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3 DOLE FOOD COMPANY, ET AL., :

4 Petitioners :

5 v. : No. 01-593

6 GERARDO DENNIS PATRICKSON, :

7 ET AL. :

8 and :

9 DEAD SEA BROMINE CO. LTD., AND :

10 BROMINE COMPOUNDS LIMITED :

11 Petitioners, :

12 v. : No. 01-594

13 GERARDO DENNIS PATRICKSON, :

14 ET AL. :

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16 Washington, D.C.

17 Wednesday, January 22, 2003

18 The above-entitled matters came on for oral
19 argument before the Supreme Court of the United States at
20 10:07 a.m.

21 APPEARANCES:

22 PETER R. PADEN, ESQ., New York, New York; on behalf of the
23 Petitioners.

24 JONATHAN S. MASSEY, ESQ., Washington, D.C.; on behalf of
25 the Respondents.

1 APPEARANCES CONTINUED:

2 JEFFREY P. MINEAR, ESQ., Assistant to the Solicitor

3 General, Department of Justice, Washington, D.C.; for

4 the United States, as amicus curiae, supporting the

5 Respondents.

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1 P R O C E E D I N G S

2 (10:07 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in Number 01-593, the Dole Food Company versus
5 Patrickson, and a companion case.

6 Mr. Paden.

7 ORAL ARGUMENT OF PETER R. PADEN

8 ON BEHALF OF THE PETITIONERS

9 MR. PADEN: Mr. Chief Justice, and may it please
10 the Court:

11 The Dead Sea Bromine Company is an
12 instrumentality of Israel under the Foreign Sovereign
13 Immunities Act for three principal reasons.

14 QUESTION: Is it -- is it owned in the same
15 capacity now as it was earlier?

16 MR. PADEN: No -- no, it is not, Your Honor.

17 QUESTION: And was it owned at the time the suit
18 was filed?

19 MR. PADEN: At the time this suit was filed, the
20 company had been privatized. It was privatized in 1995.

21 QUESTION: Right. Right, and so are you going
22 to address, then, how it comes under the statute at all in
23 those circumstances?

24 MR. PADEN: I certainly intend to do that, Your
25 Honor.

1 QUESTION: Yes.

2 MR. PADEN: The three reasons, in sum, are that,
3 throughout the period of time giving rise to the claims,
4 Israel owned a majority of the shares or other ownership
5 interests in the company. We contend that this broad
6 phrase plainly encompasses the majority ownership of Dead
7 Sea Bromine that Israel indisputably possessed through a
8 tiered ownership structure.

9 Secondly, a contrary interpretation cannot be
10 reconciled with the basic purposes of the act. The same
11 policy that Congress found applicable to directly owned
12 entities apply equally to their subsidiaries where the
13 foreign State retains a majority interest. To restrict
14 instrumentalities to entities in which States hold legal
15 title to the shares of stock would exclude a large number
16 of the very types of State-owned commercial enterprises,
17 shipping and airlines, mining operations and the like,
18 that Congress specifically intended to bring within the
19 reach of the statute.

20 QUESTION: Yes, but it's a lot of trouble to
21 track these things back, you know, who owns shares many
22 tiers up, and Congress might well have simply determined
23 we will honor the sovereignty of other States when they're
24 the principal stockholder of a corporation. Where --
25 where they are not, we are not impugning their sovereignty

1 by going ahead and permitting -- permitting suit against
2 the entity. That's certainly a rational -- a rational
3 disposition, and the language seems to suggest that.

4 MR. PADEN: Well, Your Honor, I -- I don't
5 disagree that that would be a rational disposition, but I
6 don't think there's any indication in the case law, and
7 there have been numerous cases where tiered entities have
8 appeared before courts, that it's posed any particular
9 problem to identify the tiered ownership structure. I --
10 I'm not aware of any cases where -- where that's posed an
11 enormous issue, and the computation of ownership and
12 corporate -- corporate responsibility for subsidiaries is
13 an issue that lawyers deal with every day in commercial
14 litigation, and lawyers have well-established techniques
15 to ferret out the corporate change of ownership and
16 it's -- it's done all the time.

17 We don't think -- it clearly can be an issue,
18 but we don't think that that's a particularly
19 insurmountable issue here, and, in fact, there's certainly
20 no indication --

21 QUESTION: Your -- your principle would apply no
22 matter how many tiers up they go? I -- I assume you don't
23 think the second tier is the limit?

24 MR. PADEN: So long as the State's ownership
25 interest is the majority ownership interest, Your Honor,

1 there could be --

2 QUESTION: Even though the name of the State
3 does not appear until you get six tiers up?

4 MR. PADEN: That's correct. Our position would
5 be that so long as the State's interest is a majority
6 interest, that would be the limiting principle, and I
7 think that's what the words of the statute seem
8 to suggest --

9 QUESTION: Why do you limit to the majority?
10 Supposing they have practical control as in other
11 situations, you look at who really runs the company.

12 MR. PADEN: Well, the statute says majority
13 ownership, Your Honor, and we think that --

14 QUESTION: But it doesn't say majority ownership
15 of grandchildren of the parent.

16 MR. PADEN: It says a majority ownership
17 interest, Your Honor, and we think a majority ownership
18 interest is about as broad a term as -- as could be
19 conjured up to try to describe generically the concept of
20 ownership. I think Congress had in mind that this statute
21 was going to apply to entities from nations all around the
22 world, with many different kinds of economic systems, and
23 in some countries the notion of ownership isn't even so
24 clearly established.

25 QUESTION: Well, I -- I suppose it could mean

1 ownership of other forms, for instance, an oil-drilling
2 venture, a working interest of 70 percent, which is not
3 usually called a share. It's --

4 MR. PADEN: That's true.

5 QUESTION: So -- so there -- there's work for
6 that phrase in the statute to do without adopting your
7 position, it seems to me.

8 MR. PADEN: There is. There are certainly other
9 kinds of ownership in our legal system -- partnership
10 interests are an obvious example -- which don't
11 necessarily refer to share ownership.

12 But ownership interest is a very, very broad
13 term, and it -- we think that if Congress had intended
14 this to be so specifically limited to direct -- directly
15 owned entities, it would have said directly owned --

16 QUESTION: Well, it can --

17 QUESTION: Your argument would be stronger if it
18 were a stand-alone term, but it isn't. It comes after
19 shares, and so one can say, well, we're going to read
20 ownership interest, shares or other ownership interest as
21 something, say, equivalent to a stock certificate.

22 You -- it -- it doesn't just say, ownership
23 interest, and I think that that's why the statute itself
24 doesn't answer the question.

25 MR. PADEN: Well, we think, Your Honor, that the

1 phrase needs to be read as a whole, and we do not believe
2 that this is a situation, when the statute is read as a
3 whole, that the -- that the principle of redundancy and
4 superfluosness which Judge Kozinski felt, decided in this
5 case dictated the -- the restriction to direct ownership
6 should apply.

7 QUESTION: Do you -- do you agree with the
8 respondents' contention, the United States' contention
9 that foreign countries would not -- would not give us this
10 break, that generally speaking, in international law
11 they -- they'll only look to the ownership of the
12 immediate company?

13 MR. PADEN: I -- I think that that's true, Your
14 Honor, but I think it requires a comment. I think that
15 the -- the structure of this statute very uniquely
16 reflects our Federalist system, and -- and the -- this
17 alleged disparity between treatment in this country and
18 other countries I think is something of a red herring.
19 Congress for the most part, in establishing this system,
20 I believe it's fair to say contemplated that commercially
21 owned ventures of foreign States would be subject to suit,
22 that --

23 QUESTION: I -- I thought -- I remember when
24 they enacted the FSIA. I was around, and I -- I recollect
25 quite vividly that its object was to bring United States

1 domestic law into conformity with the new, accepted
2 international determination of when -- when sovereign
3 immunity should be respected and when it shouldn't, and if
4 that's the case, and if you acknowledge that the general
5 principle internationally is not to go beyond the
6 ownership of the immediate company, then I don't know why
7 language which -- which is susceptible of that meaning
8 shouldn't be given that meaning.

