CORE
Metadata, citation and similar papers at core.ac.uk
Provided by University of Kentucky

Kentucky Journal of Equine, Agriculture, & Natural Resources Law

Volume 4 | Issue 1 Article 10

2011

Finding Access to the Federal Courts: How the Inconsistent Application of Federal Jurisdiction in cases with Significant Foreign Relations Implications Affects Mining and Agriculture Industries

Rebecca C. Griffin
University of Kentucky

Follow this and additional works at: https://uknowledge.uky.edu/kjeanrl

Part of the Civil Procedure Commons, Courts Commons, and the Natural Resources Law Commons

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation
Griffin, Rebecca C. (2011) "Finding Access to the Federal Courts: How the Inconsistent Application of Federal Jurisdiction in cases with Significant Foreign Relations Implications Affects Mining and Agriculture Industries," *Kentucky Journal of Equine, Agriculture, & Natural Resources Law*: Vol. 4 : Iss. 1 , Article 10.
Available at: https://uknowledge.uky.edu/kjeanrl/vol4/iss1/10

This Note is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Journal of Equine, Agriculture, & Natural Resources Law by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.

FINDING ACCESS TO THE FEDERAL COURTS: HOW THE INCONSISTENT APPLICATION OF FEDERAL JURISDICTION IN CASES WITH SIGNIFICANT FOREIGN RELATIONS IMPLICATIONS AFFECTS MINING AND AGRICULTURE INDUSTRIES

REBECCA C. GRIFFIN*

I. INTRODUCTION

Currently, the federal circuits are split over whether foreign relations implications can create federal question jurisdiction in cases where only state law claims appear on the face of the well-pleaded complaint. To avoid negatively affecting foreign relations, the majority of U.S. circuits have broadened federal jurisdiction over cases involving significant foreign relations implications. Litigants involved in cases with foreign relations implications, like agriculture and natural resource corporations in resource-dependent or agrarian-based countries, benefit from this majority position because federal court is generally a more favorable forum for foreign, corporate litigants.[1] Other circuits, specifically the Ninth Circuit, have decreased access to federal courts, thereby depriving such agriculture and natural resource corporations of a more favorable forum and potentially endangering U.S. foreign relations.

This split in the federal circuits substantially impacts mining and agriculture corporations operating both within the United States and abroad. Such corporations operating in countries heavily dependent upon natural resource and agriculture industries often have great influence over the economy and the government of foreign nations. For this reason, the litigation in which these types of corporations are involved can have serious foreign relations implications. The majority of federal circuits have recognized this fact. They have sought to protect U.S. foreign relations by

* Note Editor, KENTUCKY JOURNAL OF EQUINE, AGRICULTURE, AND NATURAL RESOURCES LAW, 2011-2012. J.D. expected 2012, University of Kentucky, College of Law, M.A. 2010, University of Kentucky, Patterson School of Diplomacy and International Commerce, B.A. 2008, University of Kentucky.

[1] *See* Stephan B. Burbank, *Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439, 1469 (2008) (illustrating the "growing popular view that the federal courts favored business interests" in the twentieth century); Michael E. Solimine, *The Quiet Revolution in Personal Jurisdiction*, 73 TUL. L. REV. 1, n.117 ("It is commonly reported that business defendants almost always attempt to remove [a case to federal court] to gain a more favorable forum.") (internal quotations omitted).

allowing such litigants access to the federal courts when the outcome of their case may potentially impact foreign relations, regardless whether a federal issue appears in the well-pleaded compliant. If a suit is brought in the Ninth Circuit, however, a mining or agriculture corporation, or a nation protecting such a corporation, will be denied access to federal courts and may be less able to protect its interests and the interests of the threatened industry.

This note examines the split in the circuits over whether federal question jurisdiction exists in all cases involving the federal common law of foreign relations. First, the note presents the circuit split in more detail. The next section discusses broadly the relationship between federal question jurisdiction and the federal common law on foreign relations. The analysis then dissects the majority's view and Ninth Circuit's view on the relationship between federal question jurisdiction and the federal common law on foreign relations. After examining the circuit split, the note examines the implications of how the Ninth Circuit's application of federal question jurisdiction affects mining and agriculture corporations. Finally, the piece will conclude by arguing against the Ninth circuit's interpretation of the federal common law on foreign relations. The majority position, that federal subject matter jurisdiction exists when foreign relations are implicated defensively, is the proper interpretation because it upholds the objectives of the federal common law on foreign relations and safeguards the stability of U.S. foreign relations.

II. THE CIRCUIT SPLIT

The issue among the circuits is whether federal question jurisdiction exists when the federal common law of foreign relations is only employed defensively or is not apparent on the face of the well-pleaded complaint. Recently, the Provincial Government of Marinduque filed a complaint in Nevada state court under Philippine law against a Canadian Minority shareholder of the Marcopper Mining Corporation.[2] The minority shareholder, Placer Dome, Inc., attempted to remove the case to the federal court system, causing the plaintiff to challenge federal subject matter jurisdiction.[3] The Ninth Circuit found that federal subject matter jurisdiction did not exist because the act of state doctrine, which is part of the federal common law on foreign relations, was "implicated . . . only defensively and the complaint [did not] necessarily raise a stated federal

[2] Provincial Gov't of Marinduque v. Placer Dome, Inc., 582 F.3d 1083, 1085 (9th Cir. 2009), *cert. denied*, 131 S. Ct. 65 (2010).

