Nos. 01-593, 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 Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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ARGUMENT

I. THE MAJORITY OWNERSHIP REQUIREMENT IS SATISFIED BY INDIRECT OWNERSHIP

The Dole Petitioners identified four compelling reasons in their opening brief why the FSIA's majority ownership requirement should be interpreted to encompass indirect ownership:

1. the language of both the "shares" and "ownership interest" prongs of the requirement is naturally read to encompass indirect ownership (Dole Br. 15-23);
2. because foreign governments have both political and economic reasons to organize important state-owned enterprises into tiered structures, this reading furthers one of the primary objectives of the FSIA: protecting against foreign relations problems by, among other things, channeling suits in which foreign governments are specially interested into federal court (*id*. at 23-25);
3. a distinction between direct and indirect ownership would protect companies that foreign governments directly own by a bare majority (say, 51%) while leaving unprotected companies that foreign governments indirectly own wholly (100%) through a tiered structure even though the United States has no legitimate interest in whether foreign governments use tiered structures (*id.* at 26-27); and
4. companies indirectly owned by foreign states would benefit primarily from procedural protections such as a federal forum rather than immunity from suit (*id*. at 27-28).

Neither respondents nor their *amicus curiae*, the United States Government, seriously challenge these points. In fact, the Government concedes (Gov't Merits Br. 7, 11) that foreign states exercise effective control over companies they indirectly own through tiered structures. Nevertheless, respondents and the Government urge this Court to read the majority ownership requirement to be limited to direct ownership based upon the "legal" meaning of ownership and the principle that corporations and their subsidiaries are separate legal entities. These arid, formalistic arguments are unpersuasive. Indeed, both respondents and the Government fail to offer any plausible reason why Congress would have distinguished between direct and indirect ownership in the majority ownership requirement.[1]

A. The Concept of Ownership Does Not Have a Settled Technical Meaning

Petitioners demonstrated in their opening brief (Dole Br. 16-20 & nn.5-11) that legislation, government reports, newspaper articles, and opinions of the Court frequently describe corporate shareholders as owners of the assets of the corporation and its subsidiaries. Although respondents and the Government attempt to dismiss this usage as "imprecise shorthand term[s]," "[c]olloquialisms and newspaper reports," Resp. Br. 15; Gov't Merits Br. 7, 16, neither seriously disputes that in "common parlance" (Gov't Merits Br. 12-13) the majority shareholder in a corporation is said to "own" the shares of the corporation's subsidiaries. Instead, they argue that the concept of ownership should be treated as a term of art and read according to its "legal meaning." Resp. Br. 14; Gov't Merits Br. 10-14. This argument is without merit.

1. The word "ownership" is not a term of art. A word qualifies as a term of art only if it has an "accumulated settled meaning." *Field v. Mans*, 516 U.S. 59, 69 (1995) (quotations omitted). As the opening brief pointed out (Dole Br. 33), this Court recognized long ago that "ownership" is an "untechnical"

[1] Respondents also assert (Resp. Br. 6) that the Dead Sea companies did not offer evidence of respondents' exposure to DBCP produced by the companies. In fact, however, the *Dole Petitioners* did submit such evidence. *See* Def. Joint Mem. in Opp. to Remand, Ex. 18 ¶¶ 8-11 (noting purchase of Dead Sea Bromine's Nemabrom in 1977 for use, *inter alia*, in Costa Rica); *id*., Ex. 27 (noting sales in Costa Rica); *see also Delgado v. Shell Oil Co.*, 890 F. Supp. 1324, 1343 n.35 (S. D. Tex. 1995) (finding "evidence of use of Israeli DBCP" by the Dole Petitioners), *aff'd*, 231 F.3d 165 (5th Cir. 2000), *cert. denied*, 532 U.S. 972 (2001).

concept, *Flink v. Paladini*, 279 U.S. 59, 63 (1929) (Holmes, J.), and neither respondents nor the Government have shown otherwise. Respondents' only authority (Resp. Br. 14 & n.5) does not even discuss the concept of ownership, *see* Phillip I. Blumberg, *The Increasing Recognition of Enterprise Principles in Determining Parent and Subsidiary Corporation Liabilities*, 28 Conn. L. Rev. 295 (1996), and the Government's authority (Gov't Merits Br. 16), the most recent edition of *Black's Law Dictionary,* simply defines the term without suggesting any settled technical meaning. Even more importantly, the 1979 version of the dictionary—which is more contemporaneous to the enactment of the FSIA and therefore more revealing of the congressional intent underlying it (*see, e.g*., *MCI Telecommunications Corp. v. Am. Tel. & Tel.*, 512 U.S. 218, 228 (1994))—describes the word "owner" as a "*nomen generalissimum*," a general term that does not have a settled technical meaning. *Black's Law Dictionary* 996 (5th ed. 1979); *see also id*. at 945 (defining "*nomen generalissimum*" to mean a "name of the most general kind" or "general meaning"). Thus, respondents and the Government have not even begun to establish that ownership is a legal term of art.