9 MR. PADEN: I think there's an answer to that
10 question, Your Honor. In -- in foreign nations, an entity
11 would be subject to suit, but it would typically be
12 subject to suit -- I don't think there are too many
13 foreign countries that have our Federalist system, and
14 certainly not too many foreign countries that have our
15 deeply ingrained right to a jury trial. Congress, for the
16 most part, was saying these suits should go forward.

17 One of the purposes of the act was to bring
18 commercially owned ventures of foreign States within the
19 subject of -- of litigation and make them susceptible to
20 claims, but Congress said that in doing that, because of
21 potential sensitivities that could exist, they would
22 accord those entities the same kinds of privileges that
23 the Federal Government gets when the Federal Government
24 waives its immunity, so that --

25 QUESTION: How can they be sensitive to

1 something that they're willing to do to us? I mean,
2 the -- the potential sensitivity, if -- if they would hold
3 the United States liable in such a situation, I mean,
4 would -- would not recognize sovereign immunity of the --
5 of the indirectly owned United States entity, how could
6 they be offended by our doing the same?

7 MR. PADEN: My sense is that the Congress'
8 concern about sensitivities was -- was a little different
9 than that. I don't think the notion was offense at being
10 sued. I think the notion is that foreign States would
11 have a -- an -- a -- an interest, potentially -- not in
12 every single case, but potentially significant interest in
13 the manner and treatment of claims against entities
14 that -- that they owned. They may have --

15 QUESTION: Is your point that there are no other
16 countries that have our dual Federal system with State
17 courts and Federal courts, so you're not urging that
18 there's substantive sovereign immunity. You're saying, on
19 the jurisdiction side, you should have a right, or
20 Congress meant to give you a right to have access to
21 Federal court rather than State court.

22 MR. PADEN: That's correct, Your Honor.
23 There -- there are cases, but I think they're quite rare,
24 where a commercial entity might actually be able to
25 contend that it has immunity, but for the most part,

1 Congress was thinking --

2 QUESTION: Are you contending that here?

3 MR. PADEN: Well, we've pled it in our answer,
4 Your Honor, but the issue has -- has not been crossed in
5 this particular case, because the judge in -- in the
6 district court held that we weren't even a foreign State,
7 so the question didn't even arise.

8 There are -- whether or not an entity is immune,
9 of course, if it is a foreign State, depends upon whether
10 one of the exceptions in the statute applies, and the
11 commercial activity exception requires direct effects on
12 the United States, and so forth. There's -- there are
13 issues of treaty waivers, there are a number of issues --

14 QUESTION: For purposes of your argument now,
15 can we assume that you are not claiming the substantive
16 immunity and the question is a forum question, whether you
17 can have access to a Federal forum?

18 MR. PADEN: I think you can assume that, Your
19 Honor, but I think --

20 QUESTION: Counsel for -- I'm just not sure we
21 ever get to this question. This statute, the foreign
22 sovereign immunity statute is written in the present
23 tense. It talks about an entity that is a separate legal
24 person, and a majority of whose shares or other ownership
25 interest is owned by a foreign State, and when the action

1 was filed, there was no such ownership, so how do we even
2 get to the first question?

3 MR. PADEN: We get to the first question, Your
4 Honor, because the use of the present tense does not
5 clearly indicate the point in time at which the present
6 tense exists. This statute uses the present tense in many
7 circumstances in some of the subsequent provisions that
8 discuss immunity to discuss actions that clearly took
9 place at the time the events arose.

10 QUESTION: Well, what do we do with diversity
11 jurisdiction? Supposing a person -- supposing diversity
12 jurisdiction exists at the time the suit is filed, but by
13 the time it gets up on appeal, it does not?

14 MR. PADEN: I don't -- the font, the
15 jurisdictional font of this statute, Your Honor is not
16 diversity, it's Federal question. This --

17 QUESTION: No, but I -- I would like to know
18 just for purposes of analogy, the -- when something exists
19 at the time the suit is filed, but is lost during its
20 process.

21 MR. PADEN: I think that's going to have to be
22 an issue that is decided in -- in cases as they develop.
23 There have been some cases where entities were privatized
24 during the course of litigations, and courts, I believe,
25 have consistently held that in that case, the immunity --

1 the Foreign Sovereign Immunities Act jurisdictional
2 premise is not lost because it existed at the time of the
3 claim.

4 The preponderant case law here, Your Honor, has
5 been to look either to the time of the acts that gave rise
6 to the claim, or to the time of the filing of the suit,
7 and there's a -- a nice opinion by Judge Kaplan in the
8 Southern District, in -- in the Belgrade case, which kind
9 of synthesizes those cases.

10 We -- the -- in the jurisdictional determination
11 under this statute, the way it's structured, a court very
12 frequently has to look at the acts giving rise to the
13 claim in order even to decide if it has jurisdiction,
14 because, as Your Honor will recall, in section 1330,
15 jurisdiction depends upon a determination, a) that a party
16 is a foreign State, and b) that one of the exceptions
17 applies, and most of those exceptions require an
18 examination, whether or not the acts that gave rise to the
19 claim were commercial in nature, where they took place, so
20 that the -- it's not at all unusual in the context of this
21 statute to say that the actions that gave rise to the
22 claim are the point of reference for the jurisdictional
23 determination.

24 QUESTION: Why -- why would we do that? If
25 we -- if we took your view, there are quite a few

1 jurisdictional statutes, I guess, which talk about action
2 against a foreign State. Wouldn't we then have to read
3 all those to say they mean actions against a former
4 foreign State, so if you sued Illyria or Bohemia, you
5 would suddenly discover you could get into Federal court,
6 while if you don't take your -- your approach, you'd say
7 the -- the question of -- that you're worried about will
8 arise when they get to the substance of the issue in the
9 State court.

10 MR. PADEN: Your Honor, we think that looking at
11 the time of the events that gave rise to the claim is the
12 approach that most closely comports with the policies and
13 purposes behind this act.

14 What Congress was sensitive about is when the
15 actions of foreign State instrumentalities are called
16 before the courts of the United States to be adjudicated,
17 and Congress indicated that there were sensitivities in
18 those situations that -- should be respected by according
19 a broad right to hear in court --

20 QUESTION: What's -- what's the sensitivity if
21 somebody decides to sue Czarist Russia?

22 MR. PADEN: Well, there's probably a statute of
23 limitations claims on that, Your Honor, but I think the
24 question is whether the -- whether the acts that gave rise
25 to the claim are at issue in the case, and I don't think

1 it's difficult to imagine --

2 QUESTION: You know, there -- I -- I just don't
3 agree with you that that's -- that's the policy of the
4 United States. There -- apart from who can get into
5 Federal court, there -- there is in Federal law a thing
6 called the Act of State Doctrine under which we will -- we
7 will honor and accept the action of a foreign country
8 conducted within its own borders and will not allow that
9 to be challenged in a suit in the United States. It's
10 a -- it's a longstanding doctrine, and yet we do --
11 certainly do not say that any time an act of State is
12 involved in a piece of litigation, there's Federal
13 jurisdiction.

14 This act doesn't seek to do that. It seems to
15 me the Federal jurisdiction has nothing to do with whether
16 the actions of a foreign State are the -- are the subject
17 matter of the litigation, but rather whether the foreign
18 State is a party to the litigation.