[3] *Id.*

issue, actually disputed and substantial."[4] The Ninth Circuit remanded the case back to Nevada state court.[5]

Had this case arisen in another jurisdiction, it is likely that the case would have remained in the federal court system. The key question is "whether the federal common law of foreign relations can provide subject-matter jurisdiction in situations such as this where a foreign plaintiff's complaint raises only state law claims."[6] The few courts that have addressed this question have produced conflicting responses.[7] The Second, Fifth and Eleventh Circuits interpret the federal common law on foreign relations to confer jurisdiction when the "complaint substantially affects a foreign country's sovereign interests."[8] The content of the plaintiff's well-pleaded complaint does not serve as the dispositive factor in deciding whether federal subject matter jurisdiction exists.[9] This interpretation of federal question jurisdiction suggests that jurisdiction exists in a case where a mining or agriculture corporation operates in a nation that is highly dependent on the corporation's operations. Such a corporation would be able to remove a case against it from state court and access the federal courts even though a federal issue was not apparent on the face of the well-pleaded complaint.

The Ninth Circuit responded to this application of the common law of foreign relations with criticism.[10] In *Patrickson v. Dole Food Co.*, 251 F.3d 795, 803 (9th Cir. 2001), the Ninth Circuit was "particularly troubled by the Eleventh Circuit's decision in *Pacheco de Perez* [*v. AT & T Co.*, 139 F.3d 1368, 1377-78 (11th Cir.1998),] that federal jurisdiction hinged upon whether a foreign government has taken a position in support or in opposition to the litigation."[11] The Ninth Circuit denied subject matter jurisdiction in *Patrickson* and justified its position by stating,

> Congress has not . . . extend[ed] federal-question jurisdiction to all suits where the federal common law of foreign relations might arise as an issue. . . We therefore decline to follow [*Republic of Philippines v.] Marcos*, [806 F.2d 344, 352 (2d Cir. 1986)], *Torres* [*v. S. Peru Copper*

---

[4] *Id.* at 1090 (citation omitted).

[5] *Id.* at 1093.

[6] A.A.Z.A. v. Doe Run Res. Corp., No. 4:07CV1874 CDP, 2008 WL 748328, at *2 (E.D. Mo. Mar. 18, 2008).

[7] *Id.*

[8] Petition for Writ of Certiorari at *4, Placer Dome, Inc. v. Provincial Gov't of Marinduque, 2010 WL 545707 (U.S. Feb. 10, 2010) (No. 09-944).

[9] *See* Torres v. S. Peru Copper Corp., 113 F.3d 540, 542-43 (5th Cir. 1997); Pacheco de Perez v. AT&T Co., 139 F.3d 1368, 1377-78 (11th Cir. 1998); Sequihau v. Texaco, Inc., 847 F.Supp. 61, 63 (S.D. Tex. 1994).

[10] *A.A.Z.A.*, 2008 WL 748328, at *2.

[11] *Id.* at *3.

> *Corp.*, 113 F.3d 540, (5th Cir. 1997)] and *Pacheco de Perez* insofar as they stand for the proposition that the federal courts may assert jurisdiction over a case simply because a foreign government has expressed a special interest in its outcome.[12]

The Ninth Circuit refused to allow "courts- state or federal- [to] tailor their rulings to accommodate the expressed interest of a foreign nation that is not even a party."[13]

III. FEDERAL QUESTION JURISDICTION AND THE FEDERAL COMMON LAW ON FOREIGN RELATIONS

To understand how the circuit split affects access to the federal courts, it is necessary to understand two separate but interconnected doctrines: federal question jurisdiction and the federal common law on foreign relations. The split among the circuits implicates the relationship between these two doctrines.

Constitutionally, United States federal courts are courts of limited jurisdiction and may hear only certain types of cases.[14] Federal jurisdiction must exist independently of the wishes of the parties; it will not exist based upon the opposing parties consent to litigate their case in federal court.[15] Congress, however, may confer jurisdiction on them through statutes.[16] Congress exercised this power granting the federal courts federal question jurisdiction to hear "all civil actions arising under the Constitution, laws, or treaties of the United States."[17] If a case involves or is contingent upon "a substantial question of federal law," a federal court may hear the case.[18] Additionally, the federal interest or question must be within the well-pleaded complaint.[19] It is a well-established rule that the federal courts will only "have jurisdiction to hear, originally or by removal from a state court, only those cases in which a well-pleaded complaint establishes either that federal law creates the cause of action or that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law."[20]

---

[12] Patrickson v. Dole Food Co., 251 F.3d 795, 803 (9th Cir. 2001).

[13] *Id.*

[14] U.S. CONST. art. III, § 2, cl. 1.

[15] Republic of Philippines v. Marcos, 806 F.2d 344, 352 (2d Cir. 1986).

[16] U.S. CONST. art. I, § 8, cl. 9.

[17] 28 U.S.C. § 1331.

[18] Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 27-28 (1983).

[19] Anna von Franqué, Comment, *Pineapples, Presidents and the Federal Courts: A Defense of the Federal Common Law of Foreign Relations and a New Framework for its Application*, 35 Sw. U. L. Rev. 253, 257 (2006).

[20] *Marcos*, 806 F.2d at 352 (quoting *Franchise Tax Bd.* 463 U.S. at 27-28).

