No. 01-593

IN THE

Supreme Court of the United States

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

v.

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

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

PETITION FOR A WRIT OF CERTIORARI

TERENCE M. MURPHY
JAMES S. TEATER
MICHAEL L. RICE
JONES, DAY, REAVIS & POGUE
2727 N. Harwood Street
Dallas, TX 75201
(214) 220-3939

ROBERT H. KLONOFF
Counsel of Record
DANIEL H. BROMBERG
JONES, DAY, REAVIS & POGUE
51 Louisiana Avenue, N.W.
Washington, DC 20001
(202) 879-3939

Counsel for Petitioners Dole Food Company, Inc.; Dole Fresh Fruit Company; Dole Fresh Fruit International, Inc., Dole Fresh Fruit International, Ltd.; Standard Fruit Company; Standard Fruit and Steamship Company; Standard Fruit Company de Honduras, S.A., and Standard Fruit Company de Costa Rica, S.A.

[Additional Counsel Listed on Inside Cover]

ROBERT G. CROW
BOORNAZIAN, JENSEN & GARTHE
1800 Harrison Street, 25th Flr.
Oakland, CA 94612

RICHARD C. SUTTON, JR.
RUSH, MOORE, CRAVEN, SUTTON, MOORY & BEH
2000 Hawaii Tower
745 Fort Street
Honolulu, HI 96813

Counsel for Petitioner AMVAC Chemical Corporation

SAMUEL E. STUBBS
WILLIAM D. WOOD
FULBRIGHT & JAWORKSI, L.L.P.
1301 McKinney, Suite 5100
Houston, TX 77010

Counsel for Petitioners Chiquita Brands, Inc.; Chiquita Brands International, Inc.; and Maritrop Trading Corporation

ROBERT T. GREIG
BOAZ S. MORAG
CLEARY, GOTTLIEB, STEEN & HAMILTON
153 East 53rd Street
New York, New York 10022

Counsel for Petitioners Del Monte Fresh Produce N.A., Inc.; Del Monte Fresh Produce Hawaii, Inc.; Del Monte Fresh Produce Company; and Fresh Del Monte Produce N.V.

F. WALTER CONRAD, JR.
BAKER & BOTTS, L.L.P.
910 Louisiana Street
Houston, TX 77002

Counsel for Petitioner The Dow Chemical Company

D. FERGUSON MCNIEL, III
CHARLES W. SCHWARTZ
VINSON & ELKINS, L.L.P.
2300 First City Tower
1001 Fannin Street
Houston, TX 77002

Counsel for Petitioner Occidental Chemical Corporation

JOHN T. KOMEIJI
ROBERT T. TAKAMATSU
WATANABE, ING & KAWASHIMA
999 Bishop Street, Suite 2300
Honolulu, HI 96813

Counsel for Petitioner Pineapple Growers Association of Hawaii

R. BURTON BALLANFANT
SHELL OIL COMPANY
4856 One Shell Plaza
900 Louisiana Street
Houston, TX 77002

DALE W. LEE
KOBOYASHI, SUGITA & GODA
999 Bishop Street, Suite 2600
Honolulu, HI 96813

Counsel for Petitioner Shell Oil Company

MICHAEL L. BREM

QUESTION PRESENTED

The Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1332(a), 1391(f), 1441(d), 1602-11, affords "foreign states" various substantive and procedural protections in suits in American courts. The Act defines the term "foreign state" to include certain foreign corporations "a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision." 28 U.S.C. § 1603(b)(2). In this case, the State of Israel controlled more than 65% of the shares in two Israeli corporations through ownership of their ultimate parents. Contrary to at least four other circuits (including the Fifth in a case involving the same Israeli corporations), the Ninth Circuit refused to treat the corporations as foreign states under the Act because Israel did not directly own their shares. As a consequence, this case presents the following question:

> Whether a corporation in which a foreign sovereign controls a majority of the shares indirectly through ownership of the corporation's ultimate parent may qualify as a "foreign state" under the Foreign Sovereign Immunities Act.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

In the proceedings below, the plaintiffs-appellants were respondents Gerardo Dennis Patrickson, Rodolfo Bermudez Arias, Benigno Torres Hernandez, Fernando Jiminez Arias, Santos Leandros, Herman Romero Aguilar, Elias Espinoza Merelo, Hooker Era Celestino, Alirio Manuel Mendez, and Carlos Humberto Rivera.

The defendants-appellees were petitioners Dole Food Company, Inc., Dole Fresh Fruit Company, Dole Fresh Fruit International, Inc., Dole Fresh Fruit International, Ltd., Pineapple Growers Association of Hawaii, AMVAC Chemical Corporation, Shell Oil Company, The Dow Chemical Company, Occidental Chemical Corporation, Standard Fruit Company, Standard Fruit and Steamship Company, Standard Fruit Company de Costa Rica, S.A., Standard Fruit Company de Honduras, S.A., Chiquita Brands, Inc., Chiquita Brands International, Inc., Maritrop Trading Corporation, Del Monte Fresh Produce N.A., Inc., Del Monte Fresh Produce Hawaii, Inc., Del Monte Fresh Produce Company, and Fresh Del Monte Produce N.V. (incorrectly sued below as Fresh Del Monte, N.V.).

The third-party defendants/cross-appellants were Dead Sea Bromine Co., Ltd., and Bromine Compounds Limited.

Petitioner Dole Food Company, Inc. has no parent corporations. Although it has issued stock to the public, no publicly held company owns 10% or more of its stock. Petitioners Dole Fresh Fruit Company, Dole Fresh Fruit International, Ltd., Standard Fruit Company, Standard Fruit and Steamship Company, Standard Fruit Company de Costa Rica, S.A., and Standard Fruit Company de Honduras, S.A. are, either directly or indirectly, wholly owned subsidiaries of Dole Food Company, Inc.