19 MR. PADEN: Well, Your Honor, except for Judge
20 Kozinski below, every circuit court that has looked at
21 this and looked at the legislative history has concluded,
22 as did the ABA working group, which recently did an
23 extensive study of this statute, and that group was made
24 up of prominent international relations professors and
25 practitioners, that actions of foreign States remain

1 potentially politically sensitive even after an entity is
2 sold.

3 The potential here is the point. This is kind
4 of a prophylactic statute. I don't think anybody's saying
5 that in each and every case, there will be intense foreign
6 relations issues, but I -- for example, the foreign State
7 may very well have ongoing financial obligations for
8 pre-privatization acts. That's the case with one of the
9 amici before the Court today in the State of France.

10 QUESTION: Mr. Paden, if you would look
11 particularly to the diversity statute, and now there's
12 a -- a provision that expressly deals with a foreign
13 State, everything else in diversity, you would agree, it
14 depends on the time suit was brought, and so if you moved
15 in the interim -- there was diversity when it happened,
16 but you move in the interim, when the complaint is filed
17 there's no more diversity.

18 I take it you're asking us, within the very same
19 statute, 1332(a), to interpret a foreign State differently
20 so that its nationality at the time of suit doesn't count,
21 only at the time of the act, and that would be anomalous
22 within very same provision, 1332(a), that you would treat
23 one one way, citizens of different States, that has to be
24 as of the time the complaint is filed, but a foreign State
25 only at the time the event occurred.

1 MR. PADEN: Well, two responses, if I may.
2 First of all, we're not suggesting that it should only be
3 the time of the events that gave rise to the claim. We
4 believe the appropriate rule is the rule expressed in the
5 consensus of case law today, that it would be either the
6 time the claim was filed, or the time of the acts.

7 But your question about section -- section 1330
8 is -- is a very good question.

9 QUESTION: It was 1332 I'm --

10 MR. PADEN: 1332, that refers to claims by
11 foreign States. When a foreign State entity is -- is a
12 plaintiff and chooses to come to this Court.

13 The -- the statute that we're alluding to is
14 when -- when people are trying to assert claims against
15 these entities and -- and bring them into court and have
16 their actions adjudicated in courts that the State --

17 QUESTION: So you're saying in court -- to be a
18 plaintiff, the foreign State would have to be -- it would
19 have to be a foreign entity at the time suit was brought?

20 MR. PADEN: The instrumentality has a choice
21 whether or not to come to court in that circumstance, Your
22 Honor, and invoke -- and -- and --

23 QUESTION: It's not a question of whether it --
24 it chooses to. It -- does it have access?

25 MR. PADEN: The -- the --

1 QUESTION: In other words, does it have to
2 qualify as a foreign instrumentality when it brings the
3 suit?

4 MR. PADEN: I don't think --

5 QUESTION: Suppose it's been privatized. Can it
6 come into Federal court and say, we were at the time of
7 this incident that we're suing about?

8 MR. PADEN: I believe that if the acts at -- at
9 stake took place at the time it was a foreign sovereign,
10 it should be able to do that, Your Honor.

11 QUESTION: Those are -- then you are
12 interpreting within the very same statute a citizen of a
13 State would be treated one way, or a -- a -- an entity
14 that was once a foreign State but is no longer would be
15 treated another way?

16 MR. PADEN: That's correct. I think the
17 question -- whether or not an entity is a foreign State,
18 the analysis is the same, but for purposes of when that
19 analysis is pertinent, it may be different. It may be
20 different when we're talking about what -- the rules about
21 execution of judgments than at the time of filing a claim.

22 The -- the opposite rule, we think, leads to
23 greater anomalies. Under the opposite rule, you --
24 there's a very clear prospect. There's almost an
25 inevitability that liabilities attributable to acts of

1 State instrumentalities are going to be adjudicated
2 outside the structure and protections of this act. State
3 court juries all around the country will be sitting in
4 judgment on acts of State-owned entities, and that is
5 fundamentally contrary to what Congress wanted to -- to
6 have happen.

7 In this very case I think we -- we posed a
8 hypothetical that, if we just change the facts
9 significantly but slightly, if -- if Dead Sea Bromine was
10 the sole manufacturer of the toxic, the pesticide at issue
11 in this case, and if Dead Sea Bromine, the acts of a -- an
12 instrumentality of the State of Israel, closely monitored
13 and overseen through the Government company's law
14 structure, have been alleged to be the sole manufacturer
15 of this product, the man -- the party that sought and
16 obtained approvals through, as alleged in the complaint,
17 not being entirely candid about known health risks, had
18 knowingly marketed it in the Third World, had been --
19 whose actions had been called appalling by Senator Leahy
20 in a public hearing, if that entity was on trial before a
21 lot of different juries in various parts of Texas and
22 Louisiana, being called up as a Israeli chemical company
23 who had done all these things, I think it's not at all
24 difficult to imagine that the State of Israel might have
25 some interest in that case.

1 QUESTION: Well, you've made another significant
2 change, because it wasn't the plaintiffs who brought the
3 Israeli corporations into this action. The plaintiffs
4 sued Dole, I thought, and Dole impleaded the Israeli
5 company.

6 MR. PADEN: That's definitely true, Your Honor,
7 but I'm simply trying to show that there could be a
8 hypothetical situation that's not entirely far-fetched,
9 where -- where a State's ongoing interest in litigation
10 against an entity for acts that took place when the State
11 had responsibility for it in the sense that it owned it,
12 were at stake.

13 QUESTION: Well, but if the State gives up the
14 corporation, and no longer is part of it, I would have
15 thought that that's just one of the risks that they'd have
16 to run. Why -- why -- I mean, they -- if they want -- if
17 they're worried about it, keep control of the corporation.
18 If you're not that worried about it, then when you release
19 the corporation, you're subject to a lot of State court
20 lawsuits. Is that -- why is that --

21 MR. PADEN: Well --

22 QUESTION: I can't get much of a feeling one way
23 or the other about that, to tell you the truth. I --
24 I don't -- can you say something that will make it quite
25 clear that would be a terrible thing?

1 MR. PADEN: That's clearly a policy judgment,
2 and what we're left with is this -- the wording of the
3 statute and the purposes and policies that lay behind it,
4 and we think that with that information before us,
5 Congress' concern about the risk and the sensitivities
6 both in terms of uniform -- the desirability for uniform
7 decisions and potential risks and bias that can take place
8 in multifarious State court juries, those were to be not
9 present when we were going to allow claims to go forward
10 against State entities, and where the acts at issue are
11 the acts of the State entity, those same interests would
12 seem to be implicated.

13 Many States -- privatization, of course, is a
14 fairly widespread phenomenon in the last decade, and what
15 happened to our client has happened to many formerly State
16 majority-owned entities.

17 QUESTION: And a lot of those tort claims are
18 going to be for continuing actions, so in your view, if
19 the chemical is disseminated partly while the State is the
20 owner of the company and partly while it isn't, then what
21 happens?

22 MR. PADEN: If -- so long as within the
23 allegations of the complaint, actions of a foreign State
24 instrumentality are at stake, then it should be within the
25 claim.

1 Your Honor, this case poses an even, I think
2 more stark example. As -- as noted by the court below,
3 this particular litigation is, I think in Judge Kozinski's
4 words, one part of a large broadbased litigation, I think
5 he used the word war.

6 The Delgado case out of the Fifth Circuit was --
7 it arose out of cases that began in 1994 in Texas, based
8 on the same claims, based upon the same structure of
9 parties, and at that time we were majority-owned by
10 Israel, so under the rule propounded by the respondents
11 and the Solicitor General there would be Federal
12 jurisdiction over the -- that part of the cases, but if
13 someone waited to sue until later, there wouldn't be.
14 I think Credit Lyonnais seems to be in the same position,
15 based upon the -- the information in the -- in the amicus
16 brief.