Determining whether federal question jurisdiction exists becomes complicated when a case invokes the federal common law on foreign relations (FCLFR). Now, generally, "there is no federal general common law" under *Eerie R. Co. v. Tompkins*,[21] but the federal courts develop "specialized federal common law" in rare circumstances.[22] This usually only arises in "areas where unique considerations demand that federal law supplant state law."[23] Federal question jurisdiction, for example, may exist when a complaint only puts forth state law claims if the case raises issues implicating the FCLFR, because "while the federal common law can create substantive law. . . it can also create a basis for federal jurisdiction." [24]

The FCLFR became an area of specialized federal common law because of the uniquely federal nature of international relations.[25] First, FCLFR is "federal" to the extent that cases involving foreign relations invoke separation of powers issues.[26] The Constitution confers the responsibility of conducting foreign relations on the national executive.[27] Second, FCLFR is uniquely federal because there is an obvious need for uniformity in the area of foreign relations.[28] Allowing the state courts to delve into foreign relations could disrupt U.S. relations or endanger U.S. interests. The importance of international relations led the U.S. Supreme Court to officially recognize a federal common law of foreign relations in *Banco Nacional de Cuba v. Sabbatino*.[29] As the Ninth Circuit succinctly summarized, while "there is no general federal common law, there are enclaves of federal judge-made law. One such enclave concerns the law of international relations and foreign affairs."[30]

These two legal doctrines, federal question jurisdiction and FCLFR, have an interesting and ambiguous relationship. In most circuits, the FCLFR may create federal jurisdiction when there are "foreign relations implications."[31] Foreign relations implications could arise, for instance, when a court must rule on the validity of a foreign state's action or when a foreign state has a substantial interest in the outcome of litigation.[32]

Several very strong justifications support allowing federal jurisdiction to arise in such situations. These justifications "can be divided

---

[21] Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938).

[22] Paul S. Ryerson, *Inconsistent Inconsistency: A Comment on Arrested Development of the Federal Common Law of Foreign Relations*, 16 FLA. J. INT'L L. 789, 790 (2004).

[23] *Id.*

[24] Franqué, *supra* note 19, at 256.

[25] Franqué, *supra* note 19, at 256.

[26] *See* Franqué, *supra* note 19, at 264.

[27] U.S. CONST. art. II, § 2, cl. 2.

[28] *Id.*

[29] Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 425 (1964).

[30] Placer Dome Inc. v. Provincial Gov't of Marinduque, 582 F.3d 1083 (9th Cir. 2009) (citation omitted).

[31] Franqué, *supra* note 19, at 284.

[32] *See Sabbatino*, 376 U.S. 398 (1964).

into three main categories: considerations of sovereignty, practical considerations, and constitutional issues."[33] Accepting the acts of a foreign state is an essential part of respecting the sovereignty of a foreign nation. A commonly accepted principle states that "every sovereign State is bound to respect the independence of every other sovereign State."[34] The consequences of disregarding this general principle "could seriously interfere with negotiations being carried on by the Executive Branch and might prevent or render less favorable the terms of an agreement that could otherwise be reached."[35] The practical consideration that supports federal question jurisdiction in cases with foreign relations implications is the inherent need for uniformity regarding the U.S. government interactions with other nations. The FCLFR, therefore, "should not be left to divergent and perhaps parochial state interpretations."[36] Lastly, constitutional concerns lean in favor of asserting federal jurisdiction. The power to conduct foreign relations resides with the Executive, and the U.S. courts must adjudicate in such a way that it does not infringe upon the powers of the Executive. Cases involving the FCLFR, therefore, have "constitutional underpinnings" because the circumstances raise separation of powers issues.[37]

Although several justifications exist for asserting federal question jurisdiction in cases involving the FCLFR, complaints in cases that "inevitably give rise to a defense involving a substantial federal question do not pass . . . [the well-pleaded complaint] test."[38] It may not be apparent on the face of the complaint whether litigation will affect a foreign government's act or a foreign interest. Yet, many federal circuits have still found federal question jurisdiction to exist.[39] The following describes the gradual expansion of federal question jurisdiction in cases involving FCLFR.

During the deterioration of U.S.-Cuban relations in the 1960s, the U.S. Supreme Court accepted and endorsed the FCLFR in *Sabbatino*.[40] In 1960, an American broker purchased sugar, to be delivered later that year, from a U.S. owned corporation operating in Cuba.[41] After the contract was formed, the U.S. Congress limited its sugar quota from Cuba, provoking the Cuban government to respond to what it perceived as an "act of aggression."[42] Cuba began nationalizing U.S. owned property and

---

[33] Franqué, *supra* note 19, at 259.
[34] *Sabbatino*, 376 U.S. at 416.
[35] *Id.* at 432.
[36] Franqué, *supra* note 19, at 258 (quoting *Sabbatino*, 376 U.S. at 425).
[37] *Id.* at 259 (quoting *Sabbatino*, 376 U.S. at 423).
[38] Franqué, *supra* note 19, at 257.
[39] *Sabbatino*, 376 U.S. at 401-03.
[40] *Id.* at 401.
[41] *Id.*
[42] *Id.*

companies within its territory, including the U.S. owned sugar corporation involved in the previously mentioned sugar contract.[43] The same American brokers made the same purchase agreement with the now nationalized corporation, and the nationalized corporation delivered the sugar to the American broker.[44] The American brokers then refused to give the proceeds of the sale to the now Cuban-owned corporation, causing the Cuban government to bring a conversion claim in U.S. federal courts.[45]