Petitioner AMVAC Chemical Corporation is owned by American Vanguard Corporation, which has issued stock to the public. No publicly held company other than American Vanguard Corporation owns more that 10% of AMVAC Chemical Corporation's stock.

Petitioner Maritrop Trading Corporation is a wholly owned subsidiary of petitioner Chiquita Brands, Inc., which is, in turn, a wholly owned subsidiary of petitioner Chiquita Brands International, Inc. Chiquita Brands International, Inc. has issued stock to the public. American Financial Group, Inc. and its subsidiaries, own more than 10% of the stock of Chiquita Brands International, Inc. American Financial Group, Inc., which has no parent corporations, and its subsidiary Great American Financial Resources, Inc., have issued stock to the public.

Petitioners Del Monte Fresh Produce N.A., Inc., Del Monte Fresh Produce Hawaii, Inc., Del Monte Fresh Produce Company, and Fresh Del Monte Produce N.V. are, either directly or indirectly, wholly owned subsidiaries of Fresh Del Monte Produce Inc., which has issued stock to the public. No publicly held company owns more than 10% of the stock of Fresh Del Monte Produce Inc.

Petitioner The Dow Chemical Company, which has no parent corporations, has issued stock to the public, and no publicly held company owns 10% or more of its stock.

Petitioner Occidental Chemical Corporation is wholly owned by its parent companies, which are Oxy CH Corporation, Oxy Chemical Corporation, Occidental Chemical Holding Corporation, Occidental Petroleum Investment Company, and Occidental Petroleum Corporation. Occidental Petroleum Corporation has issued stock to the public.

Petitioner Pineapple Growers Association of Hawaii is a not-for-profit corporation, has no parent corporations, and has not issued stock to the public.

Petitioner Shell Oil Company is indirectly, wholly owned by Royal Dutch Petroleum Company, a Netherlands corporation, and by The "Shell" Transport and Trading Company, p.l.c., a British corporation, both of which have issued shares to the public. No publicly held company owns 10% or more of the stock in either Royal Dutch Petroleum or The "Shell" Transport and Trading Company, p.l.c.

PETITION FOR A WRIT OF CERTIORARI

Dole Food Company, Inc., Dole Fresh Fruit Company, Dole Fresh Fruit International, Inc., Dole Fresh Fruit International, Ltd., Pineapple Growers Association of Hawaii, AMVAC Chemical Corporation, Shell Oil Company, The Dow Chemical Company, Occidental Chemical Corporation, Standard Fruit Company, Standard Fruit and Steamship Company, Standard Fruit Company de Costa Rica, S.A., Standard Fruit Company de Honduras, S.A., Chiquita Brands, Inc., Chiquita Brands International, Inc., Maritrop Trading Corporation, Del Monte Fresh Produce N.A., Inc., Del Monte Fresh Produce Hawaii, Inc., Del Monte Fresh Produce Company, and Fresh Del Monte Produce N.V. petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-23a) is reported at 251 F.3d 795. The opinion of the district court (App. 24a-78a) is unreported.

JURISDICTION

The decision of the court of appeals was entered on May 30, 2001. A petition for rehearing en banc was denied on July 10, 2001. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 4(a) of the Foreign Sovereign Immunities Act, provides in pertinent 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 a 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.

28 U.S.C. § 1603(a) & (b). The Foreign Sovereign Immunities Act, as amended, is reprinted in its entirety in the appendix. App.108a -125a.

STATEMENT

This case presents an important and recurring question concerning the scope of the Foreign Sovereign Immunities Act (the "FSIA" or the "Act"), 28 U.S.C. §§ 1330, 1332(a), 1391(f), 1441(d), 1602-11. The FSIA provides "foreign states" with general immunity from suit and a variety of procedural protections, including the right to remove cases to federal court. *See, e.g.*, 28 U.S.C. §§ 1441(d), 1604. The term "foreign state" is defined by the Act to include, among other things, certain foreign corporations "a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision." *Id.* § 1603(b)(2). In the decision below, the Ninth Circuit held that this definition covers only corporations that are directly owned by foreign governments or their political subdivisions. The other circuits to consider the question—including the Fifth Circuit in a case involving the corporations at issue here—disagree and hold that the FSIA applies to indirectly owned corporations as well.

The FSIA

Before the enactment of the FSIA in 1976, American law did "not provide firm standards as to when a foreign state may validly assert the defense of sovereign immunity." H.R. Rep. No. 94-1487, at 7 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6605. For example, although this Court had long adhered to the "separate entity rule" under which companies owned by a sovereign engaging in commercial affairs do not enjoy immunity "so far as concerns the transactions of [those] compan[ies]," *Bank of the United States v. Planters' Bank of Ga.*, 22 U.S. (9 Wheat.) 904, 907 (1824) (Marshall, C.J.), there was little consistency among the lower courts in the treatment of foreign state-owned companies. *See, e.g.*, 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, 545-47 (1991). Recognizing that "disparate treatment of cases involving foreign governments may have adverse foreign relations consequences," H.R. Rep. No. 94-1487, at 13, *reprinted in* 1976 U.S.C.C.A.N. at 6611, Congress enacted the FSIA to set forth uniform rules for the treatment of foreign governments and their affiliates.

In keeping with prior development of the doctrine of sovereign immunity, the FSIA makes foreign states generally immune from suit in both state and federal courts, but recognizes a number of exceptions to that immunity. *See* 28 U.S.C. §§ 1604-05. For example, as under the separate entity rule, there is no immunity under the FSIA from claims based on "commercial activity carried on in the United States." *Id.* § 1605(a)(2); *see also id.* § 1603(d) (defining commercial activities). Even in the absence of immunity, the Act affords foreign states important procedural protections, including prohibitions on punitive damages, attachment and execution, and jury trials. *See id.* §§ 1330(a), 1441(d), 1606, 1609-11. Of particular relevance here, the FSIA also gives foreign states a broad right to remove suits from state to federal court. *See*

id. § 1441(d); *see also* H.R. Rep. No. 94-1487, at 32, *reprinted in* 1976 U.S.C.C.A.N. at 6631 (noting the importance of removal "[i]n view of the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area").

