Nos. 01-593 and 01-594

IN THE

Supreme Court of the United States

DOLE FOOD COMPANY, *et al.*,
Petitioners,
v.
GERARDO DENNIS PATRICKSON, *et al.*,
Respondents.

DEAD SEA BROMINE CO., LTD., *et al.*,
Petitioners,
v.
GERARDO DENNIS PATRICKSON, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF CONSORTIUM DE RÉALISATION, CDR-ENTERPRISES, AND CRÉDIT LYONNAIS, S.A. IN SUPPORT OF PETITIONERS

GEORGE J. TERWILLIGER III *
DARRYL S. LEW
R. SHAWN GUNNARSON
WHITE & CASE LLP
601 Thirteenth Street, N.W.
Suite 600 South
Washington, D.C. 20005-3807
(202) 626-3600

* Counsel of Record

Counsel for Amici Curiae

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—Continued

STATUTES AND RULES

MISCELLANEOUS

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

No. 01-593 and 01-594

DOLE FOOD COMPANY, *et al.*,
Petitioners,

v.

GERARDO DENNIS PATRICKSON, *et al.*,
Respondents.

DEAD SEA BROMINE CO., LTD., *et al.*,
Petitioners,

v.

GERARDO DENNIS PATRICKSON, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* OF CONSORTIUM DE RÉALISATION, CDR-ENTERPRISES, AND CRÉDIT LYONNAIS, S.A. IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST

This brief is submitted on behalf of Consortium de Réalisation ("CDR"), CDR Enterprises ("CDR-E"), and Crédit Lyonnais, S.A. ("Crédit Lyonnais").[1] The Republic of

[1] No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amici curiae*, made a monetary contribution to the preparation and submission of this brief.

France (the "Republic") made the sovereign decision to rescue Crédit Lyonnais, a state-owned bank, from impending financial failure. To this end, in 1995 the Republic created CDR, a defeasance corporation similar to the U.S. Resolution Trust Corporation, to which the Republic transferred certain assets and liabilities of Crédit Lyonnais for orderly liquidation. CDR's shares are wholly owned by the Établissement Public de Financement et de Restructuration, a public administrative body and arm of the French State. CDR, in turn, has several wholly-owned subsidiaries, including CDR-E, which owns and manages for purposes of defeasance certain industrial interests formerly owned by Crédit Lyonnais. It is estimated that the Republic will spend approximately U.S. $20 billion in public monies as part of this defeasance operation.

As corporations established to carry out the Republic's sovereign decision to rescue and rehabilitate Crédit Lyonnais, CDR and CDR-E are in every sense of the word "instrumentalities" of the Republic and should be treated as such under the Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §§ 1330, 1332(a)(4), 1391(f), 1441(d), 1602–11 (2001). Each is currently a defendant in one or more civil actions in the United States, and each has relied on its status as an "agency or instrumentality" of the Republic to invoke the FSIA as a basis for federal jurisdiction. Both therefore have an interest in the first question presented: "Whether a corporation is an 'agency or instrumentality' if a foreign state owns a majority of the shares of a corporate enterprise that in turn owns a majority of the shares of the corporation." *Dole Food Co. v. Patrickson*, 122 S. Ct. 2657 (2002).[2]

---

[2] Not before the Court is the question of whether an entity that does not qualify as an "instrumentality" based on the majority ownership test nonetheless qualifies as an "organ" of a foreign state under the FSIA.

Crédit Lyonnais was privatized in 1999. It is a defendant in two civil actions in the United States that arise out of the same pre-privatization business transactions. One action was filed against Crédit Lyonnais before privatization, while the other was filed thereafter. In each action, Crédit Lyonnais has invoked its status as an "agency or instrumentality" of the Republic under the FSIA as a basis for federal jurisdiction. Crédit Lyonnais therefore has an interest in the second question presented: "Whether a corporation is an 'agency or instrumentality' if a foreign state owned a majority of the shares of the corporation at the time of the events giving rise to litigation, but the foreign state does not own a majority of those shares at the time that a plaintiff commences a suit against the corporation." *Id.*

Given the interests at stake, the *amici* file this brief with the full support of the Republic of France. The *amici* accordingly submit this brief in support of Petitioners and with the written consent of all parties. Letters of consent have been filed with the Clerk of the Court.

