SUPREME COURT OF THE UNITED STATES

Nos. 01–593 and 01–594

DOLE FOOD COMPANY, ET AL., PETITIONERS
01–593 *v.*
GERARDO DENNIS PATRICKSON ET AL.

DEAD SEA BROMINE CO., LTD., AND BROMINE COMPOUNDS LIMITED, PETITIONERS
01–594 *v.*
GERARDO DENNIS PATRICKSON ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

[April 22, 2003]

JUSTICE BREYER, with whom JUSTICE O'CONNOR joins, concurring in part and dissenting in part.

I join Parts I, II–A, and II–C, and dissent only from Part II–B, of the Court's opinion. Unlike the majority, I believe that the statutory phrase "other ownership interest . . . owned by a foreign state," 28 U. S. C. §1603(b)(2), covers a Foreign Nation's legal interest in a Corporate Subsidiary, where that interest consists of the Foreign Nation's ownership of a Corporate Parent that owns the shares of the Subsidiary.

The Foreign Sovereign Immunities Act of 1976 (FSIA) sets forth legal criteria for determining when a "foreign state," 28 U. S. C. §1603(a), can assert a defense of sovereign immunity. The FSIA also specifies that a "foreign state" defendant may ask a federal court to make the relevant sovereign immunity determination. §1441(d). And the FSIA allows certain foreign-state commercial

entities *not entitled to sovereign immunity* to have the merits of a case heard in federal court. §§1330(a), 1441(d), 1605(a)(2). These last-mentioned entities, entitled to invoke federal-court jurisdiction, include corporations that fall within the FSIA's definition of an "agency or instrumentality of a foreign state," §§1603(a), (b).

The corporate defendants here, subsidiaries of a foreign parent corporation, fall within that definition if "a majority of [their] shares or *other ownership interest is owned by*" a foreign nation. §1603(b)(2) (emphasis added). The relevant foreign nation does not *directly* own a majority of the corporate subsidiaries' shares. But (simplifying the facts) it does own a corporate parent, which, in turn, owns the corporate subsidiaries' shares. See *ante,* at 4.

Does this type of majority-ownership interest count as an example of what the statute calls an "other ownership interest"? The Court says no, holding that the text of the FSIA requires that "*only direct ownership* of a majority of shares by the foreign state satisfies the statutory requirement." *Ante,* at 4 (emphasis added). I disagree.

The statute's language, standing alone, cannot answer the question. That is because the words "own" and "ownership"—neither of which is defined in the FSIA—are not technical terms or terms of art but common terms, the precise legal meaning of which depends upon the statutory context in which they appear. See J. Cribbet & C. Johnson, Principles of the Law of Property 16 (3d ed. 1989) ("Anglo-American law has not made much use of the term ownership in a technical sense"); Black's Law Dictionary 1049, 1105 (6th ed. 1990) ("The term ['owner'] is . . . a nomen generalissimum"—a "term of the most general meaning" or "of the most general kind"—"and its meaning is to be gathered from the connection in which it is used, and from the subject-matter to which it is applied"). See also *Williams* v. *Taylor,* 529 U. S. 420, 431 (2000) ("We give the words of a

statute their *ordinary, contemporary, common meaning*, absent an indication Congress intended them to bear some different import" (internal quotation marks omitted; emphasis added)).

Thus, this Court has held that "ship*owne[r]*" can include a corporate shareholder even though, technically speaking, the corporation, not the shareholder, owns the ship. *Flink* v. *Paladini,* 279 U. S. 59, 62–63 (1929) (emphasis added). Moreover, this Court has held that a trademark can be "*owned by*" a parent corporation even though, technically speaking, a subsidiary corporation, not the parent, registered and thus owned the mark. *K mart Corp.* v. *Cartier, Inc.,* 486 U. S. 281, 292 (1988) (opinion of KENNEDY, J.) (emphasis added) (noting "the inability to discern" which "entit[y] . . . can be said to 'own' the . . . trademark if . . . the domestic subsidiary is wholly owned by its foreign parent"); *id.,* at 318 (SCALIA, J., concurring in part and dissenting in part) ("It may be reasonable for some purposes to say that a trademark nominally owned by a domestic subsidiary is 'owned by' its foreign parent corporation"); *id.,* at 319 ("A parent corporation may or may not be said to 'own' the assets owned by its subsidiary"). Similarly, here the words "other ownership interest" might, or might not, refer to the kind of majority-ownership interest that arises when one owns the shares of a parent that, in turn, owns a subsidiary. If a shareholder in Company A is an "owner" of Company A's ship, as in *Flink*, then why should the shareholder not be an "owner" of Company A's subsidiary? If Company A's trademark can be said to be "owned by" its shareholder, as in *K mart*, then why should Company A's subsidiary not be said to be "owned by" its shareholder? And, at the very least, can we not say that the shareholder has an "ownership interest" in the subsidiary?