17 QUESTION: Mr. Paden, because --

18 QUESTION: I have one -- one small procedural
19 question. Why is Dole properly before us? I want to make
20 you feel welcome here, but --

21 [Laughter.]

22 MR. PADEN: I do, Your Honor.

23 QUESTION: You -- you impleaded -- you impleaded
24 the Dead Sea Companies, and they're the ones --

25 MR. PADEN: I'm -- I represent Dead Sea, Your

1 Honor.

2 QUESTION: Oh, you represent Dead Sea?

3 MR. PADEN: Yes. Dole is --

4 QUESTION: Why -- why is Dole properly here?

5 MR. PADEN: Dole, I believe -- Dole is
6 interested in -- in confirming the jurisdiction of the
7 Federal court over this case and the jurisdiction of the
8 Federal court will be established if our position is
9 established, and to this extent, we have a common interest
10 in this case, apart from --

11 QUESTION: Did you -- did you join in removing,
12 or did Dole file the removal petition?

13 MR. PADEN: We filed the removal petition, Your
14 Honor. I believe that Dole filed a supplemental removal
15 petition on different grounds alleging Federal question
16 jurisdiction, which --

17 QUESTION: Right. That's how it got up to the
18 Ninth Circuit.

19 QUESTION: Yes, and -- and Dole was dismissed on
20 that -- on that ground, and that hasn't been appealed.

21 MR. PADEN: Correct. That's --

22 QUESTION: That -- that hasn't been brought --

23 MR. PADEN: That's correct.

24 QUESTION: And is there diverse -- there's no
25 diversity because there isn't complete diversity?

1 MR. PADEN: Yes, that's correct, Your Honor.

2 QUESTION: I see.

3 MR. PADEN: If I may, I'd like to reserve the
4 rest of my time for rebuttal.

5 QUESTION: Very well, Mr. Paden.

6 Mr. Massey, we'll hear from you.

7 ORAL ARGUMENT OF JONATHAN S. MASSEY

8 ON BEHALF OF THE RESPONDENTS

9 MR. MASSEY: Mr. Chief Justice, and may it
10 please the Court:

11 I'd like to begin with the first question
12 presented. Owning shares of stock in a parent corporation
13 in our view should not be equated with owning shares in
14 the subsidiary. I'd like to deal with the text of the
15 act, the structure, and its purposes, beginning with the
16 distinctive text of 1603(b)(2), which, as Justice Ginsburg
17 noted, does not refer to ownership in the abstract, it
18 refers to a special legal kind of ownership. It says, a
19 majority of shares or other ownership interests and, in
20 using that familiar phraseology of corporate law, it's
21 borrowing something which is related to the Meyer opinion,
22 I think, that Justice Breyer delivered this morning, the
23 notion that there's a degree of separateness between a
24 corporation and a shareholder. That case, as we heard it,
25 turned on the liabilities that the shareholder would not

1 bare --

2 QUESTION: Well, what -- what is the phrase that
3 you say is familiar from corporate law?

4 MR. MASSEY: Well, the concept of a majority of
5 shares.

6 QUESTION: Are you talking about a phrase, or a
7 concept?

8 MR. MASSEY: Well, the phrase in particular,
9 Your Honor.

10 QUESTION: Okay.

11 MR. MASSEY: The -- as -- I'm sorry, the
12 concept.

13 QUESTION: So you're not saying that the phrase,
14 shares or other ownership interest, is a familiar
15 phrase --

16 MR. MASSEY: Phrase -- no, Your Honor, I'm
17 saying it's a concept, the concept of what it means to own
18 a majority of shares in a corporation and, in particular,
19 1603(b)(2) is written from the perspective of the
20 subsidiary. It's written from a bottom-up perspective,
21 rather than a top-down perspective, and it asks, from the
22 subsidiary's perspective, who owns the majority of its
23 shares and it is, in our view, the corporate entity which
24 sits directly atop the subsidiary, rather than the foreign
25 State, which may stand several tiers removed.

1 It's sort of telling that in the Dead Sea
2 Company's own corporate disclosure statement, they list as
3 their -- as the owner of Dead Sea -- Israel Chemicals
4 Limited, which is the company which sits directly above
5 Dead Sea Bromine. The corporate disclosure statement then
6 goes on to say that Israel Chemicals Limited is, in turn,
7 held by another company, which is the Israel Corporation,
8 and it doesn't claim that the Israel -- it doesn't state
9 that the Israel Corporation is the owner of Dead Sea
10 Bromine. That's just the natural way we talk about it in
11 the -- in the -- especially in the corporate law realm,
12 which Congress was adopting in 16(b) -- 1603(b)(2).

13 There are several textual clues in section 1603
14 that Congress was adopting the principle of corporate
15 separateness. 1603(b)(1) requires that a corporation
16 be -- a -- a showing that the agency be a separate legal
17 person.

18 1610(b), which governs attachments, limits
19 attachments of property to claims against the particular
20 agency or instrumentality against whom the claim is
21 raised, and this Court, in the First National Citibank
22 case, held that the -- under the FSIA, the -- the property
23 and assets of a foreign-owned corporation are distinct
24 from the property and assets of the foreign State itself,
25 so this is not even a case like Bestfoods, where this

1 Court said that Congress' silence was audible in -- in
2 that Congress was legislating against these background
3 corporate law principles. Here, there are quite clear
4 textual signs that Congress was adopting a principle of
5 corporate law.

6 Now, the primary argument on the other side,
7 this is a -- the indirect shareholding is a form of other
8 ownership interest, and I -- we think that is not a proper
9 reading of this statute. As Justice Kennedy pointed out,
10 there are other forms of ownership interests in the world.
11 There are shares in an oil venture. The Tennessee Valley
12 Authority, for example, doesn't have stock. The Federal
13 Government simply owns it. The stock has been retired.

14 Congress was dealing here with foreign legal
15 systems which may have different ways of framing equity
16 interests. Socialist countries, for example, you can
17 imagine there might not be shares, so in our view the
18 phrase, other ownership interests, is meant to take into
19 account those sorts of equity holdings, so in this case --

20 QUESTION: Because? Because?

21 MR. MASSEY: Well, because Congress was dealing
22 with other foreign owners, other --

23 QUESTION: You know, I mean --

24 MR. MASSEY: Yes.

25 QUESTION: -- nobody doubts that there are other

1 ways of owning corporations. They're just saying, one
2 other way of owning it is like, under the Public Utility
3 Holding Company Act, you have a -- a pyramid of shares
4 with intervening corporations. They're not saying that's
5 the only other way. They're saying that's one other way,
6 and then you say, no, that one other way is not another
7 way, because?

8 MR. MASSEY: Because there -- we believe it's --
9 there are two reasons, primarily. First, is -- the first
10 part of the phrase, shares, already takes care of stock.
11 It would be unreasonable, in our view, to say indirect
12 stock counts as other --

13 QUESTION: Because?

14 MR. MASSEY: Because stock is not an other kind
15 of interest.

16 QUESTION: Because?

17 MR. MASSEY: Because it's already been listed --

18 QUESTION: No -- nobody's saying stock is.

19 MR. MASSEY: Sure.

20 QUESTION: What they're saying is, stock in
21 intervening corporations organized in certain ways --

22 MR. MASSEY: Right.

23 QUESTION: -- as under the Public Utility
24 Holding Company Act, is one other way, and I still haven't
25 heard the word -- you see, that's why I keep asking,

1 because.

2 MR. MASSEY: Right.

3 QUESTION: Because to me it's an unusual way,
4 not that unusual. The -- the law books are filled with
5 cases involving that, under the act I cited, and -- and so
6 they say, that's one way.

