other than ownership of stock.[197] Therefore, Congress intended ownership to depend on formal corporate ownership, as opposed to ownership in a colloquial sense.[198] Thus, in the brake manufacturer hypothetical, because the foreign government holds a controlling interest in the brake manufacturer, the foreign government will be immune from suit under the FSIA. However, because the foreign government does not own a controlling interest in the subsidiary that manufactured the faulty part, the subsidiary is not immune from suit.

In further support of its corporate ownership theory, the Court noted that the same section also refers to a "separate legal person, corporate or otherwise."[199] Through its analysis of the text, the Court concluded that Congress intended the sovereign immunity of a foreign corporation to be contingent upon formal corporate ownership.[200] If Congress had intended the statute to refer to ownership in a fashion other than formal corporate ownership, Congress was capable of doing so.[201] Thus, a foreign government must either hold a controlling interest in the company's stock, or own control of the company in some other form.[202]

Second, Justice Kennedy found a corporation to be immune from suit in U.S. courts only if it were directly owned by a foreign government.[203] This is consistent with elementary principles of corporate law, which shield corporate investors from liability notwithstanding severe wrongdoing such as commingling of corporate and personal funds.[204] Justice Kennedy began this section of his analysis by noting that a corporation and its shareholders are separate and distinct entities.[205] A shareholder, by virtue of its ownership of shares, does not own the corporation's assets.[206] Thus, an individual shareholder does

196. *Id.*
197. *Id.* at 1661.
198. *Dole*, 123 S. Ct. at 1661.
199. *Id.* at 1660.
200. *Id.* at 1660-61.
201. *Id.* at 1661.
202. *Id.* at 1661-62.
203. *Id.* at 1658-61.
204. *Dole*, 123 S. Ct. at 1661.
205. *Id.* at 1660.
206. *Id.*

not own the subsidiaries of a corporation.[207] Accordingly, the parent does not own, or have legal title to, the subsidiary of its subsidiary.[208] If a foreign corporation is afforded sovereign immunity solely because a foreign government owns a controlling share of its parent company, the FSIA would, in effect, allow the courts to pierce the corporate veil, thereby conferring immunity upon the corporation based solely on the identity of its principal shareholders (the foreign government).[209] Ordinarily, the corporate veil is pierced only when it is impossible to separate the actions of the corporation from that of the shareholders.[210] For example, piercing was not warranted in the situation of the brake manufacturer because there was no intermingling between the corporation and its owners. The business of the corporation did not become the business of the government merely because the government held an interest in a parent company. Thus, the Supreme Court held that Congress manifested its intent to deny immunity to corporations which are not directly owned by a foreign government through the statutory text and a reliance on the traditional rules of corporate ownership.[211]

The Court reasoned that the FSIA extends sovereign immunity only to a corporation which is directly owned by a foreign government because the text of the statute does not compel a conclusion that Congress intended to disregard the traditional rules of corporate formalities and pierce the corporate veil in every case where a foreign government holds some interest in a corporate defendant.[212] Thus, the Court held that Israel did not have direct ownership in either of the Dead Sea Companies, and therefore the Dead Sea Companies were not afforded sovereign immunity under the FSIA.[213]

IV. THE BENEFICIAL INTEREST TEST

The Supreme Court in *Dole* mended the split among the circuits over the meaning of the FSIA. The Court affirmed the Ninth Circuit opinion and held that only a corporation which is directly owned by a foreign government may be granted immu-

207. *Id.* at 1660.
208. *Id.*
209. *Id.* at 1661.
210. *Dole*, 123 S. Ct. at 1660-61.
211. *Id.*
212. *Id.* at 1660.
213. *Id.*

nity under the FSIA.[214] Although the holding in *Dole* created a bright-line rule mandating who may be granted immunity under the FSIA, it did not address Congress' original concern in enacting the statute. Although Congress was concerned with establishing uniformity in the granting of immunity, the underlying purpose of foreign sovereign immunity was to promote amicable foreign relations.[215] The recent Supreme Court decision advances only one of these goals. Limiting immunity to a corporation that is directly owned by a foreign government establishes a bright-line rule that produces uniformity in decisions to confer immunity upon a foreign sovereign. However, this bright-line rule fails to address Congress' original purpose, which was to promote successful foreign relations. Thus, Congress should legislatively override *Dole* and create a new rule following Judge Kaplan's "beneficial interest" test.