INTRODUCTION AND SUMMARY OF ARGUMENT

The questions presented in this case arise under the definitional section of the FSIA, 28 U.S.C. § 1603, and address whether certain types of entities are agencies or instrumentalities of a foreign state so that they can invoke federal jurisdiction under the FSIA, *see id.* at §§ 1330(a) and 1441(d), and the statute's related procedural protections.[3]

[3] The FSIA contains procedural provisions governing, among other things, venue, service of process, and attachment, arrest and execution. *See* 28 U.S.C. §§ 1391(f) (venue), 1608 (service of process), 1609–11 (attachment, arrest, and execution). Some provisions of the FSIA, however, apply only to foreign states and not to their agencies and instrumentalities, such as the protection against punitive damages. *See id.* at § 1606. In addition, the service and venue provisions for agencies and instrumentalities resemble those for private corporations. *Compare id.* at

This case does not present the entirely separate question of whether an entity that qualifies as an "agency or instrumentality" is entitled to sovereign immunity under the FSIA.[4]

Considering "the statute's language, structure, subject matter, context, and history—factors that typically help courts determine a statute's objectives and thereby illuminate its text[,]" *Almendarez-Torres v. United States*, 523 U.S. 224, 228 (1998)—the Court should answer both questions presented in the affirmative. The FSIA's definition of "agency or instrumentality" encompasses corporate entities a majority of whose shares are owned both directly and indirectly by a foreign state when litigation-creating conduct occurs, even if the entity is subsequently privatized. Not only is this construction consistent with the statutory text, purpose, and history, but it also recognizes that the strong sovereign interest in state-owned entities does not dissipate automatically because of tiered ownership or privatization. Accommodating this enduring sovereign interest lies at the heart of the FSIA and furthers the statute's purpose of promoting harmony in United States foreign relations by, among other things, providing a federal forum for civil claims against foreign states and their agencies and instrumentalities.

---

§1391(f) (venue) *with* §1391(c) (venue) *and* § 1608(b)(2) (service) *with* Fed. R. Civ. P. 4(d)(3) (service).

[4] Because the FSIA's jurisdictional and procedural protections are separate and distinct from its grant of sovereign immunity, *see Maritime Int'l Nominees Estab. v. Republic of Guinea*, 693 F.2d 1094, 1105 n.18 (D.C. Cir. 1983), it would be erroneous to assume that answering the questions presented in the affirmative would unduly expand the number of entities obtaining immunity from civil suit in United States courts. Indeed, because many foreign state-owned entities become involved in United States litigation based on their commercial activities, such entities typically will not be immune from such civil claims. *See* Rebecca J. Simmons, Note, *Nationalized and Denationalized Commercial Enterprises Under the Foreign Sovereign Immunities Act*, 90 Colum. L. Rev. 2278, 2288 (1990).

ARGUMENT

I. CONSTRUING THE DEFINITION OF "AGENCY OR INSTRUMENTALITY" TO INCLUDE ENTITIES INDIRECTLY OWNED BY A FOREIGN STATE COMPORTS WITH THE FSIA'S LANGUAGE, THE COURT'S DESCRIPTION OF "OWNERSHIP" IN CORPORATE RELATIONSHIPS, THE FSIA'S PURPOSE AND THE CIRCUMSTANCES OF ITS ENACTMENT

A. The Statutory Text

The definition of "agency or instrumentality" is found at 28 U.S.C. § 1603, which provides in relevant part:

> (a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
>
> (b) An "agency or instrumentality of a foreign state" means any entity—
>
> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof; and
>
> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

Section 1603(b)(2) defines an "agency or instrumentality of a foreign state," in part, as a "separate legal person . . . a majority of whose shares or other ownership interest is *owned* by a foreign state or political subdivision thereof . . . ." *Id.*

(emphasis added). Resolution of the first question presented chiefly turns, therefore, on the meaning of the verb "owned" in the FSIA.[5]