Although these protections are limited to "foreign states," under the FSIA that term extends beyond foreign governments. In fact, the Act defines the term "foreign state" to include "a political subdivision of a foreign state" as well as "an agency or instrumentality" of such a state. 28 U.S.C. § 1603(a). An agency or instrumentality is in turn defined to include foreign corporations "a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof." *Id.* § 1603(b)(2); *see also id.* § 1603(b)(1) (requiring that the corporation be "a separate legal person, corporate or otherwise"); *id.* § 1603(b)(3) (requiring that the corporation be neither a citizen of the United States nor created under the laws of a third country). This latter definition is not designed to dictate how entities owned by a foreign government should be structured. To the contrary, as Congress implicitly recognized, under this definition a state-owned or -controlled entity "could assume a variety of forms, including a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, [or] a steel company" and still qualify as a "foreign state" under the FSIA. H.R. Rep. No. 94-1487, at 15-16, *reprinted in* 1976 U.S.C.C.A.N. at 6614.

DBCP and the Prior Litigation over Its Use

This suit is "one front in a broad litigation war" between plaintiffs' lawyers representing banana farm workers from foreign countries such as Costa Rica, Ecuador, Guatemala, and Panama on the one hand and major fruit growers and chemical manufacturers on the other hand over the use of the chemical dibromochloropropane (DBCP) in those countries. App. 4a. Accordingly, in understanding this case, it is helpful

to know something about DBCP and the long history of litigation over it.

DBCP—DBCP is a pesticide that was used from the late 1960s through the 1970s on farms in the United States and abroad to control nematodes (microscopic, worm-like creatures that live in soil and attack the roots of trees and plants) and to improve crop yields. After studies appeared in the 1970s linking DBCP exposure to health risks such as cancer and sterility, its use was discontinued. App. 4a.

The Initial Suits—In 1983, what has been described as "one of the most wideranging efforts at forum shopping in legal history" began. *Cabalceta v. Standard Fruit Co.*, 667 F. Supp. 833, 837 (S.D. Fla. 1987), *aff'd in relevant part*, 883 F.2d 1553 (11th Cir. 1989). In that year, dozens of Costa Rican agricultural workers sued Dow Chemical Company and Shell Oil Company in state court in Florida alleging injuries from exposure to DBCP manufactured by those companies. After removal to federal court based upon diversity of citizenship, the case was dismissed under the doctrine of *forum non conveniens*. *See Sibaja v. Dow Chem. Co.*, 757 F.2d 1215, 1217 n.5 (11th Cir. 1985) (per curiam). In affirming, the Eleventh Circuit described the suit as a "paradigm case for the invocation of the doctrine of *forum non conveniens*." *Id.* at 1217-18.

Undaunted, foreign plaintiffs and their coterie of lawyers continued to file DBCP suits throughout the United States. In the last two decades, they have tried their luck in state courts in California, Texas, Florida, Louisiana, Mississippi, and, in this case, Hawaii. Although several of these suits were settled either in part or in whole, the vast majority were, upon removal to federal court, either voluntarily dismissed or

dismissed by the court based upon the *forum non conveniens* doctrine.[1]

The Alfaro Decision—One DBCP case that did not ultimately turn on the *forum non conveniens* doctrine was an action filed in Texas in 1984 by Costa Rican farm workers. Although the trial court and the court of appeals dismissed the case based on the *forum non conveniens* doctrine, in 1990 a sharply divided Texas Supreme Court held that a state statute had abrogated the doctrine in Texas. *See Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674, 679 (Tex. 1990). The Texas legislature subsequently remedied this ruling by reinstating the doctrine, *see* 1993 Tex. Sess. Law Serv. ch. 4 (S.B. 2) § 1 (codified at Tex. Civ. Prac. & Rem. Code Ann. § 71.051(a)), but that legislation did not become effective until September 1, 1993. *See id.* § 2.

Dead Sea and the Delgado Cases—The opening left by the effective date of the Texas legislation set off a mad scramble to file DBCP suits in Texas state courts. Just prior to the statutory deadline, thousands of plaintiffs alleging injuries suffered in nearly two dozen different countries filed suit in Texas state courts against a number of banana growers and DBCP manufacturers. *See Delgado v. Shell Oil Co.*, 231 F.3d 165, 169-72 (5th Cir. 2000), *cert. denied*, 121 S. Ct. 1603 (2001).

Dead Sea Bromine Co., Ltd., and Bromine Compounds, Limited (collectively, "the Dead Sea Companies") are,

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[1] *See, e.g.*, *Espinola-E v. Coahoma Chem. Co.*, No. 98-60240, slip op. at 8-9 (5th Cir. Jan. 19, 2001), *cert. denied sub nom. Aroyo-Gonzalez v. Coahoma Chem. Co.*, No. 00-1814, 2001 WL 649101 (U.S. Oct. 1, 2001); Notice, *Abarca-Abarca v. CNK Disposition Corp.*, No. 95 1096 (M.D. Fla. July 12, 1995) (voluntary dismissal); *Rojas v. DeMent*, 137 F.R.D. 30 (S.D. Fla. 1991), *vacated on other grounds*, No. 91-8185, slip op. (S.D. Fla. Feb. 25, 1992); *Dow Chem. Co. v. Castro Alfaro*, 786 S.W.2d 674, 675 (Tex. 1990); *Cabalceta*, 667 F. Supp. at 837; *Aguilar v. Dow Chem. Co.*, No. 86-4753, slip op. at 12-16 (C.D. Cal. Dec. 23, 1986).

respectively, the largest producer of bromine in the world and a leader in the production and marketing of bromine compounds. *See* About DSBG, *available at* http://www.deadseabromine.com. Although these companies also produced DBCP, and there was "evidence of the use of Israeli DBCP" in various of the countries at issue in the *Delgado* case, *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324, 1343 & n.35 (S.D. Tex. 1995) [hereinafter *Delgado II*], they were not sued in the Texas cases. Accordingly, the defendants impleaded the Dead Sea Companies. *See Delgado*, 231 F.3d at 169.