Even worse, respondents and the Government fail to reconcile their legal meaning argument with actual congressional usage. For example, in *Flink v. Paladini*, this Court construed a maritime statute referring to "owners of a[ny] vessels," 46 U.S.C. app. §§ 183, 189, to include the shareholders of a corporation holding title to a ship because "[i]n common speech the stockholders would be called owners." 279 U.S. at 63. Similarly, in *K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281 (1988), the Court construed a trademark statute, 19 U.S.C. § 1526(a), to treat a foreign corporation as the owner of a trademark registered to its American subsidiary. 486 U.S. at 292 (Kennedy, J.); *id*. at 298-99 (Brennan, J.); *id.* at 318-19 (Scalia, J.). And in the Government Corporation Control Act, Congress described several subsidiaries of the Reconstruction Finance Corporation as "wholly owned Government corporation[s]." 59 Stat. 597, 597-98 (1945). The claim that the concept of ownership has a fixed "legal" meaning excluding indirect ownership cannot be reconciled with these statutes.

2. Respondents and the Government also claim (Resp. Br. 14-16 & n.6; Gov't Merits Br. 15 n.5) that Congress could have used more precise language to include indirect ownership within the majority ownership requirement. It is, however, equally true that Congress could have precisely limited the requirement to direct ownership of shares. *See, e.g.*, 20 U.S.C. § 1087-3(a) (referring to "common shares . . . *directly owned* by a Holding Company") (emphasis added); 26 U.S.C. § 165(g)(3)(A) (requiring that "the taxpayer *owns directly* stock" in a corporation) (emphasis added); *id.* § 851(c)(3)(A) ("stock . . . *owned directly* by one or more of the corporations") (emphasis added); *id.* § 993(3)(1)(A) (referring to "stock . . . *owned directly* by the domestic corporation") (emphasis added); *id.* § 1083 (referring to "stock . . . *owned directly* by one or more of the other corporations") (emphasis added). Thus, while respondents are "correct in noting that Congress has the skills to be precise, the fact that it did not employ those skills here helps [the Court] not at all." *Scarborough v. United States*, 431 U.S. 563, 570-71 (1977).

3. In all events, respondents' legal meaning argument does not affect petitioners' interpretation of the majority ownership requirement's "ownership interest" prong. As previously demonstrated (Dole Br. 21-22), "interest" is the most general term than can be used to describe a legal right, and it has been repeatedly used by the Court to describe the rights of corporate shareholders in a corporation's property. *See, e.g.*, *Kaufman v. Société Internationale pour Participations Industrielles et Commerciales, S.A.*, 343 U.S. 156 (1952). In fact, petitioners showed that "it is hornbook law that '[s]hares of stock . . . represent a beneficial interest in the corporate property.'" Dole Br. 22 (quoting 11 *Fletcher's Cyclopedia of the Law of Private Corporations* § 5100, at 93 (perm. rev. vol. 1999)). Thus, the "legal" meaning of the word "interest" supports petitioners' conclusion that the "ownership interest" prong

encompasses the rights of a corporate shareholder in the corporation's subsidiaries.

Unable to offer any alternative reading of the language of the "ownership interest" prong, respondents contend that this language must be interpreted to exclude a corporate shareholder's interest in corporate subsidiaries in order to avoid rendering the majority ownership requirement's prior reference to "shares" superfluous. Resp. Br. 20-21. Petitioners have, however, already identified the flaw in this argument: under the principle of *ejusdem generis* the specific term "shares" defines the class covered by the general term "other ownership interest." Dole Br. 32-33 (citing 2A Norman J. Singer, *Statutes & Statutory Construction* § 47:17, at 285 (6th ed. 2000)). Respondents object that the class derived by petitioners—ownership interests that confer the same measure of control as holding title to a majority of shares (Dole Br. 22-23)—introduces the concept of control into the statute. Resp. Br. 22. In fact, it simply identifies the animating purpose of the majority ownership requirement, as the *ejusdem generis* principle demands. *See* 2A Singer, *supra*, § 47:18, at 289. While respondents also invoke the *ejusdem generis* principle, Resp. Br. 21, notably absent from their brief is any attempt to reconcile the vague and question-begging class they suggest—the "functional equivalents" of stock (*id.*)—with the subject and purpose of the FSIA.

