Law and Business Review of the Americas

Volume 10

2004

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FOREIGN SOVEREIGN IMMUNITY: WHEN IS A SOVEREIGN REALLY A SOVEREIGN?

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IN 2003, the U.S. Supreme Court ruling in *Dole v. Patrickson* resolved conflicts among the various courts of appeals involving the applicability of the Foreign Sovereign Immunity Act (FSIA) to entities remotely owned by foreign state governments.[1] In its decision issued April 22, 2003, the Supreme Court answered two technical, yet highly significant, questions and narrowed the scope of what constitutes a foreign sovereign under the FSIA.[2] The Supreme Court decision affects litigation involving foreign entities, including decisions made by lawyers in bringing these actions, as well as decisions made by foreign entities in anticipating a defense.

The U.S. Supreme Court answered the following questions: 1) is a corporation an "agency or instrumentality" if a foreign state owns the majority of the shares of a corporate enterprise that in turn owned a majority of the shares of the corporation; and 2) does the foreign state have to own the majority of the shares of the corporation at the time of the events giving rise to the litigation or at the time the plaintiff commences a suit against the corporation in order to be eligible for immunities under FSIA?[3]

I. LEGAL AND FACTUAL BACKGROUND LEADING TO SUPREME COURT DECISION

Understanding the ramifications of the Supreme Court ruling on these issues requires a basic understanding of the FSIA, the relevant provisions that form the basis of the Supreme Court decision in *Dole v. Patrickson*, and the events and conflicting decisions leading to the grant of certiorari by the Supreme Court. FSIA governs whether foreign entities are entitled to immunity from suit and jurisdiction in U.S. courts.[4] The statute

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1. Dole v. Patrickson, 123 S. Ct. 1655 (2003); 28 U.S.C. §§ 1602-1611 (1994).
2. Carlos M. Vasquez, *New Supreme Court Terms Includes Issues of Foreign Sovereign Immunity* (Addendum May 2003), *at* http://www.asil.org/insights/insigh91.htm.
3. *Dole*, 123 S. Ct. at 1655.
4. White and Case LLP, *Supreme Court Decision Modifies Applicability of Foreign Sovereign Immunities Act as to State Owned Companies* (June 3, 2003), *at* http://www.whitecase.com [hereinafter White and Case LLP].

states that a foreign sovereign is immune from the jurisdiction of the U.S. courts unless it comes under an enumerated exception.[5] 28 U.S.C. § 1603 defines a "foreign state" as including a "political subdivision of a foreign state or an agency of instrumentality of a foreign state."[6]

"Agency" or "instrumentality" of a foreign state means any entity 1) which is a separate legal person, corporate or otherwise, and 2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and 3) which is neither a citizen of a State of the United States nor created under the laws of any third country.[7]

Even if foreign sovereigns or their agencies or instrumentalities do not meet the requirements of immunity they are entitled to have actions litigated in federal court.[8] Requirements of 28 U.S.C. § 1441 provide in pertinent part:

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or defendants, to the district court of the United States for the district and division embracing the place where such action is pending. . . .
> (d) Any civil action brought in a State Court against a foreign state as defined in section 1603(a) of this title 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.[9]

The facts in *Patrickson v. Dole*, the Ninth Circuit case that was affirmed in part by the Supreme Court, are almost identical to the facts in a Fifth Circuit case, *Delgado v. Shell Oil*.[10] In both cases, foreign agricultural workers from Costa Rica, Ecuador, Guatemala, and Panama filed products liability actions in state courts, seeking damages for injuries sustained while working on banana farms in foreign countries.[11] The injuries stemmed from exposure to dibromochloropropane (DBCP), an agricultural pesticide manufactured and designed in the United States and found to cause sterility and cancer in those exposed.[12] Defendants in both actions are alleged to have designed, manufactured, sold, or used DBCP.[13] In *Patrickson* and *Delgado*, plaintiffs brought only state law causes of action against U.S. defendants, including Dole Food Company and others, for the use of DBCP, which was earlier banned from use in the United

5. 28 U.S.C. § 1604; David Zaslowsky, *Corporations as Foreign Sovereigns: To Be or Not to Be?* 228 N.Y.L.J. 4 (2002).
6. 28 U.S.C. § 1603(a).
7. 28 U.S.C. § 1603(b)(1)-(2).
8. 28 U.S.C. § 1441(a),(d).
9. *Id.*
10. Delgado v. Shell Oil Co., 231 F.3d 165 (5th Cir. 2000); Patrickson v. Dole Food Co., 251 F.3d 795 (9th Cir. 2001).
11. *Delgado*, 231 F.3d at 165; *Patrickson*, 251 F.3d at 795.
12. *Delgado*, 231 F.3d at 165; *Patrickson*, 251 F.3d at 795.
13. *Delgado*, 231 F.3d at 169; *Patrickson*, 251 F.3d at 798.