Unlike the DBCP manufacturers that the plaintiffs sued, the Dead Sea Companies were state-owned. The bromine and other minerals that they extract from the Dead Sea and formulate into chemical compounds are one of Israel's most valuable natural resources. SER 738. Not surprisingly, although they were privatized in the 1990s, both companies were originally owned and controlled by the State of Israel through state holding companies. Thus, during the period in which the Dead Sea Companies exported DBCP for use on banana farms, the State of Israel controlled a majority of their shares through such holding companies. SER 740, 741, 754-55.

As foreign corporations majority-owned by a foreign government, the Dead Sea Companies exercised their rights under the FSIA to remove the Texas lawsuits to federal court, where they were consolidated. *See Delgado*, 231 F.3d at 169, 172. Contending that only corporations directly owned by a foreign sovereign can qualify as "foreign states" under the FSIA, the *Delgado* plaintiffs moved to remand. The district court disagreed and held that the Dead Sea Companies were foreign states under the FSIA because Israel owned, albeit indirectly, a majority of their stock at the relevant times. *See Delgado v. Shell Oil Co.*, 890 F. Supp. 1315, 1319 (S.D. Tex. 1995) [hereinafter *Delgado I*]. Finding that the balance of interests clearly weighed in favor of trial in plaintiffs' home

countries, the court then dismissed the cases under the *forum non conveniens* doctrine. *See Delgado II*, 890 F. Supp. at 1372-73; *see also Delgado*, 231 F.3d at 173-74 (noting that several cases were eventually remanded for procedural defects before being removed and dismissed again).

On appeal, the Fifth Circuit affirmed. The court rejected the claim that the Dead Sea Companies had been improperly joined. *See Delgado*, 231 F.3d at 177-81. Even more pertinently, "discern[ing] nothing to support the proposition that indirect ownership of the requisite percentage precludes an entity from qualifying as a foreign sovereign," the court of appeals held that the Dead Sea Companies were foreign states under the FSIA. *Id.* at 175.

The Trial Court Proceedings in this Case

In 1997, while the *Delgado* appeal was pending in the Fifth Circuit, respondents filed this case in state court in Hawaii. This case is very similar to *Delgado*. Like many of the plaintiffs in *Delgado*, respondents are residents of Costa Rica, Ecuador, Guatemala, and Panama. They likewise allege that they were injured as a result of exposure to DBCP on banana farms in their home countries and have sued basically the same growers and manufacturers. Indeed, their counsel of record below represented intervenors in *Delgado*. *See Delgado II*, 890 F. Supp. at 1333.

As in *Delgado*, the defendants impleaded the Dead Sea Companies, and the Companies removed to federal court as "foreign states" under the FSIA. App. 5a. Dole Food Company and its subsidiaries also removed on the separate ground that respondents' claims called for application of the federal common law of foreign relations. App. 5a.

When respondents moved to remand, they argued, among other things, that the Dead Sea Companies were not foreign states because the Ninth Circuit's decision in *Gates v. Victor Fine Foods*, 54 F.3d 1457 (9th Cir. 1995), requires direct

majority ownership. Petitioners responded that *Gates* was distinguishable because the party at issue in that case was the subsidiary of a marketing board that was not owned by the Canadian Government, but instead by an organ of the Province of Alberta. *See id.* at 1459-61. As a consequence, petitioners argued, the Ninth Circuit had no occasion in *Gates* to consider whether a corporation can qualify as a foreign state based upon a foreign government's indirect ownership of it. Although the district court acknowledged that *Gates* was "not entirely on point," it nonetheless found itself compelled by Ninth Circuit precedent to require direct ownership and therefore held that the Dead Sea Companies were not foreign states under the FSIA. App. 34a-39a.

Nevertheless, the district court denied the motion to remand because it found that respondents' claims implicated the federal common law of foreign relations. App. 49a. The district court then entered an order conditionally dismissing on *forum non conveniens* grounds. App. 77a-78a; *see also* App. 79a-83a (denying motion to reconsider order); App. 84a-95a (entering judgment); App. 99a-107a (denying reconsideration of final dismissal order). When petitioners appealed, the Dead Sea Companies cross-appealed the district court's FSIA ruling.

The *Delgado* Petition

While the appeal in this case was pending, the *Delgado* plaintiffs petitioned this Court for a writ of certiorari. They primarily argued that the Fifth Circuit's decision in that case conflicted with the Ninth Circuit's in *Gates*. *See* Petition for a Writ of Certiorari, *Delgado v. Shell Oil Co.*, No. 00-1316, at 10-14 (U.S. Feb. 14, 2001). Although the defendants in *Delgado* did not dispute the importance of the question presented in the petition, they pointed out that this case was pending in the Ninth Circuit and that, if they prevailed on their argument that *Gates* was distinguishable, there would be no conflict between *Gates* and *Delgado*, and thus no need for

review. *See* Opposition Brief of the Dole Defendants, *Delgado v. Shell Oil Co.*, No. 00-1316, at 12 (U.S. March 8, 2001). They also argued that the Fifth Circuit's decision was correct. *See id.* at 16-17. Finally, they pointed out that review should be denied because (i) any remand would greatly burden the state courts and (ii) a remand would effectively unwind foreign suits that have proceeded for years based on the *forum non conveniens* dismissal. *Id.* at 17-20. This court denied review on April 16, 2001. *See* 121 S. Ct. 1603.