On its face, the word "owned" is unqualified and is not defined in the FSIA. It neither expressly requires direct ownership nor prohibits indirect ownership. Consequently, it must be afforded its "ordinary or natural meaning." *Smith v. United States*, 508 U.S. 223, 228 (1993). As the United States Court of Appeals for the Fifth Circuit observed, "The plain language of the statute simply requires 'ownership' by a foreign state. It draws no distinction between direct and indirect ownership; neither does it expressly impose a requirement of direct ownership." *Delgado v. Shell Oil Co.*, 231 F.3d 165, 176 (5th Cir. 2000). Interpreting "owned" in § 1603(b)(2) to mean only entities *directly* owned by a foreign state would therefore require the Court to read into the statute a limitation not imposed by Congress.[6]

B. The Court's Description of "Ownership" in Corporate Relationships

Courts describing the relationship between parent and subsidiary corporations have not restricted the meaning of

---

[5] While *amici* concentrate their textual argument on the word "owned" in § 1603(b)(2), that provision also refers to "other ownership interest." The plain meaning of "ownership interest" is expansive, and shows that Congress cast its definitional net broadly in § 1603(b)(2) to encompass relationships between foreign states and entities well beyond the mere direct holding of shares by the state.

[6] The United States suggests that Congress's failure to use more elaborate language in § 1603(b)(2), such as "'owns or controls directly, or indirectly,'" means that the FSIA excludes from its purview entities indirectly owned by a foreign state. Brief for the United States (Nos. 01-593 & 01-594) ("Br. United States") 9. n.4 (quoting 15 U.S.C. § 1802(3)). The absence of such additional verbiage, however, says nothing about the meaning of the word "owned" standing alone, and does not support, let alone compel, the government's interpretation.

"ownership" to the direct holding by a parent of shares in its subsidiary. Indeed, this Court has described the ownership interests held by a corporate parent in its subsidiary as extending beyond the subsidiary's shares to include its assets. *Colorado Interstate Gas Co. v. Federal Power Comm'n*, 324 U.S. 581, 607 (1945) (observing in a rate-making case involving natural gas producers that a parent corporation "owned the producing properties at the beginning of the transaction through one subsidiary; it owned them at the end of the transaction through another subsidiary").

Because the assets of a subsidiary include the shares it owns in subsidiary corporations, it is therefore not surprising that this Court also has described a corporate parent as the owner of the shares of a second-tier subsidiary held through a first-tier subsidiary. In *Bangor Punta Operations, Inc. v. Bangor & Aroostook R.R. Co.*, 417 U.S. 703 (1974), BPO (a wholly-owned subsidiary of Bangor Punta) acquired 98.3% of the outstanding stock of BAR, a railroad. Commenting on the nature of the claims at issue (the substance of which are not relevant here), the Court described Bangor Punta as the "owner" of BAR even though Bangor Punta owned the BAR shares indirectly through BPO. *Id.* at 706. In addition to using the word "own" to describe a parent corporation's relationship to an indirectly held corporate subsidiary, the Court has, conversely, referred to both directly and indirectly owned government corporations as "instrumentalities" of the government. *See Keifer & Keifer v. Reconstruction Fin. Corp.*, 306 U.S. 381, 388–89 (1939).

Therefore, these decisions further illustrate that describing entities held by a foreign state through a corporate intermediary as being "owned" by that state for purposes of the FSIA is consistent with the ordinary, natural meaning of the word. *See Smith*, 508 U.S. at 228; *accord Williams v. Taylor*, 529 U.S. 420, 431 (2000).

C. The Purposes of the FSIA and the Circumstances of Its Enactment

Construing "agency or instrumentality" to include entities indirectly owned by a foreign sovereign through a tiered corporate structure also comports with and advances the underlying purposes of the FSIA and recognizes the circumstances of its enactment.