Although the Government no longer ignores the ownership interest prong, its treatment of that provision remains submerged, albeit now in a footnote rather than an ellipsis. Gov't Merits Br. 17 n.7; *see also* Dole Br. 34. The Government asserts there that the "ownership interest" prong is inapplicable because the Dead Sea companies issued shares. This, of course, assumes that the majority ownership requirement's references to "shares" and "other ownership interest" are mutually exclusive—which, as previously shown, they are not (Dole Br. 32-33)—and thereby begs the question of what the "other ownership interest" prong means.

B. The Separate Entity Principle Is Inapplicable

Respondents and the Government also rely on the supposedly "bedrock principle" that "the parent corporation[] and its subsidiaries are separate entities." Resp. Br. 16-19; Gov't Merits Br. 6-7, 10-11. They do not, however, explain how this principle applies to the "ownership interest" prong or why it requires that any ownership of "shares" be direct. In any event, as petitioners have already demonstrated (Dole Br. 34-35), the separate entity principle is inapplicable here because the FSIA's definition of agencies or instrumentalities explicitly rejects it and because application of the principle would undermine the FSIA's goal of protecting foreign relations.

1. The FSIA Explicitly Rejects the Separate Entity Principle

Although respondents concede that the FSIA rejects the "separate entity rule" under which companies owned by foreign governments were denied foreign sovereign immunity, they argue that Congress did not mean "to ignore the formalities of corporate law or the distinctions among different entities." Resp. Br. 36. At least with respect to the Act's definition of agency or instrumentality, that is plainly incorrect. Under the formalities of corporate law invoked by respondents, "'[a] corporation and its stockholders are generally to be treated as separate entities.'" *Id.* at 16 (quoting *Burnet v. Clark*, 287 U.S. 410, 415 (1932)). The FSIA does not, however, treat corporations and governments owning a majority of their stock separately. To the contrary, it defines such corporations to be "foreign states." *See* 28 U.S.C. § 1603(b) (defining corporations majority owned by their states of incorporation to be agencies or instrumentalities of those states); *id*. § 1603(a) (defining "foreign state" to include any "agency or instrumentality of a foreign state"). Thus, in the pertinent provisions the FSIA clearly rejects the formalistic corporate law principles invoked by respondents.[2]

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[2] Respondents' attempt to distinguish the "separate entity rule" from the corporate law principles they invoke (Resp. Br. 36) is equally untenable: as

This Court's decisions in *First National City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611 (1983), and *United States v. Bestfoods*, 524 U.S. 51 (1998), do not suggest that the separate entity principle applies here. Contrary to the Government's contention (Gov't Merits Br. 17), the *Bestfoods* decision did not apply the principle "that a parent corporation does not 'own' the assets of its subsidiary"; it applied the narrower (and far more accepted) principle that "a parent corporation . . . is not liable for the acts of its subsidiaries." 524 U.S. at 61; *see also* Phillip I. Blumberg & Karen Wackerman, *The Law of Corporate Groups: Procedural Problems in the Law of Parent and Subsidiary Corporations* xi (Supp. 2002) ("Where substantive liability is not involved," the separate entity principle is "beginning to collapse."). Similarly, the *First National City Bank* decision observed only that agencies and instrumentalities of foreign governments are legally distinct from those governments for purposes of determining liability. *See* 462 U.S. at 626-28; *see also id.* at 621 (holding the FSIA inapplicable to questions of vicarious liability). Moreover, far from endorsing the separate entity principle, the decision cautioned that the "'problem of the relation between parent and subsidiary corporations'" should not be "'enveloped in the mists of metaphor.'" *Id*. (quoting *Berkey v. Third Ave. Ry. Co*., 155 N.E. 58, 58 (N.Y. 1926) (Cardozo, J.)).

2. Application of the Separate Entity Principle Would Frustrate the Congressional Policies Underlying the Majority Ownership Requirement

As previously demonstrated (Dole Br. 26-27, 35), application of the separate entity principle would also conflict with the

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respondents' own authority recognizes, the separate entity rule was based upon the principle that "a corporation has a legal personality distinct from its shareholders." William C. Hoffman, *The Separate Entity Rule in International Perspective: Should State Ownership of Corporate Shares Confer Sovereign Status for Immunity Purposes?*, 65 Tul. L. Rev. 535, 542-43 (1991).

FSIA's objective of protecting foreign relations. The attempts of respondents and the Government to dispute these arguments are unpersuasive and, in many instances, incompatible with the policies underlying the Act.