The Ninth Circuit's Decision in this Case

On May 30, 2001, the Ninth Circuit issued its decision, reversing the judgment of the district court in this case. The court of appeals rejected the district court's application of the federal common law of foreign relations but agreed with its application of the FSIA. App. 16a, 23a.

Assuming without deciding that the FSIA applies to companies that are state-owned at the time of the events giving rise to litigation, the court of appeal determined that the Dead Sea Companies were not "foreign states" under its prior decision in *Gates*. App. 16a-23a. It observed that petitioners had argued "not implausibly, that federal courts should not care how a foreign government structures its ownership interests so long as it, in fact, owns a majority interest in a particular corporation." App. 20a-21a. It also recognized that this interpretation was supported by the Fifth Circuit's decision in *Delgado* as well as decisions of the Sixth and Seventh Circuits. App. 20a (citing *Delgado*, 231 F.3d at 176; *In re Air Crash Disaster Near Roselawn, Ind. on Oct. 31, 1994*, 96 F.3d 932, 941 (7th Cir. 1996); *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 450 (6th Cir. 1988)). It found, however, that none of this mattered because, in its view, *Gates* prohibited the FSIA's definition of foreign state from extending beyond "the first tier of ownership" to cover operating subsidiaries such as the Dead Sea Companies. App. 21a.

Although the court of appeals acknowledged that *Gates* itself "did not consider whether the indirect ownership of stock qualified as an 'other ownership interest' under section 1603(b)(2)," it declined petitioners' invitation to read "other ownership interest" to include indirect ownership interests such as the State of Israel's in the Dead Sea Companies. App. 20a. Instead, the court "read it simply to describe some other form of ownership not called shares of stock" on the theory that any other reading would "make the majority-shareholder requirement superfluous." App. 20a. The court also rejected petitioners' argument that *Gates* applied only to corporations owned through an intermediate "organ," as opposed to an intermediate corporation, on the ground that "we would more readily view an organ of a foreign state as an extension of the government than we would view a state-owned business." App. 20a. The court therefore held that the Dead Sea Companies were not foreign states entitled to the protections of the FSIA. App. 23a.

REASONS FOR GRANTING THE WRIT

The decision below reveals a square conflict among the courts of appeals over the application of the Foreign Sovereign Immunity Act to corporate subsidiaries indirectly owned and controlled by foreign governments. As the FSIA was enacted in order to ensure uniform treatment of those governments and their affiliates, the conflict over this important and recurring issue warrants review by this Court.

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF AT LEAST FOUR OTHER COURTS OF APPEALS.

As an ABA Working Group recently recognized, "[t]he position of the majority of courts is that corporations indirectly owned by a foreign state through intermediary parent corporations fall within the FSIA." Working Group of the Int'l Litig. Comm. of the Am. Bar Ass'n, *Recommendations and Report on the U.S. Foreign Sovereign Immunities Act* 38

(2001) [hereinafter ABA Working Group]. By its own admission, App. 20a, in holding that the FSIA requires direct ownership, the decision below directly conflicts with the decisions of other courts of appeals over this issue.

The conflict between this case and the Fifth Circuit's decision in *Delgado*, 231 F.3d 165, is clear. Like this case, *Delgado* was a suit commenced in state court by foreign banana farm workers claiming injuries resulting from alleged exposure to DBCP. The *Delgado* plaintiffs sued essentially the same growers and manufacturers sued here, and, as here, those growers and manufacturers impleaded the Dead Sea Companies. *See id.* at 169-72. In *Delgado*, however, the Fifth Circuit held that the Dead Sea Companies were "foreign states" under the FSIA. Noting that the FSIA "simply requires 'ownership' by a foreign state" and "draws no distinction between direct and indirect ownership," that court reasoned that "indirect or tiered majority ownership is sufficient to qualify an entity as a foreign state." *Id.* at 176. It therefore concluded that Dead Sea was a foreign state because "Israel *indirectly* owns a majority interest in Dead Sea." *Id.* at 175 (emphasis added).

The Sixth Circuit has similarly determined that a foreign government's indirect ownership of a majority interest in a corporation can satisfy the FSIA's definition of foreign state. In *Gould*, 853 F.2d 445, two French copper companies were sued for, among other things, unfair competition and misappropriation of trade secrets. The first of these companies, Pechiney Ugine Kuhlmann, was wholly owned by the French Government. *Id.* at 449. The second, Trefimetaux, was wholly owned by the first at the time of the events giving rise to the lawsuit. *Id.* at 448. Even though the French government's ownership interest in Trefimetaux was indirect, in contrast to the decision below, the Sixth Circuit held that the corporation was a foreign state under the FSIA and remanded for further consideration of whether the

commercial activities exception permitted the claims against it in that case to proceed. *See id.* at 446-50.

The Seventh Circuit has also held corporate subsidiaries indirectly owned by foreign governments to be foreign states under the FSIA. In *Roselawn*, 96 F.3d 932, the court of appeals considered an airplane manufacturer, Avions de Transport Regional, G.I.E. ("ATR") that was jointly owned by two aerospace companies. A holding company wholly owned by the Italian government had a 62% interest in one of these companies. The other was owned by the French government, 62% directly and another 30% indirectly through other corporations. *Id.* at 935-36. Noting that the FSIA "does not expressly require direct ownership," the Seventh Circuit concluded that "the language and legislative history consistent with the language of the FSIA demonstrate that ATR is the type of corporation included within the statutory definition of 'foreign state.'" *Id.* at 941.