7 MR. MASSEY: That --

8 QUESTION: Now I want to know why that isn't one
9 way.

10 MR. MASSEY: Because it --

11 QUESTION: One other way.

12 MR. MASSEY: Right. First, because it's still
13 stock. Even if it's indirectly held, it's still stock.

14 QUESTION: And I don't quite see that,
15 because --

16 MR. MASSEY: Well --

17 QUESTION: Go ahead.

18 MR. MASSEY: Okay, and then second is, you're
19 absolutely right, the law books are filled, the U.S. Code
20 is filled with many other phrasings of direct, indirect
21 references to affiliates, references to beneficial
22 ownership, all the kinds of things, a control test, as
23 Justice Stevens mentioned, all the kinds of things that
24 could capture this kind of interest, but instead we have
25 the very distinctive phrasing that says, stock, and in our

1 view, once you count stock first as a direct majority
2 ownership, you shouldn't go back and count it again as an
3 indirect form.

4 QUESTION: Now --

5 MR. MASSEY: The other ought to be reserved --

6 QUESTION: -- I know that's your -- your view.

7 MR. MASSEY: I know. I know.

8 QUESTION: Now -- but let me push the because --

9 MR. MASSEY: Yes.

10 QUESTION: -- one step further. Suppose I
11 thought that the word, other ownership interest, is at
12 least open to this unusual type of arrangement as one form
13 of ownership interest.

14 MR. MASSEY: Right.

15 QUESTION: Still you should say, you shouldn't
16 interpret it that way, because?

17 MR. MASSEY: Because the number of principles
18 that animate the statute, first, this is a jurisdictional
19 statute. Jurisdictional statutes should be construed
20 precisely with clear, bright line rules and, in our view,
21 the -- the kind of direct legal ownership of stock is a
22 kind of bright line rule and the Court should not depart
23 from it.

24 Second, the statute already contains, in the
25 first clause of 1603(b)(3), the -- the so-called Oregon

1 test. The Oregon test captures governmental entities
2 which perform sovereign functions which are staffed by
3 Government employees over which the Government has a
4 significant degree of control. That's not at issue in
5 this case. That was decided both by -- in both courts
6 below adverse to the petitioners, and it's not before this
7 Court, but that clause would capture all of the
8 stereotypical cases at the heart of the Foreign Sovereign
9 Immunities Act, so we ought not stretch this part of the
10 statute to cover it.

11 QUESTION: All right, now if I think it is not a
12 stretch, but just another form of ownership --

13 MR. MASSEY: Right.

14 QUESTION: -- I'm putting this hypothetically --

15 MR. MASSEY: Right.

16 QUESTION: -- I then go on to think, you know,
17 I cannot think of a reason in the world, not even one, not
18 even a shadow of one, as to why Congress would have wanted
19 to say, when country X owns business A, it gets into
20 Federal court, but when everything is the same, but for a
21 stack of papers this thick which puts a bunch of
22 intervening paper corporations between A and Z, it doesn't
23 want it to get into Federal court, I think what could
24 they -- what human being could possibly think of any
25 conceivable reason for drawing that difference, and at

1 that point -- I'm putting it as strongly as I can --
2 I come up with a blank. I can't think of one.

3 I used to have relatives who had little tiny
4 corporations, and the number in between was a matter of
5 tax law or something. It was the same person sitting at
6 the same desk --

7 MR. MASSEY: Right.

8 QUESTION: -- doing the same thing.

9 MR. MASSEY: Right.

10 QUESTION: Now, I put it as strongly as I can.

11 MR. MASSEY: Right, and of course Congress is --
12 Congress has to legislate by category. It's not simply
13 dealing with the example of 100 percent subsidiaries.
14 Congress is drawing a general rule and, as a general rule,
15 the -- the line it drew was reasonable because Congress
16 was interested in facilitating suits against foreign
17 States in the United States courts. That's one of the
18 purposes that's laid out in 1602 in the statute, and
19 reading the statute the petitioners' way would disserve
20 those purposes.

21 First, it would impose important procedural
22 burdens on litigants that Congress did not want to impose.
23 It would eliminate traditional State long arm statutes.
24 It would eliminate the right to jury trial. It would
25 create immunity questions, because once immunity is

1 invoked --

2 QUESTION: Why -- why would it eliminate the
3 right to jury trial?

4 MR. MASSEY: Well, under the FSIA, once a --
5 a -- an entity is deemed to be a foreign State, the right
6 to jury trial is lost, even if an exception to immunity is
7 subsequently found to apply.

8 It would -- the -- the other burdens it imposes,
9 it eliminates the traditional attachment provision
10 that's --

11 QUESTION: Of course it does have a few -- but
12 nonetheless my question is, what conceivable reason could
13 there be for saying those special advantages disappear
14 when there is country A, and when there is country A to Z,
15 since the only difference between A and A to Z, I'd
16 repeat, is a bunch of paper?

17 MR. MASSEY: Well, again, as I said, Congress is
18 not just legislating with that specific example of
19 100 percent subsidiaries, it's using a -- the general
20 category. It -- it has to operate by general rule.

21 I think other examples, though, would show that
22 when you have multiple tiers, there -- the surprise factor
23 significantly increases. Congress was concerned that
24 litigants would be surprised to discover that they were
25 not dealing with an ordinary commercial entity but,

1 rather, a foreign State, and that surprise factor
2 increases as you go down the corporate tier to the nth
3 tier.

4 Also, there are potentially complex factual
5 inquiries as you go down the -- a -- a tier. In this
6 case, there are organization charts which show how the
7 shareholdings have been computed, but consider, when
8 ownership is not expressed through shares but through some
9 percentage of assets or partnership interests which are
10 not going to be reflected in a shareholder ledger, but are
11 going to be the potential subject of controversy in a
12 court, and I think the potential for factual disputes
13 increases.

14 QUESTION: Mr. Massey --

15 MR. MASSEY: Yes.

16 QUESTION: -- we're trying to find out, not
17 was -- what Congress did was reasonable --

18 MR. MASSEY: Yes.

19 QUESTION: -- but what did Congress do.

20 MR. MASSEY: Of course.

21 QUESTION: Of course if it -- what it did was
22 reasonable, that -- nobody would doubt that that would be
23 fine, and in determining what -- what Congress did, the
24 petitioners pointed to a number of statutes that use the
25 word, directly, when they meant to cut out the

1 subsidiaries.

2 MR. MASSEY: Yes.

3 QUESTION: They say, shares, or -- or a company
4 directly owned by, and this statute is silent. It doesn't
5 say, directly owned.

6 MR. MASSEY: That -- that's -- that's correct,
7 Your Honor. In our view, Congress didn't have to use
8 directly, because it was using this familiar corporate
9 concept of a majority ownership of shares. That implies
10 direct, because the owner of a majority of shares in -- in
11 this tiering relationship is the corporation immediately
12 above the subsidiary, it's not --

13 QUESTION: Is there any context in which we have
14 held that a majority ownership of shares, that -- that
15 phrase is satisfied by -- by second-tier ownership?

16 MR. MASSEY: Where this Court has held it?

17 QUESTION: Yes.

18 MR. MASSEY: I'm -- I'm not aware of any -- of
19 any case, Your Honor.

20 QUESTION: Do you plan to address the other
21 question --

22 MR. MASSEY: Yes.

23 QUESTION: -- in the case?

24 MR. MASSEY: Yes, Your Honor. Let me do that
25 right now, because I think the timing question is -- is a

1 independent way of resolving this case.

2 Ever since 1824, when Chief Justice Marshall
3 announced Mollan against Torrance, the rule has been that
4 jurisdiction is determined as of the date of filing the
5 complaint. The Chief Justice asked, what is the rule in
6 diversity cases? Well, since Anderson and Watt in 1891,
7 diversity cases have been held to be -- to be governed by
8 that rule, and the response we hear is that this is a
9 Federal question case, but, of course, even Federal
10 question cases are governed by the familiar rule that the
11 date is given by the -- the filing of the complaint.
12 That's -- United States against Keene Corporation in 1993
13 reflected that principle.