1. Relying on a report from the Working Group on the FSIA formed by the American Bar Association, respondents contend that "'a foreign state's sovereign interest in a lower tier corporation is far more likely to be significantly less than in a corporation directly owned.'" Resp. Br. 35 (quoting ABA Working Group, *Reforming the Foreign Sovereign Immunities Act*, 40 Colum. J. Transnat'l L. 489, 524 (2002)). What respondents fail to disclose, however, is that the Working Group concluded that tiered entities *should* enjoy the protections of the FSIA because "*[t]he 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.*" ABA Working Group, *supra*, at 522 (emphasis added). As petitioners demonstrated (Dole Br. 25), foreign governments often have powerful political and economic reasons for using tiered structures. The Working Group made the same point, observing that "some states utilize a tiered corporate structure to manage and control important areas of national interest, such as natural resources." ABA Working Group, *supra*, at 522 (discussing the Mexican petroleum enterprise and the Honduran lumber industry). As a consequence, it is clear that in many instances foreign governments will be gravely concerned about the treatment of companies indirectly owned (and therefore controlled) by them.

In the alternative, respondents and the Government argue that foreign governments have little concern over the treatment of their indirectly owned companies in American courts because other countries do not afford such companies any sovereign-immunity-based protections. Resp. Br. 34-35; Gov't Merits Br. 18-20. There is, however, no reason to think that foreign governments will sit by blithely while companies entrusted with key state interests are discriminated against in American state courts. Moreover, the Congress that passed the FSIA (and the

Administration that proposed it) certainly did not think so. As the Government acknowledges (Gov't Merits. Br. 19; *see also* Dole Br. 35-36 & n.15), foreign countries do not afford *any* state-owned enterprises sovereign-immunity-based protections. *See* Gary Born & David Westin, *International Civil Litigation in United States Courts* 459 (2d ed. 1992). Nevertheless, the FSIA's protections extend to enterprises that are majority owned by foreign states, no doubt based on the congressional determination that suits against such entities pose a risk to foreign relations. Thus, the claim that foreign governments will be content whether or not the FSIA affords any protections to their indirectly owned enterprises cannot be reconciled with Congress's extension of the FSIA's protections to foreign government-owned entities.

2. Although respondents and the Government do not challenge petitioners' demonstration (Dole Br. 27) that the United States lacks any legitimate interest in whether foreign governments use tiered enterprises, they contend that several policies support limiting the majority ownership requirement to directly owned entities. These arguments also conflict with the congressional policies animating the majority ownership requirement.

a. Respondents erroneously contend that reading the majority ownership requirement naturally to include both direct and indirect ownership would frustrate the FSIA's "avowed purpose of aligning U.S. law with international practice." Resp. Br. 26. First, contrary to respondents' assertion (*id.*), the natural reading of the majority ownership requirement advocated by petitioners does not extend the FSIA's immunity beyond prevailing international practice. As the opening brief demonstrated, tiered entities rarely enjoy immunity under the Act and, to the extent that they do, respondents' narrow interpretation of the majority ownership requirement would actually prevent such entities from claiming the sovereign immunity available to them in other countries. Dole Br. 28, 35-36 & n.15.

Second, alignment was not a goal of the FSIA. It is neither one of the "broad purposes" identified in the letter transmitting the bill that became the FSIA to Congress, *see* Letter from Robert S. Ingersoll & Harold R. Tyler, Jr. to Carl O. Albert, October 31, 1975, *reprinted in* H.R. Rep. No. 94-1487, at 45 (1976) [hereinafter "Ingersoll Letter"], nor one of the general purposes identified in the congressional reports, *see* H.R. Rep. No. 94-1487, at 6; S. Rep. No. 94-1310, at 8 (1976). To the contrary, because the FSIA was the first foreign sovereign immunity statute in the world, many of its provisions—including the protections afforded state-owned enterprises—intentionally sweep beyond the minimum requirements of international law. *See, e.g.*, Frederic Alan Weber, *The Foreign Sovereign Immunities Act of 1976: Its Origin, Meaning, and Effect*, 3 Yale Stud. World Pub. Order 1, 42-46 (1976-77); *see also* Gabe Shawn Varges, *Defining a Sovereign for Immunity Purposes: Proposals to Amend the Int'l Law Ass'n Draft Convention*, 26 Harv. Int'l L.J. 103, 108-09 (1985) (noting that the FSIA was intended to "serve as a model for future general international agreement") (quotation marks and citation omitted).