Similarly, in *Gilson v. Republic of Ireland*, 682 F.2d 1022 (D.C. Cir. 1982), the D.C. Circuit treated an Irish company wholly owned by an instrumentality of the Irish Government as a foreign state within the meaning of the FSIA. *See id.* at 1026 & n.19. In other cases in the Second and Fourth Circuits, the status of corporations in which a foreign government indirectly owns a majority of shares as foreign states under the FSIA has not even been disputed. *See Reiss v. Societe Centrale du Groupe des Assurances Nationales*, 235 F.3d 738, 746 (2d Cir. 2000) ("undisputed" that second-tier subsidiary of a state-owned corporation was a "foreign state" within meaning of FSIA); *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 317 (4th Cir. 1988) (parties "agree" that "affiliates" of state-owned corporation are "foreign states" within meaning of FSIA).

The ruling below cannot be reconciled with this authority. In this case, the Ninth Circuit held that the Dead Sea Companies were not foreign states under the FSIA even

though the State of Israel owned a majority interest in them at all times relevant to the events at issue here because that ownership interest was indirect. App. 5a, 23a. The conflict between this decision and the Fifth Circuit's in *Delgado* could not be more dramatic, because in *Delgado*, the Fifth Circuit held that the Dead Sea Companies were foreign states under the FSIA. The decision below also squarely conflicts with the decisions of the Sixth Circuit in *Gould*, the Seventh Circuit in *Roselawn*, and the D.C. Circuit in *Gilson* because, in direct contradiction to the decision below, each of those decisions treated companies as foreign states under the FSIA based upon indirect state ownership. Thus, there is a four-to-one conflict among the courts of appeals over whether tiered entities such as the Dead Sea Companies can qualify as foreign states under the FSIA.

II. THE DECISION BELOW MISCONSTRUES THE FSIA.

In addition to conflicting with decisions of other circuits, the decision below is also wrong. Nothing in the FSIA requires foreign governments to directly own companies in order for those companies to qualify as "foreign states" under the FSIA.

In the absence of extraordinary circumstances, the language of a statute must be given its "'ordinary, contemporary, common meaning.'" *Pioneer Inv. Servs. Co. v. Brunswick Assoc. Ltd. P'ship*, 507 U.S. 380, 388 (1993) (quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979)). The language of the FSIA at issue here states that foreign corporations "a majority of whose shares or other ownership interest is owned by a foreign state or a political subdivision thereof" may qualify as "foreign states" under the FSIA. 28 U.S.C. § 1603(b)(2). "In common speech the stockholders would be called owners" of a corporation's assets. *Flink v. Paladini*, 279 U.S. 59, 63 (1929) (interpreting stockholders in a corporation to be the "owner" of a ship in which the corporation has title).

Accordingly, the shareholders of a parent corporation are naturally understood to be owners of the parent's shares in its subsidiaries. *See, e.g*., *Mylan Labs., Inc. v. Akzo, N.V.*, 2 F.3d 56, 61 (4th Cir. 1993) (noting that PBI is a "third-tier subsidiary" of Akzo, which "indirectly *owns* all the outstanding stock of PBI, through its direct stock ownership of Akzo Pharma") (emphasis added). Indeed, in a telling confirmation of petitioners' plain language argument, in their brief before the Ninth Circuit respondents said that the Dead Sea Companies "were majority-owned by the state of Israel." Brief of Plaintiffs-Appellants/Cross-Appellees at 7, *Patrickson v. Dole Food Co.*, 251 F.3d 795 (9th Cir. 2001).

The decision below reached a different conclusion because it interpreted the provision in question as "limiting an instrumentality to the first tier of ownership." App. 19a. As the Fifth Circuit recognized, however, the FSIA "draws no distinction between direct and indirect ownership." *Delgado*, 231 F.3d at 176. To the contrary, it "simply requires 'ownership' by a foreign state." *Id*. In fact, the Act indicates that direct ownership is *not* required by providing for ownership either of shares or of "other ownership interest." Given the breadth of the word "interest"—it is the "most general term that can be employed to denote a right, claim, title, or legal share in something" (*Black's Law Dictionary* 729 (5th ed. 1979))—the Act's definition of "foreign state" can easily be read to encompass ownership that is indirect in nature.

The Ninth Circuit reached a different conclusion in part out of concern about "mak[ing] the majority-shareholder requirement superfluous." App. 20a. It reasoned that the reference to "other ownership interest" could not be read to encompass indirect stock ownership without rendering the majority-shareholding requirement meaningless. As just demonstrated, however, petitioners do not need to rely upon the "other ownership" language to succeed; state ownership of a corporation through its parent can be read quite naturally to

satisfy the majority-shareholding requirement. In any event, the reference to "other ownership interest" can be read to encompass indirect ownership of shares without rendering that requirement superfluous: as this Court has recognized, where a specific term precedes a general one, "the general term should be understood as a reference to subjects akin to the one with specific enumeration." *Brogan v. Untied States*, 522 U.S. 398 404 n.2 (1998) (quotation omitted); *see also Gooch v. United States*, 297 U.S. 124, 128 (1936) (noting that this principle "limits general terms which follow specific ones to matters similar to those specified"). Thus, far from being superfluous, the majority-shareholding requirement limits the general "other ownership interest" to interests conferring a similar measure of control over the owned entity.