The *Sabbatino* court found that it could not adjudicate the matter because doing so would require determining the validity of a foreign sovereign's actions, specifically the nationalization of the sugar corporation.[46] The Supreme Court was not ready to allow the U.S. courts to "sit in judgment on the acts of the government of another, done within its own territory."[47]

While the *Sabbatino* case did not hinge upon whether federal question jurisdiction existed, it had important implications for the relationship between federal question jurisdiction and the FCLFR. Sabbatino claimed that because a controversial international issue was the basis of the complaint, specifically the expropriation of U.S. property by a foreign government, federal law was implicated. So, even though "it would have been possible for the court to decide the case without visiting the issue of federal common law, the court was constrained to make it clear that an issue concerned with the competence and function of the Judiciary and the National Executive in ordering our relations with other members of the international community must be treated exclusively as an aspect of federal law."[48] This was only the start of the expansion of the doctrine on federal question jurisdiction.

IV. THE MAJORITY VIEW ON THE RELATIONSHIP BETWEEN FEDERAL QUESTION JURISDICTION AND THE FEDERAL COMMON LAW ON FOREIGN RELATIONS

Throughout the years the doctrine of federal question jurisdiction has expanded. More and more situations arose in which the FCLFR would create federal question jurisdiction. Jurisdiction ultimately depends on whether a complaint, which only stipulates state-based claims but has foreign relations implications, produces federal jurisdiction.[49] Most federal

---

[43] *Id.* at 401 n.3.
[44] *Id.* at 404.
[45] *Sabbatino*, 376 U.S. at 406.
[46] *Id.* at 439.
[47] *Id.* at 424 (quoting Underhill v. Hernandez, 168 U.S. 250, 252 (1897)).
[48] Franqué, *supra* note 19, at 258-259 (citation omitted).
[49] A.A.Z.A. v. Doe Run Res. Corp., No. 4:07CV1874 CDP, 2008 WL 748328, at *2 (E.D. Mo. Mar. 18, 2008).

circuits, including but not limited to the Second, Fifth and Eleventh, would answer this query affirmatively, arguing that federal question jurisdiction inherently exists if state-based claims substantially impact foreign relations. Other circuits, namely the Ninth, would disagree completely, believing that federal question jurisdiction must emerge from the face of the complaint and cannot be raised defensively. The former view will be considered for the remainder of this section while the latter will be discussed in the next section.

The Second Circuit adopted an expansive view of federal question jurisdiction in cases involving the FCLFR and helped to expand the doctrine.[50] In *Republic of Philippines v. Marcos*, former Philippine dictator Ferdinand Marcos purportedly came into possession of "five properties in New York . . . allegedly purchased . . . from the proceeds of money and assets stolen from the Philippine government."[51] In analyzing federal subject matter jurisdiction, the Second Circuit explained that it must examine the "well-pleaded complaint" in order to determine whether the claims made rely on some federal law.[52] The court conceded that the complaint must be analyzed "separate and apart from any defenses that the defendants have asserted or might assert in the future" when trying to determine whether federal question jurisdiction exists.[53]

Despite these rules and the fact that "on the face of the complaint . . . the plaintiff brought this case under a theory more nearly akin to a state cause of action for conversion," the Second Circuit found that federal question jurisdiction existed.[54] The court stated that a "well-pleaded complaint" might be read or examined in two different ways.[55] If a state cause of action involves an area where state law has been preempted by federal law then federal question jurisdiction may exist.[56] In deciding *Marcos*, the court examined "whether the federal common law in the area of foreign affairs is so 'powerful,' or important, as to displace a purely state cause of action of constructive trust."[57] The Second Circuit decided that FCLFR in this case was powerful enough; "an action brought by a foreign government against its former head of state arises under federal common law because of the necessary implication of such an action for United States relations."[58] Essentially, this judgment is based upon two grounds; "the action had 'necessary implications... for United States foreign relations'

---

[50] *See Marcos*, 806 F.2d 344.
[51] *Id.* at 348.
[52] *Id.* at 352.
[53] *Id.*
[54] *Id.* at 354.
[55] *Id.*
[56] *Marcos*, 806 F.2d at 354.
[57] *Id.*
[58] *Id.*

because it was both brought by a foreign government against a foreign head of state,' and the outcome would directly affect compliance with the diplomatic request of a foreign sovereign."[59]

The ruling in Marcos expanded federal question jurisdiction in the FCLFR context a degree because it allowed for jurisdiction over purely state law claims and paved the way for future expansion. The case, however, still involved strong and obvious foreign relations implications because the post-Marcos Philippine government was a litigant in the case and the case hinged upon acts of the Marcos Government.[60] Subsequent cases have expanded federal question jurisdiction to apply in cases where the foreign relations implications were both less obvious and less direct.