b. Respondents also argue that the natural reading of the majority ownership requirement proposed by petitioners would frustrate the FSIA's goal of facilitating litigation against foreign states and protecting the rights of litigants Resp. Br. 28-33. Although this is, in fact, a goal of the Act, *see* Ingersoll Letter, *supra*, *reprinted in* H.R. Rep. No. 94-1487, at 45, respondents do not show that the natural reading would impose substantial procedural burdens upon litigants. As the Government recognizes (Gov't Merits Br. 29 n.15), suits by American plaintiffs against foreign defendants routinely end up in federal court. *See* 28 U.S.C. §§ 1332(a)(2), 1441(a). Petitioners have previously demonstrated (Dole Br. 6-7) that the FSIA's service of process and venue provisions for agencies or instrumentalities are analogous to provisions in the Federal Rules of Civil Procedure. *Compare* 28 U.S.C. § 1391(f) *and id.* § 1608(b)(2) *with id.* § 1391(c) *and* Fed. R. Civ. P. 4(d)(3). The Act provides agencies and instrumentalities with little, if any, immunity against attachment, *see* 28 U.S.C. § 1610(b) (depriving agencies or instrumentalities of most such immunity), and, contrary to respondents' suggestion (Resp. Br. 31), it "provides, in effect, a Federal long-arm statute over foreign states." H.R. Rep. No. 94-1487, at 13. It is, of course, true that the FSIA deprives plaintiffs of the right to jury trials in state courts. However, such trials—which are, of course, available only in common law countries—create an obvious danger of discrimination and, therefore, of diplomatic friction in all cases involving entities owned by foreign states, and there is no reason to believe that concern over jury trials led Congress to include only directly owned entities in the majority ownership requirement.

Respondents contend as well that litigants may encounter more difficulty in discovering whether a tiered entity is owned by a foreign government. Resp. Br. 29-30. But respondents have not even begun to show that this is a problem uniquely associated with tiered entities. Nor, for that matter, have they shown that this problem causes any significant prejudice. They cite only one case in which the plaintiff was supposedly surprised to discover that a tiered entity was foreign owned, *O'Connell Mach. Co. v. M.V. "Americana"*, 566 F. Supp. 1381 (S.D.N.Y. 1983), *aff'd*, 734 F.2d 115 (2d Cir. 1984), and there is no indication of any resulting prejudice in that case. Nor does the English Court of Appeal's decision in *Trentex Trading Corp. v. Central Bank of Nigeria*, [1977] 1 Q.B. 529, suggest otherwise. While that case recognized that extending sovereign immunity to commercial entities creates a risk of surprise, its solution was to reject absolute immunity, *see id.* at 558 (Lord Denning, M.R.); *id.* at 576 (Shaw, L. J.), which the FSIA already does. *See* 28 U.S.C. §§ 1605-07.

c. Both respondents and the Government further claim that a narrow reading of the majority ownership requirement would avoid "potentially complex inquiries" into whether foreign states indirectly own a majority interest in a company. Resp. Br. 33-34; Gov't Merits Br. 20-21. This claim is baseless. Courts routinely make jurisdictional determinations at the beginning of a case, and, as petitioners have already pointed out (Dole Br. 39), although the corporate history of a party may, as in this case, be somewhat complex, it does not follow that a factual issue of this sort is likely to become the subject of significant dispute. There was no dispute below over the magnitude of Israel's interests in the Dead Sea Companies. Moreover, while in their opening brief petitioners challenged respondents and the Government to cite a case involving such a dispute (*id.*), neither has done so.

Nor is there any merit to the Government's claim that a natural reading of the majority ownership requirement would force courts to assume an improper "policy-making function." Gov't Merits Br. 20. *First*, because none of the petitioners advocate an infinite-tiering approach, there is no need to choose between that approach and the effective ownership approach advocated by the petitioners. *Second*, the judiciary is more than capable of determining the appropriate test for something as relatively objective as ownership, and, in doing so, courts would be exercising far less policymaking authority than they necessarily do in construing vague, undefined terms in the FSIA such as "organ of a foreign state." 28 U.S.C. § 1603(b)(2); *see also Tex. Trading & Milling Corp. v. Fed. Republic of Nigeria*, 647 F.2d 300, 302-03 (2d Cir. 1981) (noting that the FSIA is a "vaguely worded statute . . . described by its draftsmen as providing only 'very modest guidance' on issues of preeminent importance") (quotation omitted). *Third*, neither respondents nor the Government has offered a bright-line alternative to petitioners' interpretation. To the contrary, both fail to offer any clear definition of the "ownership interest" prong, *see* Gov't Merits Br. 18n.7; Resp. Br. 21, and respondents acknowledge (Resp. Br. 36) that their interpretation would force courts to rely more heavily on the vague and policy-laden organ requirement. Thus, respondents' and the Government's interpretation of the majority ownership requirement does not avoid the need for judicial "policy-making" in applying the FSIA.

C. Respondents and the Government Have Not Explained Why Congress Would Have Distinguished Between Direct and Indirect Ownership in the Majority Ownership Requirement

Finally, the interpretation advanced by respondents and the Government must be rejected because it fails to explain why Congress would have wanted the majority ownership requirement to distinguish between direct and indirect ownership. Petitioners have offered a natural, coherent, and sensible interpretation of the majority ownership requirement that explains how the language of the requirement can be read to cover both direct and indirect ownership (Dole Br. at 15-23); that furthers the FSIA's primary objective of protecting foreign relations (*id*. at 23-28); and that comports with both the legislative history and the terminology traditionally used to describe companies indirectly owned by the United States (*id*. at 28-31). By contrast, the interpretation respondents and the Government advance asks the Court to ignore "common parlance" in favor of supposed technical meanings and inapplicable background principles; to ignore the primary objective of the statute in favor of policies that were rejected in the provisions being construed; and to adopt an interpretation that can in practice lead to arbitrary results with no explanation why it is necessary to countenance such results. In short, respondents and the Government have failed to offer a cogent interpretation of the majority ownership requirement, which is no doubt why the majority of lower courts have not adopted their interpretation.