Moreover, the FSIA's definition of "foreign state" must be read in light of the purposes of the Act. *See, e.g.*, *Flink*, 279 U.S. at 63 (interpreting the word owner "in a broad and popular sense in order not to defeat the manifest intent" of the statute there). Like private businesses, foreign governments often find it useful, for both legal and business purposes, to divide the operations of the businesses they own among separate but affiliated corporations. *See, e.g.*, ABA Working Group, *supra*, at 43 (noting that "at least some states structure important areas of national interest, such as natural resources, through several levels of corporations"). The United States has no interest in discouraging foreign governments from using this sort of structure. *See* H.R. Rep. No. 94-1487, at 15, *reprinted in* 1976 U.S.C.C.A.N. at 6614 (observing that businesses qualifying as a "foreign state" under the FSIA can "assume a variety of forms"). "The strength of a foreign state's sovereign interests in an area do not necessarily dissipate when employing more complicated legal structures resembling those used by modern private businesses." ABA Working Group, *supra*, at 43-44. Furthermore, any attempt to dictate how foreign governments structure their state-owned businesses could very easily be seen as an intrusion upon that

government's sovereignty. It would therefore be inconsistent with the underlying purposes of the FSIA to read the Act's definition of foreign states to dictate direct ownership of businesses and penalize foreign governments for engaging in the common practice of organizing their commercial interests through operating subsidiaries.

Indeed, such a reading exalts form over substance. Under the Ninth Circuit's interpretation, a corporation in which a foreign government owns 51% of the stock and thereby controls a bare majority of the board of directors would qualify as a foreign state under the FSIA. However, if that same government owned 100% of the stock in a holding company, which in turn owned 100% of an operating subsidiary, the operating subsidiary would not qualify. That makes no sense. Obviously, the foreign government would exercise greater practical control over the corporation in the latter scenario than in the former. Because the parent of a wholly owned subsidiary "may assert full control at any time if the subsidiary fails to act in the parent's best interests," *Copperweld Corp. v. Independence Tube Co*., 467 U.S. 752, 771-72 (1984), in the second scenario the government would maintain full control over the subsidiary's actions. In the first scenario, however, even though the foreign government would directly own a majority of the shares of the corporation, it would not have an entirely free hand because it would be obliged to take the rights and interests of minority shareholders into account. *See, e.g*., I James D. Cox *et al*., *Corporations* § 11.10 (2001).

Nor does the recognition of indirect ownership require courts to permit infinite looping of corporate ownership. In *Gates*, 54 F.3d 1457, the decision upon which the decision below relied, App. 19a-21a, the Ninth Circuit expressed concern that permitting indirect ownership would necessarily "provide potential immunity for every subsidiary in a corporate chain no matter how far down the line." *Gates*, 54 F.3d at 1462. That is not true. If courts focus on substance and require a foreign government to have an effective majority

interest in any tiered subsidiaries that are treated as foreign states under the FSIA, not every majority-owned subsidiary of a corporation majority owned by a foreign government may qualify as a foreign state.

Indeed, under this approach a foreign government's ownership interests must be much higher than a bare majority to qualify. For example, if a foreign government owns 51% of the shares in a holding corporation, which in turn owns 51% of the shares in a subsidiary corporation, the government's ownership interest in the subsidiary would be only 26.01% (=51% x 51%). Indeed, even if the foreign state owns 70% of the shares in a parent corporation, which in turn owns 70% of the shares in a subsidiary corporation, the subsidiary would not qualify as majority owned because the state's ownership interest would be only 49% (=70% x 70%).[2] Thus, a sensible reading of the language of the FSIA does not open up the courts to a flood of FSIA claims by remote subsidiaries over which a foreign government exercises no real control. It simply treats those corporations in which a foreign government has a truly effective majority interest as foreign states under the FSIA.

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[2] The State of Israel retained an indirect majority interest in the Dead Sea Companies during the periods at issue in this suit because it owned virtually all of the shares in the holding companies that in turn owned virtually all of the shares in the Dead Sea Companies. For example, between 1968 and 1975, Israel owned 99.9% of Dead Sea Works Ltd., which in turn owned 99.9% of Dead Sea Bromine. SER740, SER749-50, SER754.

III. THE DECISION BELOW RAISES AN IMPORTANT AND RECURRING ISSUE THAT WARRANTS THIS COURT'S ATTENTION.

The question presented—whether foreign corporations indirectly owned by foreign governments through holding companies may qualify as foreign states under the FSIA—is a frequently recurring one. Many foreign governments own businesses that operate in the U.S. Indeed, by one account, fully two-thirds of the foreign corporations in the Fortune 500 were wholly or partially state-owned. *See* Abdullahm Al-Obaidan & Gerald W. Scully, *Efficiency Differences Between Private and State-Owned Enterprises in the International Petroleum Industry*, 24 Applied Economics 237 (1992). As noted above, *see supra* p. 16, many of these businesses are in turn organized through holding companies and operating subsidiaries, and when those subsidiaries are sued in the United States, they invoke the FSIA. Not surprisingly, questions whether these entities qualify as foreign states under the FSIA and may therefore invoke the Act's substantive and procedural protections arise frequently. In fact, the issue has arisen in more than two dozen reported decisions in the last two decades.[3]

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[3] *See EOTT Energy Operating Ltd. P'ship v. Winterthur Swiss Ins. Co.*, 257 F.3d 992 (9th Cir. 2001); *Delgado*, 231 F.3d 165 (5th Cir. 2000); *Theo. H. Davies & Co. v. Republic of the Marshall Islands*, 174 F.3d 969 (9th Cir. 1998); *Roselawn*, 96 F.3d 932; *Corporacion Mexicana de Servicios Maritimos, S.A. de C.V. v. M/T Respect*, 89 F.3d 650, 655 (9th Cir. 1996); *Antoine v. Atlas Turner, Inc.*, 66 F.3d 105 (6th Cir. 1995); *Gates*, 54 F.3d 1457; *Straub v. AP Green, Inc.*, 38 F.3d 448 (9th Cir. 1994); *Linton v. Airbus Industrie*, 30 F.3d 592 (5th Cir. 1994); *Fed. Ins. Co. v. Richard I. Rubin & Co.*, 12 F.3d 1270 (3d Cir. 1993); *Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 10 F.3d 425 (7th Cir. 1993); *Am. W. Airlines, Inc. v. GPA Group, Ltd.*, 877 F.2d 793 (9th Cir. 1989); *Gould*, 853 F.2d 445; *State Bank of India v. NLRB*, 808 F.2d 526 (7th Cir. 1986); *Alberti v. Empresa Nicaraguense de la Carne*, 705 F.2d 250, 253 (7th Cir. 1983); *Gilson*, 682 F.2d 1022; *Dewhurst v. Telenor Invest A.S.*, 83 F. Supp. 2d 577 (D. Md. 2000); *Parex Bank v. Russian Sav. Bank*, 81 F. Supp. 2d 506 (S.D.N.Y.