Torres v. Southern Peru Copper Corp., came out of the Fifth Circuit and expanded federal question jurisdiction even more.[61] The case involved Peruvian plaintiffs who brought suit against a copper smelting and refining company, which was incorporated in Delaware and had its principal place of business in Peru.[62] The Fifth Circuit affirmed the federal district court's finding that there was federal question jurisdiction despite the fact that the plaintiff's complaint only involved claims based in state law.[63] Once aware of the suit, Peru, as a sovereign nation, contacted the U.S. State Department to protest the litigation because it "implicate[d] some of its most vital interests, and hence, will affect its relations with the United States."[64] The court heavily considered and examined the foreign relations implicated in pursuing litigation against the mining corporation:

> The mining industry in Peru, of which SPCC [the corporation involved in the litigation] is the largest company, is critical to that country's economy, contributing up to 50% of its export income and 11% of its gross domestic product. Furthermore, the Peruvian government has participated substantially in the activities for which SPCC is being sued. By way of example, the government: (1) owns the land on which SPCC operates; (2) owns the minerals which SPCC extracts; (3) owned the. . . refinery [involved in the litigation] from 1975 until 1994, during which time pollution from the refinery may have contributed to the injuries complained of by the plaintiffs; and (4) grants concessions that allow SPCC to

---

[59] Franqué, *supra* note 19, at 260 (citation omitted).
[60] *See generally Marcos*, 806 F.2d 344.
[61] Torres v. S. Peru Copper Corp., 113 F.3d 540.
[62] *Id.* at 541, 543.
[63] *Id.* at 543.
[64] *Id.* at 542.

> operate in return for an annual fee. Moreover, the government extensively regulates the mining industry.[65]

The court's rationale for maintaining federal question jurisdiction was that the cause of action "strikes not only at vital economic interest but also at Peru's sovereign interests by seeking damages for activities and policies in which the government actively has been engaged."[66]

The Fifth Circuit essentially deemed that the text of the complaint was not dispositive with the respect to whether federal question jurisdiction existed because it granted jurisdiction based on a complaint that contained no claims that independently satisfied the requirements of federal question jurisdiction.[67] The court, rather, examined the nature of the complaint and determined that "the plaintiff's complaint raise[d] substantial questions of federal common law by implicating important policy concerns" alone.[68] The *Torres* case built on the expansion of the *Marcos* case. Now, federal question jurisdiction based on the FCLFR may arise over state claims even if a foreign government is not involved in the litigation; it need only have a vital economic interest in the outcome of the litigation. This would be sufficient to create federal question jurisdiction and removal from state courts.[69]

As demonstrated, *Torres*, *Marcos*, and other case law broadened the situations in which federal question jurisdiction exists, but there are limits to the doctrine. The Eleventh Circuit in *Pacheco de Perez v. AT&T Co.* adopted the rules set down in Torres but limited them important ways.[70] The defendant telecommunications company in *Pacheco* had been laying fiber-optic cable in Tejerias, Venezuela; while digging the trench for the cable, an excavating machine struck a gas pipeline, which caused an explosion that injured the plaintiffs.[71] The plaintiffs filed two actions, one in state court and the other in a federal district court.[72] The federal district court consolidated the actions and dismissed them on the basis of *forum non conviens*.[73] On appeal, the Eleventh confronted the issue of whether or not "the district should have remanded the case back to Georgia state court for lack of federal jurisdiction."[74] One of the many grounds asserted for federal jurisdiction was that the FCLFR created federal question jurisdiction over

---

[65] *Id.* at 543.
[66] *Id.*
[67] *Torres*, 113 F.3d at 542-43.
[68] *Id.* at 543.
[69] Franqué, *supra* note 19, at 261.
[70] Pacheco de Perez v. AT&T Co., 139 F.3d 1368, 1377-78 (11th Cir. 1998).
[71] *Id.* at 1371.
[72] *Id.*
[73] *Id.*
[74] *Id.*

the case.[75] The Eleventh recognized that "the Fifth Circuit has extended the area of federal jurisdiction based on the federal common law of foreign relations to disputes between private parties that implicate the 'vital economic and sovereign interests' of the nation where the parties' dispute arose."[76] In failing to find federal question jurisdiction, the Eleventh Circuit accepted the Fifth Circuit's legal principle but limited its application in certain situations, such as if the foreign "interest in the plaintiff's action is too speculative and tenuous to confer federal jurisdiction over the case."[77] The Eleventh Circuit limited the doctrine by saying that "while a case that strikes at the heart of the economic and sovereign interests of a foreign nation will be covered by the FCLFR, one that has too little economic effect on the sovereign, or too loose a connection with sovereign interest will fall outside this grant of federal jurisdiction."[78] The court justified its decision in *Pacheco* by saying that, in stark contrast to *Torres*, there was "no evidence regarding the relative importance of the fiber-optic cable project, or the telecommunications industry in general, to the Venezuelan national economy."[79]

The Fifth Circuit, a year prior to *Pacheco,* similarly restricted *Torres* in *Marathon Oil Co. v. Ruhrgas, A.G.*[80] In *Marathon,* the defendant, a German gas supplier, argued that its role in the German economy would implicate the FCLFR and create federal question jurisdiction.[81] The Fifth Circuit said that federal question jurisdiction based on FCLFR did not exist in this particular case because the outcome of litigation would probably not "impact severely the vital economic interests of a highly developed and flourishing industrial nation such as Germany."[82]

Despite the limits imposed in *Pacheco de Perez* and *Marathon Oil Co.*, the recent expansion in the law on federal question jurisdiction is significant. It provides companies that play a substantial role in foreign economies with greater access to the federal courts, or at least more access than other companies. Mining and agriculture companies, especially in less developed, resource-dependent or agrarian-based countries, find themselves in a position to take advantage of these new legal developments. These companies often command great influence over vital sectors of economies and over foreign governments themselves. They are more able than most companies to demonstrate to the federal circuits that the litigation in which

---

[75] *Pacheco de Perez*, 139 F.3d at 1372.

[76] *Id.* at 1377.

[77] *Id.* at 1378.