Congress enacted the FSIA in 1976 for the purpose of "comprehensively regulating the amenability of foreign nations to suit in the United States." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493 (1983). From the Executive Branch's perspective, the FSIA was enacted "to facilitate and depoliticize litigation against foreign states and to minimize irritations in foreign relations arising out of such litigation." Letter from Robert S. Ingersoll, Deputy Secretary of State, and Harold R. Tyler, Jr., Deputy Attorney General, to Carl O. Albert, Speaker of the House of Representatives (Oct. 31, 1975) *in* H.R. Rep. No. 94-1487, at 44, 45 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6634.

Such politicization occurred because the State Department was increasingly involved in deciding requests for foreign sovereign immunity under the pre-FSIA legal regime, during which the United States had adopted the "restrictive theory" of foreign sovereign immunity (granting immunity for sovereign acts but denying it for commercial acts) as a matter of Executive policy rather than national legislation. *See* Letter from Jack B. Tate, Acting Legal Adviser, Department of State, to Phillip B. Perlman, Acting Attorney General (May 19, 1952), *reprinted in* 26 Dep't of State Bulletin 984, 985 (1952). Consequently, "foreign nations often placed diplomatic pressure on the State Department in seeking immunity. On occasion, political considerations led to suggestions of immunity in cases where immunity would not have been available under the restrictive theory." *Verlinden*, 461 U.S. at 487. Congress therefore enacted the FSIA, in part, to adopt by statute the "restrictive theory" of immunity and to transfer the often thorny issue of foreign sovereign immunity from the political branches to the judiciary as a means of "reducing the foreign policy implications of immunity determinations, and assuring litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process." H.R. Rep. No. 94-1487, at 7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6606.

By the time Congress enacted the FSIA in 1976, the number of foreign state-owned corporations created to carry out sovereign tasks had grown dramatically, as had the potential for legal disputes between these entities and United States citizens. As the Court has observed, "[i]ncreasingly during this century, governments throughout the world have established separately constituted legal entities to perform a variety of tasks." *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba*, 462 U.S. 611, 624 (1983). Foreign states use such corporate structures to accomplish governmental and commercial objectives, including the improved control of publicly owned enterprises, the integration of enterprises in certain industrial sectors, the management of enterprises in preparation for privatization, and the financial rescue of loss-producing enterprises. *See* Anjali Kumar, *The State Holding Company*, 187 World Bank Discussion Papers 11–12 (1992).

Indeed, scholars surveying the field six years *before* Congress enacted the FSIA elaborated on this point, noting in particular the use of multi-tiered public corporations by developing nations:

> [P]ublic enterprise, largely in the form of development corporations, has become an essential instrument of economic development in the economically backward countries which have insufficient private venture capital to develop the utilities and industries which are given priority in the national development plan. Not infre-

quently, these public development corporations . . . *directly or through subsidiaries*, enter into partnerships with national or foreign private enterprises, or they offer shares to the public.

W. Friedmann, *Government Enterprise: A Comparative Analysis*, *in* Government Enterprise 333–34 (W. Friedmann & J.F. Garner eds., 1970) (emphasis added), *quoted in First Nat'l City Bank*, 462 U.S. at 625. As evidenced by *amici*, this phenomenon has not been limited to developing nations.[7]

When it enacted the FSIA, Congress was well aware of this widespread use of tiered corporate structures to carry out sovereign functions, and accounted for this phenomenon by defining the term "agency or instrumentality of a foreign state" to cover a wide range of entities:

> As a general matter, 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 in its own name.

H.R. Rep. No. 94-1487, at 15–16 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6614.

Against this backdrop, Congress surely could have limited the scope of the FSIA to directly owned instrumentalities had it intended to so circumscribe the definition of "foreign state"

---

[7] Indeed, the United States itself created and employed numerous multi-tiered public corporations in response to the Great Depression and World War II. *See Keifer & Keifer*, 306 U.S. at 390 ("Because of the advantages enjoyed by the corporate device compared with conventional executive agencies, the exigencies of war and the enlarged scope of government in economic affairs have greatly extended the use of independent corporate facilities for governmental ends.").

in the statute. That Congress did not do so is telling, particularly since it took care elsewhere in the FSIA to delimit the scope of otherwise broad terms in precisely that manner. *See* 28 U.S.C. § 1605(a)(2) (providing for jurisdiction based on certain commercial activity that "causes a *direct* effect in the United States") (emphasis added).[8]