In dicta, Judge Kaplan of the Southern District of New York suggested that the Act may be read "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."[216] For example, a company that is 51% owned by a foreign nation may own 51% of another company.[217] The foreign nation would beneficially own only 26% of the second-tier subsidiary.[218] Thus, the FSIA would not apply to the second tier. However, there may be occasions where a foreign nation may beneficially own an "nth"-tier subsidiary. That tier would then be allowed to remove to federal court under the FSIA in the event it is sued by a domestic (U.S.) plaintiff.

Consider the hypothetical example of the train accident at the beginning of this Article. Assume that the foreign government owned 75% of the shares of the company which owned 51% of the shares of the brake manufacturer. The foreign government, in this case, would only hold a 38% beneficial interest in the brake manufacturer.[219] Therefore, according to the beneficial interest test, the foreign government does not hold a majority beneficial interest in the brake manufacturer. Because the

214. *Id.*
215. *See supra* note 66 and accompanying text.
216. Musopole v. S. African Airways (PTY.) Ltd., 172 F. Supp. 2d 443 (S.D.N.Y. 2001).
217. *Id.*
218. *Id.*
219. 0.75 x 0.51 = 0.3825 or 38%.

foreign government does not hold more than a 50% beneficial interest, the brake manufacturer is not an agency or instrumentality of a foreign sovereign, and cannot claim immunity under the FSIA.

The "beneficial interest" approach advanced by Judge Kaplan in *Musopole* is the best test to use in determining whether an "nth"-tier subsidiary of a foreign government may benefit from the immunity extended under the FSIA for four reasons. First, this approach is the most consistent with the statutory language and legislative intent of the FSIA. Second, this approach will alleviate the Ninth Circuit's concern that an endless chain of foreign corporations would be granted immunity because their government had some minute ownership interest in the corporation. Third, allowing courts to determine the beneficial interest that a foreign government holds in a corporation will create a predictable standard which domestic plaintiffs can rely upon when deciding whether to file suit against the corporation. Fourth, the "beneficial interest" approach is a compromise between the decisions of the Ninth and Seventh Circuits.

A. CONSISTENT WITH STATUTORY LANGUAGE AND LEGISLATIVE INTENT.

First, Congress should codify the beneficial interest test because it is most consistent with the statutory language and legislative intent of the FSIA. When drafting the FSIA, Congress endeavored to create a bright-line rule.[220] Additionally, Congress did not intend to extend immunity to defendants where the foreign government did not have a substantial interest in the outcome of litigation.[221] Accordingly, Congress drafted language that conferred immunity upon a "foreign state."[222] Congress defined "foreign state" as including a political subdivision or an agency or instrumentality of a foreign state.[223] Because the language of the Act can be construed to confer immunity on a lower-tiered subsidiary of a foreign government-owned corporation, it is important to note that Congress did not intend to extend immunity to an endless line of subsidiaries.[224]

220. *See supra* note 48 and accompanying text.
221. *See supra* notes 57-60 and accompanying text.
222. 28 U.S.C. § 1603 (a)-(b).
223. *Id.*
224. *See supra* notes 109-10 and accompanying text.

The *Dole* decision, on the other hand, limits immunity to a company that is directly owned by the foreign government.[225] *Dole* does not contemplate the possibility that a foreign government may hold a substantial interest in a lower-tier subsidiary of a corporation. Thus, *Dole* risks denying immunity to a foreign government-owned corporation where the government has a substantial interest in the outcome of litigation merely because the government does not directly own the corporation. For this reason, the beneficial interest approach is the best approach because it complies with Congress' intent to limit immunity while still affording immunity to those companies where the foreign government holds a substantial interest in the prosperity of the company.

B. PROMOTES U.S. FOREIGN POLICY

The second reason why Congress should legislatively overrule *Dole* and codify the beneficial interest test is because it remedies the concern advanced by the Ninth Circuit that a broad interpretation of the FSIA would grant immunity to an endless chain of corporations merely because, somewhere in the line of ownership, a foreign government owned over 50% of its shares.[226]

The beneficial interest test alleviates this problem by ensuring that immunity is extended, not only to a company that is directly owned by a foreign government, but also when a foreign government holds a substantial beneficial interest in that company. This is consistent with Congressional intent because Congress is not concerned with litigation the outcome of which would not affect U.S. foreign policy with the foreign defendant's nation. A nation that only holds a small beneficial interest in a company is not likely to be as interested in the outcome of litigation as the foreign government that owns a large beneficial interest or directly owns the company

C. PROVIDES A BRIGHT-LINE RULE

The third reason why Congress should legislatively overrule *Dole* and codify the beneficial interest test is because it provides a bright-line rule that allows the courts to determine whether a foreign defendant corporation should be granted immunity from

225. *See supra* Part III.
226. *See supra* notes 109-10 and accompanying text.

suit in U.S. courts. By granting immunity only when a foreign government beneficially owns a substantial interest in that company, courts achieve a uniform standard for determining immunity for "foreign states."