States by the Environmental Protection Agency.[14] The defendants continued to sell the pesticide for use in foreign countries where workers were not warned of its effects and often did not wear protective gear when using it.[15]

In *Delgado*, unable to remove the cases on any federal question basis, defendants impleaded Dead Sea Bromine Company, Ltd. (Dead Sea) who they asserted was a "foreign state" within the meaning of FSIA.[16] Dead Sea was a second-tier subsidiary of a company owned by the State of Israel.[17] Dead Sea promptly claimed immunity under FSIA and removed the entire case to federal court, a tactical move alleged by plaintiffs to be orchestrated by the defendants to land in federal court.[18]

In an attempt to remand the action back to state court, *Delgado* plaintiffs alleged that defendants fraudulently impleaded Dead Sea as a procedural weapon.[19] The U.S. District Court for the Southern District of Texas ruled that Dead Sea qualified as a "foreign state" under FSIA and, as such, its presence conferred subject matter jurisdiction over the entire action.[20] Under the FSIA, once an entity is classified as a foreign state, the entity is presumed to be immune from the jurisdiction of U.S. courts.[21] Unless a specified exception applies, a federal court lacks subject matter jurisdiction over a claim against a foreign state.[22] Unlike the normal foreign state defendant, Dead Sea was allegedly actively cooperating with the respondents who were ostensibly suing it, and so it waived its immunity, thus strengthening the defendants' arguments for federal subject matter jurisdiction.[23] The case was subsequently dismissed under the doctrine of forum non conveniens.[24]

On October 19, 2000, the Fifth Circuit affirmed the district court's decision in *Delgado*. The Court of Appeals held that indirect state ownership suffices for "foreign state" status under FSIA, entitling defendants to remove actions to federal court.[25] The Fifth Circuit stated that the plain language of the statute simply requires "ownership" by a foreign state.[26]

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14. *Patrickson*, 251 F.3d at 798.
15. *Foreign Sovereign Immunities Act: Supreme Court Says Banana Workers' Suit Belongs in State Court*, 21 No. 5 ANDREWS TOXIC CHEMICALS LITIG. REP. 3 (2003) [hereinafter ANDREWS TOXIC REP.]; *see also* Ann Pickering, *Banana Workers and DBCP*, MEDILL NEWS SERVICE (Aug. 2002), *available at* http://journalism.medill.northwestern.edu
16. *Delgado*, 231 F.3d at 169.
17. *Id.* at 175.
18. *Id.* at 174.
19. *Id.* at 174.
20. *Id.* at 175.
21. 28 U.S.C. § 1604(a).
22. Saudi Arabia v. Nelson, 507 U.S. 349, 355 (1993).
23. *Delgado*, 231 F.3d at 177. For a general discussion of fraudulent joinder and its effects on FSI, *see* J. Thompson Thornton & Aurora A. Ares, *The Foreign Sovereign Immunities Act of 1976: Misjoinder, Nonjoinder and Collusive Joinder*, 58 J. AIR L. & COM. 703 (1993).
24. *Delgado*, 231 F.3d at 165.
25. *Id.* at 176.
26. *Id.*

"It draws no distinction between direct and indirect ownership; neither does it expressly impose a requirement of direct ownership."[27] The Fifth Circuit stated, "should any doubt remain concerning this Circuit's position on tiering or indirect ownership, we squarely hold today that indirect or tiered majority ownership is sufficient to qualify an entity as a foreign state, assuming that all other requirements are met."[28]