Construing the word "own" to include indirectly held subsidiaries of a foreign state, and thereby affording them the jurisdictional and procedural benefits of the FSIA, not only recognizes the circumstances surrounding enactment of the statute, but also recognizes the practical reality that the sovereign interest in state-owned corporate structures transcends the first tier of ownership. As the American Bar Association recently observed in connection with recommending reforms to the FSIA, "The strength of a foreign state's sovereign interests in an area does not necessarily dissipate when it employs more complicated legal structures resembling those used by modern private businesses." Working Group of the ABA, *Report: Reforming the Foreign Sovereign Immunities Act*, 40 Colum. J. Transnat'l L. 489, 523 (2002) ("ABA Working Group"). This statement is as true for *amici* as it is for other multi-level state-owned entities. The

[8] The United States argues unconvincingly that the definition of "agency or instrumentality" should be narrowly construed because Congress enacted the FSIA against the background "principle of separate corporate status." Br. United States 7. However, *United States v. Bestfoods*, 524 U.S. 51 (1998), on which the government principally relies, Br. United States 7–8, stands for the unremarkable proposition that the ownership of shares without more is not a proxy for corporate liability. *See* 524 U.S. at 61–62. In addition, interpreting the term "owned" in light of an entity's distinct corporate personality is redundant, if not irrelevant, under the FSIA, because the statute already requires an entity to demonstrate that it is "a separate legal person." 28 U.S.C. § 1603(b)(1). Whether a subsidiary of a foreign state-owned corporation is a "separate legal person" therefore adds nothing to the analysis of whether it is "owned" by the state.

Republic of France has an abiding interest in the operation of both CDR and CDR-E as part of a comprehensive defeasance structure established to carry out the financial rescue and rehabilitation of Crédit Lyonnais, plainly a sovereign undertaking.

Perhaps because Congress recognized this enduring sovereign interest in state-owned entities, it intended for the jurisdictional provisions of the statute to be construed broadly. "Such broad jurisdiction in the Federal courts should be conducive to uniformity in decision, which is desirable since a disparate treatment of cases involving foreign governments may have adverse foreign relations consequences." H.R. Rep. No. 94-1487, at 13 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6611; *accord id.* at 32, 6631 ("In view of the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area, it is important to give foreign states clear authority to remove to a Federal forum actions brought against them in the State courts."). As one federal Court of Appeals has recognized, "a liberal approach in implementing the FSIA's comprehensive jurisdictional scheme is most conducive to the FSIA's paramount objectives of keeping federal courts open to foreign states, and indeed of affirmatively encouraging private actions against foreign states to be adjudicated in federal court." *In re Texas Eastern Transmission Corp.*, 15 F.3d 1230, 1241 (3d Cir. 1994) (citations omitted).

In light of the foregoing, *amici* urge the Court to reverse the unduly narrow interpretation of § 1603(b)(2) of the FSIA adopted by the Ninth Circuit that limited the statute's reach to entities that are directly owned by a foreign state. *See* Pet. App. 20a–21a. This interpretation conflicts with the text, structure, purpose and background of the FSIA, and undervalues the strong sovereign interest in indirectly held public corporations created to accomplish state governmental and commercial objectives.

II. CONSTRUING THE FSIA TO INCLUDE ENTITIES THAT WERE STATE-OWNED WHEN LITIGATION-CREATING CONDUCT OCCURRED BUT WERE PRIVATIZED BEFORE SUIT IS FILED COMPORTS WITH THE STATUTORY TEXT AND THE COURT'S SOVEREIGN IMMUNITY JURISPRUDENCE AND FURTHERS THE PURPOSES OF THE ACT

A. The Grammatical Tense of the Definition of "Agency or Instrumentality"

The FSIA defines an "agency or instrumentality" to include an entity "a majority of whose shares . . . is owned by a foreign state." 28 U.S.C. § 1603(b)(2). Seizing on the use of the present tense in this definition, the Ninth Circuit expressed skepticism over whether entities that had been privatized by the time suit was filed could avail themselves of the procedural and jurisdictional provisions of the FSIA in litigation involving pre-privatization events. *See* Pet. App. 17a–18a. This concern, shared by the Solicitor General, *see* Br. United States 15, is misplaced.