II. THE MAJORITY OWNERSHIP REQUIREMENT SHOULD BE APPLIED HERE TO THE TIME OF THE CONDUCT UNDERLYING SUIT

A. The Majority Ownership Requirement's Use of the Present Tense Does Not Preclude Its Application to the Time of the Conduct Underlying Suit

In providing its views at the certiorari stage, the Government claimed that the majority ownership requirement's use of the present tense was the "[m]ost telling[]" evidence that the requirement must be applied exclusively to the time of filing. Gov't Br. 15. In its merits brief, the Government virtually ignores tense. While still contending that the word "is" indicates that the majority ownership requirement must be applied to the time of filing, Gov't Merits Br. at 24, the Government does not dispute petitioners' demonstration (Dole Br. 40-41) that the present tense can be used in a temporally indefinite fashion, that statutory drafters frequently use the tense in this fashion, or that this Court has specifically refused to rely upon the tense of the verb "to be" in determining when a statutory provision should be applied. *See Costello v. INS*, 376 U.S. 120, 125 (1964). In fact, the Government concedes that other provisions of the FSIA couched in the present tense apply to conduct prior to the filing of suit. Gov't Merits Br. 24-25 n.13. Thus, it has essentially abandoned its principal argument at the certiorari stage.

By contrast, respondents continue to place heavy reliance on the majority ownership requirement's "unambiguous use of the present tense" based on a series of decisions of the Court. Resp. Br. 41-43. This reliance is misplaced. Most of the passages cited by respondents do not address statutes couched in the present tense,[3] and those that do are inapposite. The decision in *Stafford v. Briggs*, 444 U.S. 527 (1980), observes only that a statutory provision cast in the present tense "*can reasonably be read* as describing the character of the defendant at the time of the suit." *Id*. at 536 (emphasis added). And two of the three remaining cases interpret statutory provisions couched in the present tense to apply to conduct *prior* to the filing of suit. *See Ingalls Shipbuilding, Inc. v. Office of Worker's Comp.*, 519 U.S. 248, 252, 255-62 (1997) (determining status as "person entitled to compensation" at time of settlements that occurred prior to

[3] *See United States v. Wilson*, 503 U.S. 329, 333 (1992) (construing language in the past and present perfect tenses); *Dickerson v. New Banner Inst., Inc*., 460 U.S. 103, 116 (1983) (present perfect); *Scarborough*, 431 U.S. at 570 (present perfect); *Barrett v. United States*, 423 U.S. 212, 217 (1976) (present perfect); *Otte v. United States*, 419 U.S. 43, 49-50 (1974) (past).

submission of benefit claims); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 240 (1989) (plurality op.) (finding that the "present, active tense of the operative verbs . . . turns our attention to the actual moment of the event in question, . . . the employment decision"). Thus, far from supporting respondents' claim that statutes couched in the present tense must be applied to the time of the filing, respondents' authorities confirm that such statutes can be applied to conduct prior to filing.

Respondents also claim that the service and enforcement provisions of the FSIA support their interpretation because both contemplate companies majority owned by foreign states at the time of filing. Resp. Br. 45. It is, however, by no means clear that the Act's enforcement provisions are properly applied by reference to status at the time of filing. While, as previously demonstrated (Dole Br. 45-46), the FSIA's objectives are served by providing companies that are privatized before filing with the Act's protections in suits arising out of conduct prior to privatization, there is no logical reason to provide companies that are privatized after filing but before enforcement with the Act's protections against attachment and execution. Thus, if anything, the FSIA's enforcement provisions confirm that the majority ownership requirement cannot be rigidly interpreted to apply only at the time of filing, but must instead be interpreted flexibly in the light of the context in which it is being applied.

B. Immunity Law, Not the Diversity Jurisdiction Statute, Provides the Best Model for the Majority Ownership Requirement

In their opening brief, petitioners showed that under the doctrines of domestic sovereign immunity, official immunity, and diplomatic immunity a defendant's status is determined by reference to the time of the underlying conduct. Dole Br. 43-45. Although respondents and the Government contend that jurisdictional statutes provide a better model, their arguments are unpersuasive.