Neither do the various linguistic indicia to which the majority points help resolve the question. As the majority points out, the statute's use of the word "shares" leans in

favor of reading "ownership" as incorporating formal, technical American legal requirements. *Ante,* at 5–6. But any resulting suggestion of formal technical limitation is neatly counterbalanced by the fact that the "statute had to be written for the contingency of ownership forms in other countries, or even in this country, that depart from conventional corporate structures." *Ante,* at 7. And given this latter necessity, there is no reason to read the phrase "*shares or other*" as if those words meant to exclude from the scope of "other" any kind of mixed, say, debt/equity, ownership arrangement that might involve shares only in part.

The majority's further claim that Congress's use of the word "ownership" means "only *direct* ownership," *ante,* at 4 (emphasis added), or formal ownership, founders upon *Flink, supra,* and *K mart, supra,* as well as upon several statutes that demonstrate that Congress felt it necessary explicitly to use the word "direct" (a word missing in the FSIA) in order to achieve that result. See, *e.g.,* 20 U. S. C. §1087–3(a) ("common shares . . . *directly owned* by a Holding Company" (emphasis added)); 26 U. S. C. §165(g)(3)(A) (requiring that "the taxpayer *owns directly* stock" in a corporation (emphasis added)); §851(c)(3)(A) (stock "*owned directly* by one or more of the other corporations" (emphasis added)). Were the Court's logic correct, see *ante,* at 7–8, the word "direct" in these statutes would be redundant.

The majority's "veil piercing" argument, *ante,* at 6, is beside the point. So is the majority's reiteration of the separateness of a corporation and its shareholders, *ante,* at 5–6, a formal separateness that this statute explicitly sets aside. See 28 U. S. C. §§1603(a), (b) (acknowledging the separateness of a corporate entity but nevertheless deliberately conferring the "foreign state" status of the shareholder upon the corporation itself); H. R. Rep. No. 94–1487, p. 15 (1976) (same). See also Working Group of

the American Bar Association, Reforming the Foreign Sovereign Immunities Act, 40 Colum. J. Transnat'l L. 489, 517–518 (2002) (hereinafter ABA Working Group) (FSIA rejects the "separate-entity" rule that courts had often applied to deny immunity to state-owned corporations).

Statutory interpretation is not a game of blind man's bluff. Judges are free to consider statutory language in light of a statute's basic purposes. And here, as in *Flink, supra,* and *K mart, supra,* an examination of those purposes sheds considerable light. The statute itself makes clear that it seeks: (1) to provide a foreign-state defendant in a legal action the right to have its claim of a sovereign immunity bar decided by the "courts of the United States," *i.e.,* the federal courts, 28 U. S. C. §1604; see §1441(d); and (2) to make certain that the merits of unbarred claims against foreign states, say, states engaging in commercial activities, see §1605(a)(2), will be decided "in the same manner" as similar claims against "a private individual," §1606; but (3) to guarantee a foreign state defending an unbarred claim certain protections, including a prohibition of punitive damages, the right to removal to federal court, a trial before a judge, and other procedural rights (related to service of process, venue, attachment, and execution of judgments). §§1330, 1391(f), 1441(d), 1606, 1608–1611. See *Verlinden B. V.* v. *Central Bank of Nigeria,* 461 U. S. 480, 497 (1983) ("Congress deliberately sought to channel cases against foreign sovereigns away from the state courts and into federal courts"); H. R. Rep. No. 94–1487, at 32 ("giv[ing] foreign states clear authority to remove to a Federal forum actions brought against them in the State courts" in light of "the potential sensitivity of actions against foreign states and the importance of developing a uniform body of law in this area"); *id.,* at 13 ("Such broad jurisdiction in the Federal courts should be conducive to uniformity in decision, which is desirable since a disparate

treatment of cases involving foreign governments may have adverse foreign relations consequences").