14 And as Justice Ginsburg noted, even if some
15 parts of the act are a Federal question, it's also telling
16 that in 1332(a)(4), Congress created a new species of
17 diversity jurisdiction, so accepting the petitioners'
18 argument here would lead to the anomalous situation where
19 there's a diversity part of the statute that's going to be
20 governed by the Mollan against Torrance rule, and there
21 will be a Federal question part of the statute that would
22 be governed by a different rule.

23 QUESTION: Mr. Paden said that that (a)(4) would
24 be interpreted by the different rule, so he's being
25 consistent with --

1 MR. MASSEY: Okay -- well, I misunderstood.
2 I apologize, but then that also means that there are some
3 diversity rules that are being interpreted one way, and
4 other diversity rules being interpreted a different way.
5 Either way, there's an anomaly, and it appears to us the
6 simplest way to resolve it would simply be to adhere to
7 the longstanding principle that the date on which the
8 complaint is filed is the relevant time to take a
9 snapshot.

10 That's also more administratively feasible,
11 because you can imagine that the rule of when the
12 underlying conduct occurred is a -- is a -- might be
13 difficult to determine in some cases. In this --

14 QUESTION: Or it might also extend over a
15 considerable period of time.

16 MR. MASSEY: That's correct, Your Honor.
17 I agree completely.

18 And so it's -- it's more reasonable to assume
19 Congress was legislating against the background
20 understanding that the date of filing of the complaint
21 would be determinative. It used the present tense in
22 1603. In 1441(d), which is the removal provision at issue
23 here, it talked about a case against a foreign State, and
24 in our view, it's more reasonable, it's more naturally
25 read to think that a case is a case against a foreign

1 State only if the entity actually is a foreign State at
2 the time, as opposed to being Czarist Russia.

3 1608, which is the special service provision,
4 also indicates that Congress is contemplating entities
5 that actually were foreign States, because --

6 QUESTION: Well, their point, though, is that,
7 first my examples were slightly absurd, and -- which they
8 were -- and secondly, that in any real case where -- where
9 you have, say, Communist Russia you're suing, or -- or
10 more recent former States, you're -- you're actually suing
11 the State, and the -- the defense is, but that State no
12 longer exists, like Bosnia or something.

13 There are a few things that are more involved in
14 foreign relationships, and -- and boy, to suddenly throw
15 that to 50 State courts is a total nightmare if you're
16 really worried about the foreign State, so even though it
17 creates differences between the diversity jurisdiction and
18 the other, we better keep these in Federal court, or we're
19 all in trouble. I mean, that's what I took them to say.

20 MR. MASSEY: Right. Well, I think the -- the
21 answer to the jurisdiction point and the sort of State
22 court point is that they're already is a provision in the
23 diversity statute, 1332(a)(3), I believe it is, that deals
24 with citizens of foreign countries, so there's already
25 diversity jurisdiction for suits against foreign

1 corporations after they've been privatized. They would be
2 able -- any claim against the Government would be
3 protected by the act of State doctrine, as Justice Scalia
4 noted. There could be no -- of course, no direct
5 liability imposed --

6 QUESTION: It works all right with the
7 corporations, but what if you're actually suing the State,
8 which still has some assets somewhere? How does that
9 work?

10 MR. MASSEY: Well, that, of course, isn't --
11 that's not going to be before this Court today, but --

12 QUESTION: Oh, no, but if we go into the foreign
13 State, former foreign States don't count, we've decided
14 that, and so I -- just curious. I don't want to do it
15 blindly.

16 MR. MASSEY: Well, no, I'm -- we're not asking
17 you to decide anything about -- about former foreign
18 States. I think --

19 QUESTION: Is there a reading that -- that
20 throws out the corporation that used to be owned but now
21 isn't by a foreign State, but keeps the former foreign
22 State within?

23 MR. MASSEY: Well, the -- the whole immunity
24 that foreign States enjoy is governed by 1604 and 1605,
25 and -- and the provision that we're focusing here is -- is

1 just the definition of agency and instrumentality, so I --
2 I think this Court could safely leave for another day the
3 issue of the former foreign State. It -- it's not at
4 the -- it's not in the provision that we are asking this
5 Court to interpret, and -- and it's governed by different
6 provisions which Your Honors could -- could leave for
7 another day.

8 QUESTION: Mr. Massey, practically, is it so in
9 these litigations that if you can't remove to the Federal
10 court, the State courts keep them and try them, whereas if
11 you remove them to the Federal court, they are then
12 dismissed on forum nonconvenience?

13 MR. MASSEY: Well, it's -- undoubtedly the forum
14 nonconvenience defense would be raised in State court as
15 well. In this case, the -- no proceedings of any
16 substance have occurred, so nobody --

17 QUESTION: But in this category of case --

18 MR. MASSEY: Yes.

19 QUESTION: -- is that the general pattern?

20 MR. MASSEY: That is the -- yes, that's the
21 general pattern. It's -- that's correct and, of course,
22 I think there would also be an immunity asserted. The
23 Dead Sea petitioners have preserved that. It's in joint
24 appendix 57, and -- and the -- the issue of whether they
25 would be entitled to immunity, or whether the commercial

1 activity exception would apply or something, hasn't been
2 litigated yet.

3 QUESTION: When was the Foreign Sovereign
4 Immunities Act passed?

5 MR. MASSEY: 1976, Your Honor.

6 QUESTION: We presumably lived, then, for 200
7 years without it, these cases being tried in State court?

8 MR. MASSEY: That's correct, Your Honor. The --
9 the -- under the -- the prevailing doctrine of the
10 separate entity rule, any separate unit or corporation was
11 not entitled to immunity, that's correct, and it was
12 governed by, after 1952 the Tate letter, which the --
13 which the State Department issue didn't -- this Court has
14 described the procedural history in Verlinden, but you're
15 absolutely correct, Your Honor.

16 I -- I think that in the -- at the end of the
17 day, what -- what is at issue here is a statute which
18 Congress adapted in 1602, set outting out -- setting out
19 the purposes to facilitate suits against foreign entities,
20 and also, as Justice Scalia noted, it referred to
21 principles of international law in 1602, and here,
22 we're -- the petitioners are asking this Court to
23 aggravate the difference between U.S. law and the law of
24 every other country.

25 These petitioners do not receive immunity even

1 in the courts of Israel or anywhere else, and the concerns
2 about State courts and juries could be addressed through
3 other provisions which enact -- which are enacted in the
4 diversity statute which govern every other corporation in
5 the world.

6 If there are no further questions --

7 QUESTION: Thank you, Mr. Massey.

8 Mr. Minear, we'll hear from you.

9 ORAL ARGUMENT OF JEFFREY P. MINEAR

10 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

11 SUPPORTING THE RESPONDENTS

12 MR. MINEAR: Thank you, Mr. Chief Justice, and
13 may it please the Court:

14 Congress enacted the FSIA against the backdrop
15 of venerable corporate law principles, including the
16 principle that a parent corporation and subsidiary are
17 distinct, and that the shareholders of a parent
18 corporation are not the shareholders of a subsidiary
19 corporation. We submit that the FSIA refers to share
20 ownership in that familiar legal sense.

21 Viewed in that light, a foreign State's majority
22 ownership of the shares of a parent gives the foreign
23 State control over the subsidiary, but it does not give
24 that foreign State ownership of the subsidiary's shares.
25 If Congress had intended that the FSIA would extend agency

1 or instrumentality status to the foreign State's control
2 of the subsidiary, it could easily have said exactly that.