[78] Franqué, *supra* note 19, at 261-62 (quoting *Pacheco*, 139 F.3d at 1377).

[79] *Pacheco*, 139 F.3d at 1378.

[80] Marathon Oil Co. v. Ruhrgas, A.G., 115 F.3d 315, 320 (5th Cir. 1997), *rev'd on other grounds*, 526 U.S. 574 (1999).

[81] *Id.*

[82] *Id.*

they are involved will have significant implications on foreign relations. If, however, such a company finds itself in litigation before the Ninth Circuit, it will not be able to take advantage of these recent developments and will not be able to remove the entire case into the federal court system.

V. THE NINTH CIRCUIT APPLICATION OF FEDERAL QUESTION JURISDICTION IN CASES INVOLVING THE FEDERAL COMMON LAW OF FOREIGN RELATIONS

The Ninth Circuit diverged from the typical application of the federal question jurisdiction in cases involving the federal common law on foreign relations, first in *Patrickson v. Dole Food Company* and recently in *Provincial Government of Marinduque v. Placer Dome, Inc. Placer* emerged due to mining operations occurring on the Philippine island of Marinduque between 1964 and 1997.[83] This particular island was rich in valuable mineral resources, including copper and gold.[84] Hoping to profit from these natural resources, the defendant, Placer Dome, Inc. (PDI), a Canadian corporation, constructed the Tapian Pit mining site on the island of Marinduque.[85] The Provincial Government of the island brought suit against PDI, arguing that the PDI site was illegally within the Torrijos Watershed Forest Reserve, and that PDI procured access to the land by using its influence over President Ferdinand Marcos. [86] The Government contended that PDI provided President Marcos with a "forty percent interest in Marcopper, a shell company created to extract the copper," and that Marcos in return granted PDI access to the protected lands.[87]

The plaintiff also alleged that the PDI operations polluted a key Marinduque water source and fishery by funneling its "acid mine drainage" into the Boac River, Mogpog River and Calancan Bay.[88] According to the plaintiffs, the dumps were hazardous to the residents because they caused high "levels of cadium, copper, zinc, lead, and mercury in the bay's fish, and unacceptably high levels of lead in the blood of local residents."[89] These conditions, according to the plaintiff, continued to harm the Marinduquenos who "continue to use the river to irrigate their farms and hydrate their animals and themselves."[90] Due to PDI's actions, the plaintiffs brought both tort and contract claims against PDI in the state courts of

---

[83] Provincial Gov't of Marinduque v. Placer Dome, Inc., No. 2:05-CV-01299-BES-RJJ, 2008 WL 6915277, at *6 (D. Nev. Jan. 16, 2008).

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *Id.*

[89] *Placer Dome, Inc.*, 2008 WL 6915277, at *6.

[90] *Id.* at *7.

Nevada based on the belief that the defendant "conducte[d] significant and continuous business in the state."[91]

The defendant responded by moving under 28 U.S.C. § 1441(a) to remove the *Placer* case to the federal courts, alleging that the action "implicated issues of federal common law to the extent that the propriety of acts of a foreign state were at issue."[92] The Federal District Court of Nevada granted the motion in favor of the defendant because the complaint involved the FCLFR, and federal question jurisdiction therefore existed.[93] The district court found that the "complaint [was] replete with allegations regarding the Philippine Government's activities, which contributed to the environmental harm that Plaintiff has suffered."[94]

However, the Ninth Circuit later reversed in part and vacated the district court's decision after reviewing it de novo.[95] The court examined whether the FCLFR was raised and thus whether the federal district court had jurisdiction under 28 U.S.C. § 1331.[96] The Ninth Circuit found that the complaint did not raise these matters, but rather the federal common law of foreign relations only became implicated via the defense's response; this was not sufficient to confer federal subject matter jurisdiction because "the federal question on which jurisdiction is premised cannot be supplied via a defense; rather, the federal question must be disclosed upon the face of the compliant, unaided by the answer."[97]

During its analysis, the Ninth Circuit mentioned *Patrickson v. Dole Food Co.*, a case it had previously decided. In that case, Costa Rican, Ecuadorian, Guatemalan, and Panamanian agricultural laborers brought suit against fruit companies which used dibromochloropropane (DBCP) as a pesticide on their banana farms and the chemical companies which manufactured that pesticide.[98] The plaintiffs in that case alleged injuries from working with DBCP, a substance that can cause "sterility, testicular atrophy, miscarriages, liver damage, cancer, and other ailments that you wouldn't wish on anyone."[99] Two formerly government-owned companies and the Dole Food Company motioned to remove the case to federal court based on, among other things, federal question jurisdiction.[100] The Dole Company argued that federal question jurisdiction existed because the case

---

[91] Provincial Gov't of Marinduque v. Placer Dome, Inc., 582 F.3d 1083, 1085 (9th Cir. 2009), *cert. denied*, 131 S. Ct. 65 (2010).

[92] *Placer Dome, Inc.*, 2008 WL 6915277, at *1.

[93] *Id.* at *2.

[94] *Placer*, 582 F.3d at 1090.

[95] *Id.*

[96] *Id.* at 1087.

[97] *Id.* at 1086 (quoting Phillips Petrol. Co. v. Texaco, Inc., 415 U.S. 125, 127-28 (1974) (per curiam)).

[98] Patrickson v. Dole Food Co., 251 F.3d 795, 798 (9th Cir. 2001).

[99] *Patrickson*, 251 F.3d at 798.