D. COMPROMISE BETWEEN NINTH AND SEVENTH CIRCUITS

The beneficial interest test provides a compromise between the Seventh and Ninth circuits. It advances the policy goals of limiting immunity whild making sure domestic lawsuits do not jeopardize foreign policy. Domestic plaintiffs may rely on this standard when deciding whether to file suit against foreign corporate defendants. This approach prevents the extension of immunity to an endless line of corporations, and therefore alleviates the concerns of the Ninth Circuit. Additionally, the beneficial interest test is consistent with the Seventh Circuit approach because it allows successive tiering instead of limiting immunity to the first tier.

CONCLUSION

Congress intended the FSIA to grant federal subject matter jurisdiction to foreign states so that decisions regarding those states would be somewhat uniform. Uniformity in the treatment of foreign states within the federal court system would help advance the Executive Branch's ability to conduct successful foreign policy.[227] The meaning of § 1603(a)-(b) of the FSIA has recently become a subject of hot debate. The Ninth Circuit led the way in *Gates v. Victor Fine Foods* when it refused to extend federal subject matter jurisdiction to the second-tier subsidiary of a government-owned corporation.[228] In 1996, one year later, the Seventh Circuit advanced a literal interpretation of the act when it allowed successive tiering of a corporation for purposes of extending federal subject matter jurisdiction.[229] Recently, the Fifth and Sixth Circuits have joined the Seventh in allowing successive tiering. Thus, the trend seems to be moving toward a broad definition of "agency or instrumentality" as found in the majority opinions which allow successive tiering.

227. *See* In re Air Crash Disaster Near Roselawn, Ind. on Oct. 31, 1994, 96 F.3d 932 (7th Cir. 1996).

228. *Gates*, 54 F.3d at 1459.

229. *Air Crash Disaster Near Roselawn*, 96 F.3d at 932.

The Supreme Court ruled on the issue in its 2003 decision *Dole Food Co. v. Patrickson.*[230] Justice Kennedy wrote that the FSIA grants immunity to a corporate defendant that is directly owned by a foreign government.[231] The Court emphasized that Congress focused on corporate ownership when it drafted the FSIA.[232] Because a corporate shareholder has an ownership interest only in the corporation for which it holds shares, and not the corporation's subsidiary, bestowing immunity upon a subsidiary amounts to piercing the corporate veil.[233]

The Southern District of New York proposed a solution, in dicta, which is a better approach than that espoused by the Supreme Court in *Dole.*[234] *Musopole* implied that when determining whether an entity is an "agency or instrumentality" of a foreign state it is helpful to determine the beneficial interest held by the government in order to achieve the ultimate purpose of the FSIA, which is to insure that "foreign states" receive uniform treatment by federal courts, thus ensuring consistency in U.S. foreign policy.[235] This interpretation is not only a fair compromise between the strict and broad interpretations advanced by the Ninth and Seventh Circuits respectively, but alleviates the risk produced by *Dole* of creating inconsistent foreign policy. *Dole* effectively creates the bright-line rule sought by Congress to produce uniformity in decisions to confer sovereign immunity. However, *Dole* does not address Congress' ultimate concern, which was a rule that would aid the Executive Branch in conducting successful foreign policy by not subjecting foreign government-owned corporations to litigation in U.S. courts, or at least to produce safeguards against biased jury trials. Instead, *Dole* limits immunity to those corporations that are directly owned by a foreign government, while denying immunity to all other corporations where the foreign government has a substantial interest in the outcome of litigation. The "beneficial interest" test on the other hand, grants immunity to all corporations that are owned by a foreign government where the foreign government has a substantial interest in the outcome of litigation.

230. *Dole*, 538 U.S. at 1660.
231. *Id.*
232. *Id.*
233. *Id.*
234. Musopole v. S. African Airways (PTY) Ltd., 172 F. Supp. 2d 443 (S.D.N.Y. 2001).
235. *Id.*