3 QUESTION: Well, they don't think of these
4 things all the time, so -- so what -- what about -- they
5 just don't. It's -- and that's -- we have -- that's why
6 we have a difficult problem, so I wondered, with the
7 language, and nobody accepts -- I just want to know the
8 reason for this, and I'm sure it's not a tenable
9 interpretation, because nobody's advanced it, but if you
10 look at the first part, literally speaking, it says a
11 foreign State includes an instrumentality of a foreign
12 State, and so an instrumentality of a foreign State, is,
13 among other things, a corporation, the majority of shares
14 of which the foreign state owns. And that's true as to
15 the first corporation in the tier, A. Well, now, since A
16 is included in the term, foreign State, it therefore is a
17 foreign State. That's what it says. And therefore, B is
18 a company whose shares, the majority of which are owned by
19 a foreign State, and so forth down the line.

20 Now, literally, that's what it says, and so
21 what's wrong if I can't think of any reason why they'd
22 want a difference, and the -- that language literally
23 covers it, what's wrong with that?

24 MR. MINEAR: There's a very strong textual
25 indication that that's not a correct reading, and that is

1 found in section 1603(b)(2), where it speaks of a majority
2 of whose shares or other ownership interest is owned by
3 the foreign State, or political subdivision thereof.

4 QUESTION: Yes.

5 MR. MINEAR: Now, obviously, if Congress had
6 intended that recursive use that you've described, they
7 would not have included, political subdivision thereof,
8 which is also a part of a foreign State and, in fact, that
9 provision excludes agency or instrumentality.

10 We think what the Court can draw from this is
11 that Congress was using foreign State in a very strict
12 sense of simply a foreign nation.

13 QUESTION: Or -- but you're referring there back
14 to the intent of Congress. I see that linguistic point,
15 but if we're referring back to the intent of Congress, I'm
16 back to my question I asked before, what possible intent
17 of Congress could the interpretation that you advance
18 further? I mean, what reason is there? The same
19 questions I asked before. I'm just --

20 MR. MINEAR: We think --

21 QUESTION: -- you've got me back to that because
22 of your response, which referred to the intent of
23 Congress.

24 MR. MINEAR: We think there are two very clear
25 reasons. First of all, Congress was drawing a bright

1 line. We think that Congress wanted to avoid litigation
2 over where to litigate. Nothing's more wasteful than
3 that -- and by doing so it spoke to ownership of majority
4 of shares in the traditional legal sense, which provides a
5 very bright line rule.

6 We also think that this -- this reading must
7 be -- must take into account that we're not speaking
8 solely of the interest of foreign nations, but also of the
9 interest of American litigants. Congress was trying to
10 strike a balance between the two, and the balance that we
11 suggest here is one that recognizes that American
12 litigants have an interest in a clear delineation of who
13 is entitled to foreign sovereign status and who is not.
14 We think our interpretation reflects both of those
15 concerns.

16 QUESTION: But the statute does refer to other
17 ownership interests.

18 MR. MINEAR: Yes, it --

19 QUESTION: Other forms of ownership. What does
20 that cover, then?

21 MR. MINEAR: Again, Your Honor, we think that it
22 ought to be -- that this term ought to be interpreted in
23 terms of a -- a test that provides a bright line rule. We
24 think other ownership interest refers to something that is
25 an alternative to shares, such as, as Justice Kennedy has

1 described in ownership in -- in a joint venture.

2 We don't think that Congress intended to
3 complicate the inquiry by making inquiries into whether
4 something that is sometimes described as control should be
5 treated as a different type of ownership interest. We
6 think that here, that what Congress was seeking was
7 clarity, and the interpretation that we're providing is
8 designed to provide that clarity for foreign nations and
9 for American litigants as well.

10 Now, we think it's important to remember that
11 Congress drew this line with the understanding that
12 foreign instrumentalities is a narrow term, particularly
13 as used by foreign nations. Foreign nations by and large
14 would not provide immunity to corporations. We believe
15 that Congress took the step of extending it to a
16 first-tier corporation, but concluded that that is where
17 the line should be drawn, it should go no further, and we
18 think a narrow construction of this term is also
19 appropriate in -- in the face of the fact that Congress is
20 granting a special privilege, a comity-based privileged,
21 that not ought to be extended beyond what other foreign
22 nations recognize in applying their immunity laws to the
23 United States.

24 This is particularly so when the construction
25 that we urge is very unlikely to lead to foreign friction

1 with other nations. Because, as -- because foreign
2 nations do not recognize the immunity that's being sought
3 here in their own courts, it's very unlikely that they
4 will object to our recognition of nonimmunity on the same
5 basis in our courts.

6 Now, even if this Court concluded that the FSIA
7 granted agency or instrumentality status to subsidiaries,
8 the Dead Sea companies would still not qualify because, as
9 noted before, they did -- did not have that status at the
10 time that this suit was brought. We think that the
11 diversity statute model provides the appropriate test
12 here.

13 Diversity jurisdiction is predicated on whether
14 or not the parties are diverse at the time the suit is
15 brought. It's based on the status of the parties.
16 Likewise, jurisdiction that is based on the status of a
17 foreign entity ought to be determined at the foreign
18 ownership's --

19 QUESTION: How do you deal with somebody who
20 sues Yugoslavia, as a State? I mean, they find some
21 assets owned by Yugoslavia, they go sue them.

22 MR. MINEAR: I think --

23 QUESTION: What -- that goes to a -- West
24 Virginia State court?

25 MR. MINEAR: I think the question here is, who

1 exactly are they suing?

2 QUESTION: They're suing Yugoslavia. That's
3 the --

4 MR. MINEAR: They might be suing --

5 QUESTION: -- the -- it says, defendant,
6 Yugoslavia.

7 MR. MINEAR: But that suit most likely has to be
8 served on someone, and it's likely --

9 QUESTION: There is somebody over there who
10 claims to be the recipient of lawsuits -- I mean, we could
11 easily construct a serious problem, or you may have looked
12 into it in telling me it just isn't a problem, and I'd
13 like to hear you say that, if that's so, because it would
14 help.

15 MR. MINEAR: We think it's unlikely to be a
16 problem. I cannot say that we -- we can -- can certify
17 that this problem would never arise, but typically, these
18 types of suits are brought against another State that now
19 stands in the shoes of the former State, and there might
20 be interesting questions of law with regard to the
21 liability of that suit, but they may never be reached
22 because in that case, the suit is being brought --

23 QUESTION: Okay, so you're telling me, and
24 you've looked into it, this isn't really a problem, it's
25 theoretical, not real?

1 MR. MINEAR: We think it is primarily a
2 theoretical problem.

3 We think that Congress had no compelling reasons
4 to provide immunity for past agencies and
5 instrumentalities that are no longer associated with the
6 foreign -- foreign State. As Justice Scalia pointed out,
7 there's other mechanisms, such as the Act of State
8 Doctrine, that provide protection of the foreign sovereign
9 interests in those cases and, in any event, a foreign
10 corporation, even after it has become privatized, still
11 has access to Federal court jurisdiction under the
12 alienage diversity statute, provided that it satisfies
13 the -- the requirements that Congress has set forth.

14 Finally, I'd like to note that because two
15 questions are presented here, the Court does have
16 discretion to reach both of those questions, and we think
17 that there would be an advantage in clarity in the law if
18 the Court did address both the so-called tiering question
19 and the timing question, since they both have led to
20 disputes among litigants in the lower courts. They --
21 both issues have been fully briefed and, as I say, the
22 Court does have that power to make that determination if
23 it so chooses.

24 QUESTION: Mr. Minear, I don't understand how
25 the Act of State Doctrine would apply to sales of Israel

1 pesticide in Central America.