[100] *Id.*

revolved around "a vital sector of the economies of foreign countries and so has implications for our nation's relations with those countries."[101] Dole's underlying theory was that a judgment against it and the other multinational corporations involved in the litigation would detrimentally impact the banana industry – "one of the most import sectors of those [four] countries' economies."[102]

There was plenty of case law and precedent to support Dole's argument. The Ninth Circuit cited the cases mentioned above, including *Torres v. Southern Peru Copper Corporation*, *Pacheco de Perez v. AT&T Co.*, and *Republic of Philippines v. Marcos*.[103] All of those cases asserted that the federal common law on foreign relations may be invoked simply when the outcome of the litigation could potentially affect a vital sector of a foreign nation's economy. However, in *Patrickson*, the Ninth Circuit held that "even if the case turns entirely on the validity of a federal defense, federal courts may not assert jurisdiction unless a federal right or immunity is an element, and an essential one, of the plaintiff's cause of action."[104] The workers of those four Latin American countries brought only state court claims, including "negligence, conspiracy, strict liability, intentional torts, and breach of implied warranty."[105] The Ninth Circuit stressed none of these causes of action related to a federal or constitutional right or action and could not serve as the basis for federal question jurisdiction.[106]

In the later *Placer* decision, the Ninth Circuit unambiguously admitted that, in the *Patrickson* case, it "*part[ed] ways with other circuits* that had more broadly interpreted the doctrine as supplying federal-question jurisdiction over any case that might affect foreign relations regardless of whether federal law is raised in the complaint."[107] The Ninth Circuit adamantly argued that, "*Sabbatino* [and the acceptance of a federal common law on foreign relations] did *not* create an exception to the well-pleaded complaint rule. What Congress has not done is to extend federal-question jurisdiction to all suits where the federal common law of foreign relations might arise as an issue."[108] The court found that federal courts did not have jurisdiction to rule on the *Placer* matter despite the governmental involvement,[109] which included the following:

---

[101] *Id.* at 800.
[102] *Id.*
[103] *Id.* at 801.
[104] *Id.* at 799 (citing Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 11 (1983)).
[105] *Patrickson*, 251 F.3d at 799.
[106] *Id.* at 804-05.
[107] *Placer*, 582 F.3d at 1089 (emphasis added).
[108] *Id.* at 1089-90 (emphasis added) (citing *Patrickson*, 251 F.3d at 801-02).
[109] *Placer*, 582 F.3d at 1090-91.

> (1) President Marcos overturned a presidential proclamation to allow mining in a forest reserve;
>
> (2) Marcos, and subsequent to his removal, a presidential commission, owned 49 percent of the shares in Marcopper, a subsidiary of Placer Dome;
>
> (3) Marcos ordered a government commission to issue a permit allowing Marcopper to dump toxic tailing into Calancan Bay;
>
> (4) Marcos ordered the same pollution commission to remove restraints it had placed on Marcopper's dumping of waste into the bay; and
>
> (5) President Aquino ordered a pollution control board not to enforce a cease and desist order against Marcopper. [110]

The Ninth Circuit declined to recognize federal jurisdiction when the complaint refers to the "government's complicity in the claimed damage to the Marinduquenos" and alleged illegal activities.[111]

The Ninth Circuit essentially based its *Placer* decision on two grounds. First, it said that federal question jurisdiction did not exist because the issue was only raised defensively.[112] Second, it claimed no federal jurisdiction existed because the government acts involved were not substantial enough to trigger the federal common law on foreign relations.[113] In order for there to be federal question jurisdiction and, thus, removal power in cases involving FCLFR in the Ninth Circuit, there needs to be "more" than "a general invocation of international law or foreign relations."[114] The Ninth Circuit argued that the previous list of government actions was not truly essential to the complaint. In order to find Placer Dome guilty, it was not necessary, according to the Ninth Circuit, to invalidate the acts of the government of Marinduque.

The first rationale is of more importance for the purposes of this analysis. The Ninth Circuit unambiguously explained that jurisdiction did not exist in *Placer* simply because the "doctrine [was] implicated. . . only defensively and the complaint [did] not necessarily raise a stated federal issue actually disputed and substantial."[115] The Ninth Circuit not only rejected the majority view on the relationship between federal question

---

[110] *Id.* at 1090.
[111] *Id.* at 1091.
[112] *Id.* at 1086.
[113] *Id.* at 1091.
[114] *Id.*
[115] *Placer,* at 1090 (citing Grable & Sons Metal Prod., Inc. v. Darue Eng'g & Mfg., 545 U.S. 308, 314 (2005)).

jurisdiction and FCLFR, but also criticized the other circuits for expanding federal jurisdiction in cases involving FCLFR. The Ninth Circuit equated the other circuit's recognition of federal jurisdiction in cases involving FCLFR to "tailor[ing] their rulings to accommodate a non-party" country.[116] The Ninth Circuit disapproved of the Eleventh Circuits consideration, in *Pacheco*, of foreign opposition to litigation,[117] saying that the "effect of. . . litigation on the economies of foreign countries is of absolutely no consequence to our jurisdiction."[118]

The Ninth Circuit's minority view deprives mining and agriculture companies, which substantially impact the vital economic sectors in certain countries, of access into the U.S. federal courts. The minority view seems to be in conflict with many practical considerations. For instance, the Ninth Circuit admitted in *Patrickson* that certain areas of the federal common law on foreign relations, specifically the act of state doctrine, "generally serves as a defense."[119] Also in *Patrickson*, the Ninth Circuit stated that "the common law of foreign relations will become an issue only when-and-if-it is raised as a defense."[120] A plaintiff suing one of these countries is not likely to mention the foreign relations implications in the complaint if he or she prefers to litigate in state court. The Ninth Circuit's bar against defensively raised foreign relations implications would prevent cases based on state court claims to enter federal court, even if there were substantial and potentially disastrous consequences for foreign relations. If the Circuits do not allow for a degree of leniency with respect to the well-pleaded complaint rule and the doctrine of federal question jurisdiction, they may very well jeopardize U.S. relations and interests abroad.