The Fifth Circuit acknowledged that its ruling was consistent with the Seventh and Sixth Circuits, but not the Ninth Circuit.[29] In fact, the ruling directly conflicted with the Ninth Circuit holding that only direct ownership is permitted by 28 U.S.C.§1603(b).[30] In *Gates v. Victor Fine Foods*, the court held that the entity was " wholly owned by an agency or instrumentality of a foreign state" but not owned by a foreign state or political subdivision thereof as required by the statute.[31]

In *Patrickson*, one of the defendants, Dole Food Company, responded to the class action brought in Hawaii state court by impleading the same Israel chemical company as it did in *Delgado*, Dead Sea, which manufactured some of the DBCP used in the plaintiffs' countries.[32] Dead Sea claimed to be an instrumentality of the foreign state of Israel as defined by FSIA, entitling it to removal under 28 U.S.C § 1441(d).[33] In May 2001, the Ninth Circuit disagreed, finding that Dead Sea was not an instrumentality of Israel under FSIA.[34] Thus, removal was improper. This ruling effectively barred defendant Dole Food's access to a federal forum.[35]

II. THE SUPREME COURT GRANTS CERTIORARI IN *DOLE V. PATRICKSON* TO RESOLVE CONFLICTS

Here, two circuits hearing cases involving the same defendants and third party defendant under the same facts reached entirely different results. The Fifth Circuit held that Dead Sea was a foreign state qualifying for immunity while the Ninth Circuit held that it was not. In the Ninth Circuit, second-tier entities were not entitled to sovereign immunity and the term "foreign state," as used in 28 U.S.C. § 1603(b), was limited to the state itself so that a majority of shares in the instrumentality must be owned by the foreign state or a political subdivision.[36]

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27. *Id.*
28. *Id.*
29. *Id.* at 176 (citing Gates v. Victor Fine Foods, 54 F.3d 1457, 1462 (9th Cir.1995).
30. Gates v. Victor Fine Foods, 54 F.3d 1457, 1462 (9th Cir. 1995).
31. *Id.*
32. ANDREWS TOXIC REP., *supra* note 15, at 3.
33. Patrickson v. Dole Food Co., 251 F.3d 795, 798 (9th Cir. 2001).
34. *Id.* at 808.
35. Lumen N. Mulligan, *No Longer Safe at Home: Preventing the Misuse of Federal Common Law of Foreign Relations as a Defense Tactic in Private Transnational Litigation*, 100 MICH. L. REV. 2408, 2421 (2002).
36. Dennis Quick, *Local Law Firm Gives Foreign Workers a Chance for Justice*, CHARLESTON REG'L. BUS. J., June 19, 2003, *available at* http://www.crbj.com; *see also*, Thad T. Dameris & Michael Muchetti, *Vectors to Federal Court: Unique Ap-*

Direct conflict among the circuit courts as to what constitutes an agent or instrumentality of a foreign sovereign set the stage for clarification by the Supreme Court. In some U.S. courts, foreign entities were entitled to rights and protections under the FSIA while in others they were treated in the same manner as any other foreign corporation.[37] A need arose for authoritative construction to resolve the issue uniformly throughout the nation.

The Supreme Court granted certiorari on the Ninth Circuit case, *Dole v. Patrickson*, where defendants claimed that the circuit erred in finding that Dead Sea was not a foreign state for purposes of the FSIA, thus disallowing removal to federal court.[38] The Supreme Court disagreed with Dole, finding that Dead Sea was not an instrumentality of Israel at the time of the filing of the complaint, because any relationship recognized under FSIA between Dead Sea and Israel had been severed before suit was commenced.[39] The Court also held that instrumentality status is determined at the time of the filing of the complaint.[40] In arriving at this conclusion, the court construed 28 U.S.C. § 1603(b)(2) so that the present tense in the provision "a majority of whose shares . . . is owned by a foreign state" follows the plain meaning of the text of the provision, which is expressed in the present tense.[41]

The Supreme Court also held that a foreign state must own a majority of shares of a corporation if the corporation is to be deemed an instrumentality of the state under the definition of agency or instrumentality in the FSIA.[42] Dead Sea was an indirect subsidiary of Israel and thus could not come within the statutory language granting instrumentality status to an entity a "majority of whose shares or other ownership interest is owned by the foreign state of political subdivision thereof."[43] The Court referenced basic principles of corporate law, specifically, that a corporation and its shareholders are distinct entities. An individual shareholder does not own corporate assets and thus does not own any subsidiary corporations that may be owned by the corporation.[44] The Supreme Court focused on "ownership" rather than control by holding that "majority ownership by a foreign state, not control, is the benchmark of instrumentality status."[45] Israel did not own a majority of shares in Dead Sea.[46]

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proaches to Subject Matter Jurisdiction in Aviation Cases, 62 J. AIR L. & COM. 959 (1997).