According to the Government, it is a "hornbook principle" that jurisdictional statutes should be applied by reference to the time of filing and that Congress must therefore be assumed to have drafted the majority ownership requirement with this principle in mind. Gov't Merits Br. 23-24. The Government does not, however, cite any treatises or law review articles recognizing this principle. Moreover, the cases it cites all deal with diversity jurisdiction and simply hold that such jurisdiction cannot be created or lost due to developments after filing.[4] It should therefore come as no surprise that even respondents characterize these cases as establishing only a "rule under the diversity statute," Resp. Br. 44, or that this supposedly fundamental principle escaped the attention of Judge Kozinski in the decision below. Thus, the Government has failed to show that its supposed hornbook principle applies to statutes such as the FSIA, whose jurisdictional provisions are based on "arising under," rather than diversity, jurisdiction. *See Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 492-97 (1983).

In any event, the FSIA is not an ordinary jurisdictional statute. *Cf. id.* at 496-97 (noting that jurisdictional statutes do not normally contain substantive provisions). As petitioners' opening brief pointed out (Dole Br. 39), Congress intended the FSIA to confer broad and expansive jurisdiction. *See* H.R. Rep. No. 94-1487, at 13. *See generally In re Tex. E. Transmission Corp. PCB Contamination Ins. Coverage Litig.*, 15 F.3d 1230, 1241 (3d Cir. 1994). Even more importantly, Congress made jurisdiction under the FSIA turn upon the availability of immunity. Under the Act, federal courts have subject matter jurisdiction whenever there is a claim against a foreign state that is "*not entitled to immunity* either under sections 1605-07 or under any applicable international agreement." 28 U.S.C.

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[4] *See Freeport-McMoRan, Inc. v. K N Energy, Inc.*, 498 U.S. 426, 429 (1991) (per curiam) (diversity jurisdiction not lost by assignment of plaintiff's interest); *Smith v. Sperling*, 354 U.S. 91, 93 n.1 (1957) (jurisdiction not lost by appointment of non-diverse administrator for plaintiff's estate); *Anderson v. Watt*, 138 U.S. 694, 708 (1891) (revocation of non-diverse executor); *Mullen v. Torrance*, 22 U.S. (9 Wheat.) 537, 539 (1824) (post-pleading claim of diversity); *see also Conolly v. Taylor*, 27 U.S. (2 Pet.) 556, 565 (1829) (permitting diversity to be established by dropping party).

§ 1330(a) (emphasis added). Thus, even in its jurisdictional provisions the FSIA is concerned with immunity. Furthermore, as a practical matter, it makes no sense to say that for jurisdictional purposes the definition of foreign state must be applied at the time of filing when the jurisdictional inquiry turns upon an immunity determination that, as respondents and the Government concede (Resp. Br. 44-45 n.33; Gov't Merits Br. 25 n.13), looks to the time of the conduct underlying the suit. As a consequence, immunity law provides a far better model for construing the majority ownership requirement than a diversity jurisdiction principle of questionable applicability.

Although respondents and the Government offer a number of objections to using immunity law as a model (Resp. Br. 47-48; Gov't Merits Br. 25-28), those objections are easily answered. *First*, it makes no difference that most immunity decisions are not based upon statutory interpretation. As previously argued (Dole Br. 44), "where a common-law principle is well established . . ., the courts may take it as given that Congress has legislated with an expectation that the principle will apply except when a statutory purpose to the contrary is evident." *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) (quotation omitted).

Second, it does not matter that the domestic sovereign and official immunity doctrines are based upon different functional considerations than foreign sovereign immunity. As the opening brief showed (Dole Br. 44-45), foreign sovereign immunity is rooted in the same functional considerations as *diplomatic* immunity and was in fact derived from that doctrine. *See The Schooner Exchange v. McFadden*, 11 U.S. (7 Cranch) 116, 137-39 (1812).

Third, the Court's decision in *The Western Maid*, 257 U.S. 419 (1922), cannot be distinguished on the ground that it "declined to create a cause of action or substantive liability." Gov't Merits Br. 27 (emphasis omitted). In that decision, the Court refused to apply generally applicable maritime law because the United States had "not consented to be sued for torts." 257 U.S. at 433.

As respondents acknowledge (Resp. Br. 47-48), this is plainly an immunity decision. *See also Blanco v. United States*, 775 F.2d 53, 59 (2d Cir. 1985) (noting that *The Western Maid* provided incentives to enact "a *waiver of sovereign immunity* for damages caused by public vessels") (emphasis added). Thus, the objections of the Government and respondents to using immunity law as a model are without merit.

C. Applying the Majority Ownership Requirement to Privatized Companies in Suits Arising Out of Conduct Before Privatization Serves the FSIA's Goal of Protecting Foreign Relations

Petitioners demonstrated in their opening brief (Dole Br. 45-46) that applying the majority ownership requirement to the time of the conduct underlying suit serves the FSIA's goal of protecting foreign relations because suits against privatized entities based on conduct before privatization can implicate sensitive foreign government interests and therefore create a risk of irritating foreign relations. Neither respondents nor the Government undermine these very practical and concrete considerations.