Most important for present purposes, the statute seeks to guarantee these protections to the foreign nation not only when it acts directly in its own name but also when it acts through separate legal entities, including corporations and other "organ[s]." 28 U. S. C. §1603(b).

Given these purposes, what might lead Congress to grant protection to a Foreign Nation acting through a Corporate Parent but deny the same protection to the Foreign Nation acting through, for example, a wholly owned Corporate Subsidiary? The answer to this question is: In terms of the statute's purposes, *nothing at all* would lead Congress to make such a distinction.

As far as this statute is concerned, decisions about how to incorporate, how to structure corporate entities, or whether to act through a single corporate layer or through several corporate layers are matters purely of form, not of substance. Cf. H. R. Rep. No. 94–1487, at 15 (agencies or instrumentalities "could assume a variety of forms"); *First Nat. City Bank* v. *Banco Para el Comercio Exterior de Cuba,* 462 U. S. 611, 625 (1983) (noting that "developing countries" often "establish separate juridical entities . . . to make large-scale national investments"). The need for federal court determination of a sovereign immunity claim is no less important where subsidiaries are involved. The need for procedural protections is no less compelling. The risk of adverse foreign policy consequences is no less great. See ABA Working Group 523 ("The strength of a foreign state's sovereign interests . . . does not necessarily dissipate when it employs more complicated legal structures resembling those used by modern private businesses"); Dellapenna, Refining the Foreign Sovereign Immunities Act, 9 Willamette J. Int'l L. & Disp. Resol. 57, 92–93 (2001). See also A. Kumar, The State Holding Company: Issues and Options 3 (World Bank Discussion Paper No.

187, 1992) ("The existence of state holding companies, in many variants, is widespread").

That is why I doubt the majority's claim that its reading of the text of the FSIA is "[t]he better reading," *ante,* at 7, leading to "[t]he better rule," *ante,* at 8. The majority's rule is not better for a foreign nation, say, Mexico or Honduras, which may use "a tiered corporate structure to manage and control important areas of national interest, such as natural resources," ABA Working Group 523, and, as a result, will find its ability to use the federal courts to adjudicate matters of national importance and "potential sensitivity" restricted, H. R. Rep. No. 94–1487, at 32. Congress is most unlikely to characterize as "better" a rule tied to legal formalities that undercuts its basic jurisdictional objectives. And working lawyers will now have to factor into complex corporate restructuring equations (determining, say, whether to use an intermediate holding company when merging or disaggregating even wholly owned government corporations) a risk that the government might lose its previously available access to federal court.

Given these consequences, from what perspective can the Court's unnecessarily technical reading of this part of the statute produce a "better rule"? To hold, as the Court does today, that for purposes of the FSIA "other ownership interest" does not include the interest that a Foreign Nation has in a tiered Corporate Subsidiary "would be not merely to depart from the primary rule that words are to be taken in their ordinary sense, but to narrow the operation of the statute to an extent that would seriously imperil the accomplishment of its purpose." *Danciger* v. *Cooley,* 248 U. S. 319, 326 (1919).

I believe that the Court should decide this issue just as it decided *Flink*. There, the Court unanimously determined that, in light of "[t]he policy of the statutes" in question, a corporate shareholder was an "owner" of a

ship, which, technically speaking, belonged to the corporation. 279 U. S., at 62–63. Justice Holmes wrote, in his opinion for the Court:

> "For th[e] purpose [of these statutes] no rational distinction can be taken between several persons owning shares in a vessel [here, a subsidiary] directly and making the same division by putting the title in a corporation and distributing the corporate stock. The policy of the statutes must extend equally to both. . . . We are of [the] opinion that the words of the acts must be taken in a broad and popular sense in order not to defeat the manifest intent. This is not to ignore the distinction between a corporation and its members, a distinction that cannot be overlooked even in extreme cases . . . , but to interpret an untechnical word ['owner'] in the liberal way in which we believe it to have been used . . . ." *Ibid.*

No more need be said.