37. Zaslowsky, *supra* note 5; *see also In re* Air Crash Disaster Near Roselawn Indiana, 96 F.3d 932, 941 (7th Cir. 1996) (defining foreign state broadly to include political subdivisions as agencies or instrumentalities).
38. Dole v. Patrickson, 123 S. Ct. 1655 (2003).
39. *Id.*
40. *Id.* at 1655.
41. *Id.*
42. *Id.* at 1657.
43. *Id.* (quoting 28 U.S.C. § 1603(b)(2)(2003)).
44. *Id.* at 1660.
45. *Id.* at 1662; *see also* Ann Pickering, *On the Docket, available at* http://journalism.medill.northwestern.edu (last visited Oct. 7, 2003).
46. *Dole*, 123 S. Ct. at 1660.

The Court distinguished official immunity in common law, which is given to prevent the threat of suit from crippling the proper and effective administration of public affairs, from the FSIA, which is not meant to avoid chilling foreign states or their instrumentalities in the conduct of their business, but to give them some protection from the inconvenience of suit as a gesture of comity between the United States and other sovereigns.[47]

III. EFFECTS OF *DOLE V. PATRICKSON* RULING ON PENDING AND FUTURE LITIGATION

Thus, the U.S. Supreme Court's decision solved the conflicts and resolved technicalities involving the timing and constitution of instrumentalities of foreign states. What effect will this have on pending litigation in lower courts involving foreign entities? Guidance can perhaps be found in *Borja v. Dole Food Company*, a case dealing with this very issue.[48] In *Borja*, another case involving foreign banana workers exposed to DBCP, defendants again impleaded Dead Sea and the action was removed to federal court. There, plaintiffs' Motion to Remand was denied and the case was conditionally dismissed on the grounds of forum non conveniens, relying on the Fifth Circuit opinion in *Delgado v. Shell Oil Co.*[49] After the Supreme Court's decision in *Dole v. Patrickson*, the U.S. District Court for the Northern District of Texas determined that the court can alter or amend a final judgment under Fed.R.Civ. P. 59(3) on a number of grounds, including an intervening change in law, the availability of new evidence not previously available, and the need to correct a clear error of law or prevent manifest injustice.[50] The district court determined that Dead Sea's removal in the case under 28 U.S.C. § 1441(d) was improper, and as a result, the court lacked subject matter jurisdiction over the action.[51] The court vacated its forum non conveniens ruling and remanded the case to state court.[52]

Other pending actions will likely be remanded if removals were granted on erroneous grounds now clarified by the U.S. Supreme Court. Whether plaintiffs in civil cases already dismissed in their entirety could refile their actions or have them reinstated on the basis of *Dole v. Patrickson* may depend on the facts and circumstances of the particular case.[53] Perhaps the patent unfairness in denying the dismissed claimants of the benefits of the holding in *Patrickson* will prevail. The interests of justice warrant affording the same treatment for those claimants.[54]

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47. *Id.* at 1663 (citing Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 486 (1983)); *see also* Lawrence Newman and David Zaslowsky, *International Litigation: High Court Narrows Coverage of FSIA*, N.Y.L.J. 3, June 9, 2003.
48. Borja v. Dole Food Co., Inc., 2003 WL 21529297 (N.D. Tex. June 30, 2003).
49. *Id.* at *1.
50. *Id.*; *see also In re* Benjamin Moore & Co., 318 F.3d 626, 629 (5th Cir. 2002).
51. *Borja*, 2003 WL 21529297 at *2.
52. *Id.*
53. White and Case LLP, *supra* note 4.
54. Gondeck v. Pan American World Airways, Inc., 382 U.S. 25 (1965).