Use of the present tense in defining "agency or instrumentality" simply does not require that an entity be state-owned when an action is commenced against it. The definitional use of the present tense is timeless and does not control when an entity must exhibit the characteristics of an instrumentality to effectuate the purposes of the FSIA. *See, e.g., Coalition for Clean Air v. Southern Cal. Edison Co.*, 971 F.2d 219, 225 (9th Cir. 1992) (observing that in construing congressional intent "[t]he present tense is commonly used to refer to past, present, and future all at the same time"). The language of § 1603(b)(2) certainly does not foreclose applying the FSIA to entities that were state-owned at the time of the underlying conduct, even if the entities were subsequently privatized.

Indeed, every federal Court of Appeals to have considered the issue has ruled that an entity that was majority state-owned when the conduct giving rise to the litigation occurred is entitled to the benefits and protections of the FSIA. *See Peré v. Nuovo Pignone, Inc.*, 150 F.3d 477, 480–81 (5th Cir. 1998); *General Elec. Capital Corp. v. Grossman*, 991 F.2d 1376, 1381–82 (8th Cir. 1993); *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 449–50 (6th Cir. 1988). As the United States Court of Appeals for the Eighth Circuit observed, the present tense used in § 1603(b)(2) can "speak to a variety of situations, including the time of the alleged wrongdoing." *General Elec. Capital Corp.*, 991 F.2d at 1381 (citation omitted). The correctness of this view is confirmed by the Court's sovereign immunity jurisprudence.

B. The *Western Maid* Case

This Court's jurisprudence has recognized the principle that the sovereign character of an entity survives its privatization for purposes of immunity for pre-privatization conduct. *In re The Western Maid*, 257 U.S. 419 (1922). In that case, two ships were leased or chartered to the United States and used for public purposes during wartime. After the ships were returned to their private owners, claims were brought against the ships for damages caused by collisions that occurred while the ships were in government service. This Court, speaking through Justice Holmes, found that the vessels were immune from suit due to their status at the time of the relevant conduct. *Id.* at 432–33. Put differently, because of the sovereign character of the vessels at that time, they were entitled to the then prevailing benefit of absolute immunity from suit regardless of their subsequent transfer into private hands. *See Calmar S.S. Corp. v. United States*, 345 U.S. 446, 452 (1953) (describing the principal issue in *The Western Maid* as "whether an enforceable liability could have been created when those two vessels passed into private ownership, although no such liability arose when the collisions occurred"). Similarly, if an entity is an instrumentality of a foreign state when it engages in litigation-creating conduct, it should be entitled to invoke the procedural and jurisdictional benefits and protections of the FSIA regardless of whether it is later privatized.

C. The Abiding Sovereign Interest in Privatized Entities

In construing the FSIA, it should be recognized that there is an abiding sovereign interest in the judicial treatment of a former state-owned entity. If a former state-owned entity is sued based on pre-privatization conduct, the propriety of conduct performed under the aegis of the state is being scrutinized. Judicial scrutiny of such conduct implicates the same foreign policy concerns that animated the passage of the FSIA. *See, e.g., Peré*, 150 F.3d at 481 ("The foreign policy concerns underlying sovereign immunity do not necessarily disappear when a defendant loses its foreign status before suit is filed."); *General Elec. Capital Corp.*, 991 F.2d at 1381 ("The foreign policy concerns discouraging us from judging the acts of another nation are not necessarily eliminated because an entity is not a foreign state at the time of suit."); ABA Working Group, 40 Colum. J. Transnat'l L. at 530 ("[A]ctions of foreign states remain politically sensitive even after the entity is sold or otherwise loses its status as a foreign state or instrumentality."). In commenting on the timing issue, the Ninth Circuit recognized, but seriously undervalued, this important sovereign interest. *See* Pet. App. 18a.