Moreover, in its *Patrickson* decision, the court doubted whether "foreign relations are an appropriate consideration at all" and asserted that "the relevant question is not whether the foreign government is pleased or displeased by the litigation, but how the case affects the interest of the United States."[121] It appears that the Ninth Circuit has attempted to bifurcate foreign relations by considering only how litigation would affect U.S. interests and disregarding the position of a foreign government. To appropriately consider whether U.S. interests will be adversely affected by a certain case, the courts *must* take into consideration how a foreign government will act or respond. It is the foreign government's response that will affect U.S. interests.[122] It is a simple truth that if litigation will negatively impact a vital industry or sector of a foreign economy, there is a

---

[116] *Patrickson*, 251 F.3d at 803.
[117] *Pacheco*, 139 F.3d at 1378.
[118] *Patrickson*, 251 F.3d at 804.
[119] *Id.* at 800 n. 2.
[120] *Id.* at 800.
[121] *Id.* at 804.
[122] *See, id.* at 804.

probability that the outcome of the litigation will negatively affect U.S. interests, especially in the global economic crisis in which we now find ourselves. To ignore this fact is to undermine the whole purpose of certain areas of the federal common law of foreign relations.

VI. IMPACT OF THE CIRCUIT SPLIT ON MINING AND AGRICULTURAL INDUSTRIES

As demonstrated, there is no consensus on the relationship between federal question jurisdiction and FCLFR. The rules governing these doctrines are not uniformly applied throughout the federal circuits. The question now becomes how significant the circuit split will be to those in the mining and agricultural industries or to those in litigation with such corporate entities. There is some debate about whether the ability to keep suits in federal courts really impacts the outcome of litigation. According to the Ninth Circuit, the denial of federal jurisdiction does not have a substantial impact on the outcome of a case: the fact that "the case is litigated in federal court, rather than state court, will not reduce the impact of the case on the foreign government."[123] The Ninth Circuit justified its position, saying "federal judges, like state judges, are bound to decide a case before them according to the rule of law."[124] The court also stated in that "if federal courts are so much better suited than state courts for handling cases that might raise foreign policy concerns, Congress will surely pass a statute giving. . . [the federal courts] jurisdiction."[125] Since Congress has yet to act on the subject, the Ninth continues to refuse to recognize federal question jurisdiction in many cases with substantial foreign relations implications.[126]

Once again, the Ninth Circuit seems to ignore the practical considerations related to its judgments. Having cases in federal court rather than state courts can have a substantial impact on litigation. The denial of federal jurisdiction in these cases allows plaintiffs to "enjoy more relaxed *forum non conveniens* standards and avoid higher burdens of proof and the strict standing requirements of federal court."[127] The Ninth Circuit, in its criticism of the other circuits, is neglecting the reality that federal procedural rules not only have a substantial impact on litigation but may, in fact, be dispositive. The refusal to recognize federal question jurisdiction in cases involving defensively-raised foreign relations implications will cause the Ninth Circuit to deny companies, particularly agriculture and mining

---

[123] *Patrickson*, 251 F.3d at 803.

[124] *Id.*

[125] *Id.* at 804.

[126] *E.g.*, *id.*

[127] Andrew W. Davis, Note, *Federalizing Foreign Relations: The Case for Expansive Federal Jurisdiction in Private International Litigation*, 89 MINN. L. REV. 1464, 1470 (2005).

corporations that affect vital sectors of the economies of foreign nations, the opportunity to take advantage of the more favorable forum to which they are entitled. Moreover, the refusal potentially jeopardizes U.S. interests and foreign relations by failing to recognize and consider the interests of foreign nations in its litigation.

VII. CONCLUSION

Currently, the "debate over the application of the federal common law of foreign relations as a basis for federal question jurisdiction" continues to rage.[128] The primary point of contention "is in part a function of how strictly the well-pleaded complaint rule should apply to cases implicating foreign relations."[129] The United States Court of Appeals for the Ninth Circuit has adopted the minority position on the subject, refusing to find federal question jurisdiction in cases involving state-based claims and defensively-raised foreign relations implications.[130] This position undermines the objectives of the foreign common law on foreign relations and endangers U.S. foreign relations. For these reasons, the majority position is proper, and federal question jurisdiction should exist even when foreign relations implications are only raised defensively.

Until the U.S. Supreme Court resolves this circuit split, agriculture and natural resource corporations need to be aware of these rules. A corporation's failure to understand and take advantage of these rules could deny it access to federal court, which is a more favorable forum in which to litigate its claims or claims brought against it. If, however, its suit comes before the Ninth Circuit, access to the federal courts may not ever be an option.

---

[128] *Id.* at 1469.
[129] *Id.* at 1469.
[130] See, e.g., *Patrickson*, 251 F.3d at 808-09; *Placer*, 582 F.3d at 1093.