As the present case shows, a conflict among the circuits over the proper treatment of these corporations can lead to directly inconsistent results, creating the very real and intolerable possibility that the availability of the FSIA's protections—including not just the right to removal but the various other statutory protections as well—turns upon the circuit in which a suit is brought. This prospect is especially troubling in light of the overall purpose of the FSIA, which was to ensure "uniformity in decision" by the judiciary. H.R. Rep. No. 94-1487, at 13, *reprinted in* 1976 U.S.C.C.A.N. at 6611. Indeed, contradictory results in cases such as this one and *Delgado* may generate the very sort of protests to the Executive Branch that the FSIA was intended to avoid. *See id.* (noting that "disparate treatment of cases involving foreign governments may have adverse foreign relations consequences"). Thus, for this reason as well, this Court should resolve the clear conflict over the application of the FSIA presented by this case.

2000); *Millicom Int'l Cellular, S.A. v. Republic of Costa Rica*, 995 F. Supp. 14, 18 n.5 (D.D.C. 1998); *Hyatt Corp. v. Stanton*, 945 F. Supp. 675 (S.D.N.Y. 1996); *Gardiner Stone Hunter Int'l v. Iberia Lineas Aereas De Espana, S.A.*, 896 F. Supp. 125 (S.D.N.Y. 1995); *Credit Lyonnais v. Getty Square Assocs.*, 876 F. Supp. 517 (S.D.N.Y. 1995); *Lopez Del Valle v. Gobierno de la Capital*, 855 F. Supp. 34 (D.P.R. 1994); *D.W. Talbot v. Saipem A.G.*, 835 F. Supp. 352 (S.D. Tex. 1993); *Trump Taj Mahal Assocs. v. Costruzioni Aeronautiche Giovanni Agusta, S.p.A.*, 761 F. Supp. 1143 (D.N.J. 1991), *aff'd*, 958 F.2d 365 (3d Cir. 1992); *Richmark Corp. v. Timber Falling Consultants*, 747 F. Supp. 1409 (D. Or. 1990), *aff'd*, 937 F.2d 1444 (9th Cir. 1991); *Outbound Mar. Corp. v. P.T. Indonesian Consortium of Constr. Indus.*, 582 F. Supp. 1136 (D. Md. 1984).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

ROBERT G. CROW
BOORNAZIAN, JENSEN & GARTHE
1800 Harrison Street, 25th Flr.
Oakland, CA 94612

RICHARD C. SUTTON, JR.
RUSH, MOORE, CRAVEN, SUTTON, MOORY & BEH
2000 Hawaii Tower
745 Fort Street
Honolulu, HI 96813

Counsel for Petitioner AMVAC Chemical Corporation

SAMUEL E. STUBBS
WILLIAM D. WOOD
FULBRIGHT & JAWORSKI, L.L.P.
1301 McKinney, Suite 5100
Houston, TX 77010

Counsel for Petitioners Chiquita Brands, Inc.; Chiquita Brands International, Inc.; and Maritrop Trading Corporation

ROBERT H. KLONOFF
Counsel of Record
DANIEL H. BROMBERG
JONES, DAY, REAVIS & POGUE
51 Louisiana Avenue, N.W.
Washington, D.C. 20001-2113
(202) 879-3939

TERENCE M. MURPHY
JAMES S. TEATER
MICHAEL L. RICE
JONES, DAY, REAVIS & POGUE
2727 N. Harwood Street
Dallas, TX 75201-1515
(214) 220-3939

Counsel for Petitioners Dole Food Company, Inc.; Dole Fresh Fruit Company; Dole Fresh Fruit International, Inc., Dole Fresh Fruit International, Ltd.; Standard Fruit Company; Standard Fruit and Steamship Company; Standard Fruit Company de Honduras, S.A., and Standard Fruit Company de Costa Rica, S.A.

ROBERT T. GREIG

BOAZ S. MORAG
CLEARY, GOTTLIEB, STEEN & HAMILTON
153 East 53rd Street
New York, New York 10022

Counsel for Petitioners Del Monte Fresh Produce N.A., Inc.; Del Monte Fresh Produce Hawaii, Inc.; Del Monte Fresh Produce Company; and Fresh Del Monte Produce N.V.

MICHAEL L. BREM
F. WALTER CONRAD, JR.
BAKER & BOTTS, L.L.P.
910 Louisiana Street
Houston, TX 77002

Counsel for Petitioner The Dow Chemical Company

D. FERGUSON MCNIEL, III
CHARLES W. SCHWARTZ
VINSON & ELKINS, L.L.P.
2300 First City Tower
1001 Fannin Street
Houston, TX 77002

Counsel for Petitioner Occidental Chemical Corporation

JOHN T. KOMEIJI
ROBERT T. TAKAMATSU
WATANABE, ING & KAWASHIMA
999 Bishop Street, Suite 2300
Honolulu, HI 96813

Counsel for Petitioner Pineapple Growers Association of Hawaii

R. BURTON BALLANFANT
SHELL OIL COMPANY
4856 One Shell Plaza
900 Louisiana Street
Houston, TX 77002

DALE W. LEE
KOBOYASHI, SUGITA & GODA
999 Bishop Street, Suite 2600
Honolulu, HI 96813

Counsel for Petitioner Shell Oil Company

October 5, 2001