More significantly, the Supreme Court's ruling in *Dole v. Patrickson* has broader ranging effects on litigation involving foreign entities. A finding of foreign state status has highly significant consequences for both the entity in question and the litigant suing it. A major consequence of foreign state status is removal rights. Federal courts are courts of limited jurisdiction, requiring constitutional and congressional authority, such as those under FSIA, to hear cases.[55] Underlying claims can be removed without consent of codefendants.[56] If an entity is a foreign state, it is immune from suit unless an exception applies.[57]

Many scholars believe that litigation in federal court is advantageous to corporate defendants, particularly for corporate defendants facing alien tort plaintiffs seeking redress for overseas conduct.[58] A claimant has no right to a jury trial against any entity that qualifies as a foreign state.[59] Federal courts may be more encumbered by procedural constraints than state courts, making litigation more difficult for foreign plaintiffs.[60] These constraints include stricter standing requirements, stricter burdens of proof, restrictions on post-judgment attachments in executions, and a more liberal standard for forum non conveniens dismissal.[61] A forum non conveniens dismissal that forces plaintiffs to seek redress in the courts of law of their own countries generally equates to a victory for a corporate defendant because it forces plaintiffs to seek recovery in foreign courts where there is often inadequate redress for personal injury.[62]

Some commentators feel that the Supreme Court decision will require foreign states to alter the structure of instrumentalities if they desire the legal protections of the FSIA.[63] A decision to privatize a state-owned business will require the foreign state to consider the loss of legal protections afforded by the FSIA.[64] Alternatively, a state can nationalize or become majority owner of a corporate entity to provide FSIA protection for civil actions not yet filed.[65]

Some litigators believe that foreign countries that have used multi-tiered subsidiaries to organize their state owned enterprises will now be

55. Mulligan, *supra* note 35, at 2436.
56. 28 U.S.C. § 1441(d) (2003).
57. 28 U.S.C. § 1605 (2003); *see also* William C. Hoffman, *The Separate Entity Rule in International Perspective: Should State Ownership of Corporate Shares Confer Foreign Status for Immunity Purposes?*, 65 TUL. L. REV. 535, 576 (1991) (most frequently invoked exception requires that the plaintiff's claim must arise from a "commercial activity carried on in the United States . . . in connection with a commercial activity of the foreign state elsewhere . . . and that act causes a direct affect in the United States").
58. Mulligan, *supra* note 35, at 2409.
59. 28 U.S.C. § 1441(d)(2003).
60. Armin Rosencranz and Richard Campbell, *Foreign Environmental and Human Rights Suits Against U.S. Corporations in U.S. Courts*, 18 STAN. ENVTL. L.J. 145, 188 (1999).
61. Mulligan, *supra* note 35, at 2409.
62. Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 506-07 (1947).
63. White and Case L.L.P., *supra* note 4, at 2.
64. *Id.*
65. *Id.*

exposed to tort suits in the most pro-plaintiff state courts.[66] Before the *Patrickson* decision "even if a foreign company's tie to its government was as thin as the last hair on your head, corporate defendants would get their case tried in the more lenient, jury free federal court—and emerge relatively unscathed."[67] "The availability of the more favorable forums will inevitably increase the number of lawsuits against state owned enterprises overall."[68] One commentator on the Supreme Court decision, Anthony Vale of Pepper Hamilton L.L.P., in Philadelphia explained that "newly privatized companies in Europe and Asia will be exposed to lawsuits in the United States for which they once had sovereign immunity, because the Supreme Court held that the status of the company at the time of the alleged wrongful conduct was irrelevant."[69]

According to Christian Hartley, who co-wrote the briefs for the foreign workers in *Patrickson*, "the case will force corporations with ownership remotely tied to foreign governments to behave more responsibly when doing business in the United States."[70] Others feel that the decision limits the reach of foreign state immunity and that many plaintiffs previously denied their day in court will now have access to the judicial system. As to the *Patrickson* plaintiffs, "at least some of those workers now have a chance for justice."[71]

66. ANDREWS TOXIC REP., *supra* note 15, at 3 (quoting Donald Falk, appellate partner with Mayer, Brown, Rowe, and Maw).
67. Quick, *supra* note 36, at 2.
68. ANDREWS TOXIC REP., *supra* note 15, at 3.
69. *Id.*
70. Quick, *supra* note 36, at 1.
71. *Id.*

Articles