2 MR. MINEAR: It most likely would not apply --

3 QUESTION: Yes.

4 MR. MINEAR: -- in this situation because
5 obviously, the Act of State Doctrine applies to the acts
6 of a foreign State in --

7 QUESTION: Within its own --

8 MR. MINEAR: -- within -- within --

9 QUESTION: Yes.

10 MR. MINEAR: -- its own territory, within is own
11 jurisdiction.

12 If there are no further questions, thank you,
13 Your Honor.

14 QUESTION: Thank you, Mr. Minear.

15 Mr. Paden, you have 7 minutes remaining.

16 REBUTTAL ARGUMENT OF PETER R. PADEN

17 ON BEHALF OF THE PETITIONERS

18 MR. PADEN: Thank you, Your Honor.

19 First, with respect to the phrase, ownership
20 interest, Mr. Massey suggested that the issues here, and
21 I believe Mr. Minear as well, are related to the issues in
22 the recently decided Meyer case, with which I confess I'm
23 not familiar, but I think also the Bestfoods kind of case.

24 We think those cases are very different. Those
25 cases relate to liability-creating statutes and, in the

1 context of a statute that creates liability, whether
2 Congress intended for traditional rules of corporate
3 veil-piercing to be eased somewhat in assigning liability
4 in the case of the Superfund law to the -- to the owner of
5 the contaminated facility.

6 This is not a statute that gives rise to
7 liability. It defines a category of entities that are
8 within the scope of the -- of the group that Congress
9 intended to -- to vest with a certain limited protection
10 when they will be sued in -- in the United States, namely,
11 a broad right to a Federal forum, and so forth.

12 QUESTION: We -- we have always construed
13 jurisdictional statutes quite narrowly, going all the way
14 back to Strawbridge against Curtis, that said you have to
15 have complete diversity under the diversity statute, and
16 it seems to me you're asking for something different than
17 that here.

18 MR. PADEN: I think, Your Honor, that the -- in
19 the first place, of course, the statute has to be
20 construed to the best one can on the words of the statute
21 and the congressional intent. I think there is some
22 interesting language. I -- I believe it's the Delta case
23 of the Sixth Circuit, or maybe the Texas Eastern case in
24 the Third Circuit -- talking about why, in the context of
25 this law, there actually should be a broad interpretation

1 of diversity. Really, that's just another way of saying
2 because Congress intended to bring within it a certain
3 defined category of -- of entities.

4 I think it's very hard to -- to articulate a
5 reason why Congress would have wanted to bring commercial
6 operations of foreign States within the scope of the
7 statute and say -- let me back up a moment.

8 There was a time when Dead Sea Works was the
9 immediate parent of Dead Sea Bromine, and Dead Sea Works
10 was owned by the State of Israel. Dead Sea Works' job is
11 to extract manganese and potassium from the Dead Sea.
12 Dead Sea Bromine's job is to extract Dead -- bromine from
13 the Dead Sea. It's impossible to come up with a rationale
14 why Congress wanted Dead Sea Works to be within the
15 purpose -- the purview of this statute and Dead Sea
16 Bromine not to be.

17 QUESTION: Well, they listed two. They said,
18 first of all it's easier for the court not to have to go
19 through the morass of paper and try to figure out who owns
20 what where, and the second one is that, because it's less
21 surprising, at least the customers and others will know,
22 likely, who owns the company, and know it's the State.
23 Those were their two responses.

24 MR. PADEN: Correct. I -- in terms of ownership
25 interest, I think it's -- it's a well-known and widely

1 used phrase in our law as well as others to be a generic
2 broadbased term. We did a little research on some
3 publicly available information just to try to find
4 companies that I think we can say are well-known to be --
5 have certain relationships, and I think it's fair to say,
6 based on news articles and so forth, that General Electric
7 Company is widely understood to own NBC, the broadcasting
8 network.

9 It turns out that General Electric Company is
10 the 100 percent shareholder of a company called NBC
11 Holdings, Inc., which is the 100 percent shareholder of
12 NBC, Inc., the broadcasting company. I think the chairman
13 of the board of GE would be astonished to hear the United
14 States and the respondents explain that GE does not have
15 an ownership interest in NBC. It's --`

16 QUESTION: I think that was conceded, that for
17 purposes of newspapers reports, and -- yeah, we understand
18 that you would have five tiers down, if only one person
19 owns it, you say, well, that person owns it, even if it's
20 the fifth tier down, but the question is, in this context
21 of a jurisdictional statute -- and I wanted to ask you
22 particularly, you've just heard Mr. Minear's argument, do
23 we, as a Court, owe any special respect to what the
24 executive tells us a statute that deals in the foreign
25 affairs realm means?

1 MR. PADEN: Your Honor, I think in this case
2 that -- that we think that the respect that is owed to the
3 Justice and State Departments in this case is -- is
4 measured by the persuasiveness of the opinions that
5 they're offering. Essentially, they're offering a legal
6 interpretation of the meaning of the statute and
7 congressional intent.

8 I don't think they've said that the
9 interpretation that we're offering here will impair or
10 jeopardize the conduct of our foreign relations. In fact,
11 the only comment in their brief about this is to note that
12 there have not been frictions in foreign relations as a
13 result of the extant state of the law, and the extant
14 state of the law is really in our favor on both points.

15 There are a number of cases where privatized
16 entities have been held to be agencies or
17 instrumentalities, and certainly where tiered entities
18 have been, so we think it really is a matter of an
19 analysis of the legal opinions about statutory
20 construction and -- and whether --

21 QUESTION: But the -- the Government says you
22 are the one who's saying, oh, a foreigner might be
23 offended by the jury trial, whatever.

24 MR. PADEN: We're trying to honor the intent of
25 Congress, Your Honor. Congress --

1 QUESTION: And -- and the Government answers no,
2 that we don't think this is going to be disturbing foreign
3 nations. You're the one who says that it will.

4 MR. PADEN: I think what's salient is what
5 Congress said, Your Honor, and Congress said that when
6 claims are brought, when we are going to allow claims
7 against foreign State entities for their commercial
8 activities or whatever in this country, we're going to
9 accord them the kinds of -- the Federal jurisdiction
10 breadth and lack of jury trial which we accord to
11 ourselves when we agree to be sued.

12 QUESTION: May I ask you what the purpose of
13 filing this lodging was, this gigantic paper? Are we
14 supposed to read this to figure out what the corporate
15 relationships were, or what was the purpose?

16 MR. PADEN: Your Honor, that contains a lot of
17 very detailed material in support of the information that
18 we thought pertinent describing the particular structure
19 of the Government companies law and the legal regimes --

20 QUESTION: But is this typical of what a
21 district judge would have to look through to figure out
22 ownership under your theory?

23 MR. PADEN: No, sir. It doesn't --

24 [Laughter.]

25 MR. PADEN: -- not at all. That had nothing

1 really to do with ownership. We -- we actually originally
2 put that material in the record in support of our argument
3 that the company was an organ of the State of Israel
4 within the kind of emerging case law there, and what that
5 material shows is the extensive, detailed
6 interrelationship between the Government companies
7 authority in Israel.

8 They made decisions about whether or not the
9 company was going to have to use company cars, about
10 whether or not they were -- they made -- they made -- they
11 had input in the operation of this company to a minute
12 degree of detail and to, of course, very profound
13 decisions such as budget decisions, who would be on the
14 board of directors.

15 This company, under the Government companies
16 law, a Government subsidiary company is treated, for all
17 intents and purpose the same, whether it's indirectly
18 held, as a Government company which is directly owned, and
19 it -- and this detailed material is really in support of
20 several pages in our brief where we -- where we provide
21 a -- a long paragraph with a series of examples of the
22 extent of the interrelationship between the Government of
23 Israel, the ministers of finance, the Government companies
24 authority, and so forth.

25 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Paden.

1 MR. PADEN: Thank you, Your Honor.

2 CHIEF JUSTICE REHNQUIST: The case is submitted.

3 (Whereupon, at 11:06 a.m., the case in the

4 above-entitled matter was submitted.)

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