Their primary response is a theoretical one: once state-owned enterprises are privatized, foreign governments supposedly lose any special interest in those organizations. Resp. Br. 46; Gov't Merits Br. 29. Indeed, the Government goes so far as to assert that a foreign state's interest in a privatized entity "generally would not be substantially different than would be the case if the foreign state" had never owned the entity. Gov't Merits Br. 29. That is preposterous. As the ABA Working Group has recognized, "*actions of foreign states remain potentially politically sensitive even after the entity is sold or otherwise loses its status as a foreign state or instrumentality*." ABA Working Group, *supra*, at 530 (emphasis added). Moreover, foreign governments often retain a special interest in privatized companies. For example, when Israel began privatizing the Dead Sea Companies and their parents in 1992, it amended the articles of the Dead Sea Companies to give it a "Special State

Share" to ensure that it maintained a veto over any reorganization of the company or sale of a substantial block of its stock. J.A. 73-74, 104-09, 118-23.

Such special shares are not unusual. To the contrary, "governments often attach special conditions to privatization sales, demanding a special or golden share." Dick Welch & Olivier Frémond, *The Case-By-Case Approach to Privatization: Techniques and Examples* 35 (World Bank Technical Paper No. 403: 1998); *see also* Andrei A. Baev, *Is There a Niche for the State in Corporate Governance? Securitization of State-Owned Enterprises and New Forms of State Ownership*, 18 Hous. J. Int'l L. 1, 23 (1995) (noting that the "worldwide popularity [of] the golden share" is due to its promise of maintaining "government power over important industries without a ban on private ownership"). Indeed, the use of golden shares is so prevalent in Europe that just last summer the European Court of Justice issued decisions limiting discriminatory use of such shares. Case C-503/99, *Comm'n of the European Communities v. Kingdom of Belgium*, O.J. 2002 C169/4 (2002); Case C-483/99, *Comm'n of the European Communities v. French Republic*, O.J. 2002 C169/3 (2002). The claim that foreign countries lose all special interest in state-owned enterprises after privatization cannot be reconciled with this reality.

The Government also contends that any affront to a foreign state from litigation involving privatized companies is likely to be remote and, in any event, not the "sort of affront" that would implicate the objectives of the FSIA. Gov't Merits Br. 29. That is also incorrect. As petitioners demonstrated in their opening brief, under routine indemnification provisions, foreign governments can be the real party in interest in suits against privatized entities arising out of conduct before privatization. Dole Br. 45-46. Unable to dispute this, respondents and the Government suggest that the act of state doctrine will take care of any concerns raised by such cases. Resp. Br. 47; Gov't Merits Br. 28. The act of state doctrine will not, however, minimize the threat of foreign policy disruption when a foreign government is the real party in interest in a commercial dispute due to an indemnification agreement. Nor is it clear that the act of state doctrine would apply in all politically sensitive cases involving privatized entities because, as this Court has observed, "[a]ct of state issues only arise when a court *must decide*—that is, when the outcome of the case turns upon—the effect of official action by a foreign sovereign." *W.S. Kirkpatrick & Co. v. Envtl. Tectonics Corp., Int'l*, 493 U.S. 400, 406 (1990). In any event, because Congress intended the FSIA to "deal *comprehensively* with the subject of foreign sovereign immunity," *Argentine Republic v. Amerada Hess Shipping Corp*., 488 U.S. 428, 438 (1989) (emphasis added), any interpretation of the FSIA that requires other sources of law to fill a gap must be rejected.

Finally, even assuming the Government is correct in asserting (Gov't Merits Br. 29) that the United States "has not encountered 'diplomatic friction' arising from post-privatization litigation," that assertion does not advance the Government's position. As the Government recognized in its prior brief (Gov't Br. 14-15), every court of appeals to decide the issue has held that state-owned enterprises are not stripped of the protections they enjoyed under the FSIA for their prior conduct once they are privatized. Moreover, while respondents cite a number of cases supposedly suggesting otherwise, Resp. Br. 46 n.35, only one of them even considered the issue and, even then, did so only in dictum. *See Ocasek v. Flintkote Co*., 796 F. Supp. 362, 365 (N.D. Ill. 1992). Thus, there does not appear to have been any litigation in which a privatized entity sued for conduct before privatization has been denied the FSIA's protections, and therefore no suit in which the denial of such protection might have created diplomatic friction. As a consequence, the United States' lone practical argument is without merit.

CONCLUSION

For the reasons stated above, as well as those stated in the opening brief of the Dole Petitioners and the briefs of the Dead Sea Petitioners, the judgment of the United States Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

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