The abiding state interest in privatized entities also frequently implicates the public fisc of the foreign sovereign. In this regard, privatization agreements often contain indemnification clauses that require the foreign state to indemnify the now private entity against certain liabilities arising from pre-privatization conduct. *See Cargill Int'l S.A.*

v. M/T Pavel Dybenko, 991 F.2d 1012, 1016 (2d Cir. 1993) (acknowledging that in the process of privatization "the foreign state may remain financially responsible for any judgments won against a former state-owned entity, especially where the acts at issue occurred when the entity was still under government control"). Nor is this an exclusively foreign phenomenon. For example, the United States itself has made indemnification commitments in the privatization of its interests. *See* United States Enrichment Corp. Privatization Act, 42 U.S.C. § 2297h-7(a)(1) (providing for continuing liability of the Secretary of Energy for pre-privatization conduct). This is precisely the situation faced by *amici*, because the Republic of France has remained financially responsible for certain pre-privatization conduct of Crédit Lyonnais.[9]

As one commentator has observed, privatization has been "the dominant international economic trend" over the past decade. ABA, *Introduction: Privatization—The Global Scale-Back of Government Involvement in National Economics*, 48 Admin. L. Rev. 435, 435 (1996). Given this trend, denying the benefits and protections of the FSIA to privatized entities in cases involving pre-privatization conduct could adversely affect many former state owners. Such a ruling also would disturb the settled expectations of foreign states based on the uniformity of decisional law generated by the Courts of Appeals on the timing issue,[10] *see*

---

[9] The existence of such sovereign financial commitments substantially undermines the Ninth Circuit's assumption that litigation against privatized corporations does not directly implicate sovereign interests. *See* Pet. App. 18a ("Nor will American courts necessarily have to worry about ordering a foreign state to pay money to a private litigant.").

[10] In contrast, applying the FSIA to formerly state-owned entities would not frustrate the settled expectations of private plaintiffs. Where a claim involves pre-privatization conduct, the plaintiff would have actually dealt with a foreign state-owned entity. As a result, a trial of the plaintiff's claim in federal court under the FSIA procedures against the

Pet. App. 17a, and would therefore risk creating the very friction in foreign relations that the FSIA was designed to avoid.

For these reasons, the Court should construe the FSIA as applying to an entity that was an "agency or instrumentality" when the conduct occurred that gives rise to the litigation.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

GEORGE J. TERWILLIGER III*
DARRYL S. LEW
R. SHAWN GUNNARSON
WHITE & CASE LLP
601 Thirteenth Street, N.W.
Suite 600 South
Washington, D.C. 20005-3807
(202) 626-3600

* Counsel of Record

Counsel for Amici Curiae

August 23, 2002

---

now privatized entity would afford the plaintiff those same rights to which the plaintiff was entitled when the events occurred underlying the litigation.

CERTIFICATE OF SERVICE

Nos. 01-593 and 01-594

DOLE FOOD COMPANY, *et al.*,

Petitioners,

v.

GERARDO DENNIS PATRICKSON, *et al.*,

Respondents.

DEAD SEA BROMINE CO., LTD., *et al.*,

Petitioners,

v.

GERARDO DENNIS PATRICKSON, *et al.*,

Respondents.

I, George J. Terwilliger III, do hereby certify that, on this twenty-third day of August, 2002, I caused three copies of the Brief Amicus Curiae of Consortium de Réalisation, CDR-Enterprises, and Crédit Lyonnais, S.A. in support of Petitioners in the foregoing case to be served on the following parties by first-class mail, postage prepaid:

ROBERT H. KLONOFF
DANIEL H. BROMBERG
JONES, DAY, REAVIS & POGUE
51 Louisiana Ave., N.W.
Washington, D.C. 20001

JONATHAN S. MASSEY
JONATHAN S. MASSEY P.C.
3920 Northampton Street, N.W.
Washington, D.C. 20015

PETER R. PADEN
ROBINSON SILVERMAN PEARCE
ARONSOHN & BERMAN LLP
1290 Avenue of the Americas
New York, New York 10104

George J. Terwilliger III

Date: August 23, 2002