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CRIMINAL PROCEEDINGS AND THE FOREIGN SOVEREIGN IMMUNITIES ACT

Congress enacted the Foreign Sovereign Immunities Act of 1976 (FSIA) to address the inconsistent application of doctrines of state immunity to civil suits against foreign states and state-owned enterprises. The statute confers jurisdictional immunity on these entities, subject to enumerated exceptions. Most litigation under the FSIA involves whether a particular defendant qualifies as a foreign state, and whether the criteria for applying an exception are satisfied in a particular civil suit. In *Samantar* (2010), the Supreme Court characterized the FSIA as “a comprehensive solution for suits against [foreign] states” and clarified that it does not apply to proceedings against individual foreign officials. The Court has not, however, addressed whether the FSIA applies to criminal proceedings against foreign states and state-owned enterprises (SOEs), or how to analyze immunity defenses in that context. As I argue in a [recent article](#), the best interpretation of the FSIA is that it applies only to civil proceedings. Foreign SOEs do not enjoy immunity from criminal proceedings, at least with respect to their commercial activities.

Background

Because criminal proceedings against foreign state-owned enterprises have historically been few and far between, the question of the FSIA’s application to criminal proceedings arose infrequently following the statute’s enactment. However, as Brandon Garrett [notes](#), prosecutions of foreign corporations have become more common in the past two decades. For example, the Foreign Corrupt Practices Act (FCPA) has been criminally enforced against foreign companies. The FCPA was enacted in 1977 in the wake of the Watergate scandal, and Congress extended its reach to encompass foreign firms in 1998. State-owned firms have been implicated in criminal FCPA actions. In 2006, for example, the Norwegian state-owned company Statoil (now renamed Equinor) agreed to pay a \$10.5 million penalty and to enter into a deferred prosecution agreement for bribing an Iranian official. In 2018, the Brazilian state-owned company Petrobras agreed to pay over \$850 million in criminal penalties and to enter into a non-prosecution agreement for FCPA violations in conjunction with its role in facilitating payments to politicians and political parties in Brazil.

A hard-fought [legal battle](#) involving a grand jury subpoena against an [Egyptian state-owned bank](#) did not resolve the question whether the FSIA applies to criminal proceedings against SOEs. Recent high-profile criminal proceedings involving state-related entities include a grand jury [indictment](#) against the Internet Research Agency (IRA), a Russian organization engaged in political and electoral interference operations on behalf of the Kremlin. The IRA was not state-owned, but it acted on behalf of a foreign state; that is not enough to qualify it for foreign state immunity, as Bill Dodge and I [explained](#) in an amicus brief and the Ninth Circuit [held](#) last year. In another case, four Chinese companies argued that they were immune from charges of conspiracy to commit economic espionage because they were “instrumentalities” of China, but they [failed](#) to establish a prima facie case that they qualified as instrumentalities. Meanwhile, counsel for Halkbank, which is majority-owned by the Turkish government, has asked for an [extension](#) until May 13, 2022 to seek Supreme Court review of the Second Circuit’s decision that Halkbank can face criminal charges for alleged participation in a scheme to evade U.S. sanctions.

Increased prosecutorial attention to activities including cyber espionage and trade secret theft, in addition to foreign corrupt practices, could set criminal investigations of foreign entities on a collision course with potential claims of jurisdictional immunity. Even though it

might be difficult to conceive of holding a foreign state criminally responsible for its conduct under international or domestic law, the same is not necessarily true of SOEs. As the U.S. government argued in response to a Lithuanian shipping company's [motion to quash](#) a grand jury subpoena, the customary international law principle that a foreign state itself is not generally "subject to punitive measures" does not apply to "separate corporate entities even if majority owned by the state." Moreover, from a human rights perspective, Camilla Wee has [noted](#) that it could be desirable to hold SOEs to "a higher standard of human rights observance and protection." Depending on the circumstances, enforcing such obligations could provide additional occasions for the exercise of domestic jurisdiction, including the potential imposition of punitive measures.

The potential application of the FSIA as a bar to criminal proceedings is a uniquely American problem. Other common-law countries, such as the United Kingdom and Canada, explicitly exclude criminal proceedings from the scope of their state immunity acts. In addition, [the U.K. State Immunity Act](#) makes clear that its provisions do not apply "to any entity . . . which is distinct from the executive organs of the government of the State and capable of suing or being sued." Instead, a "distinct" entity can claim jurisdictional immunity from civil proceedings "if and only if . . . the proceedings relate to anything done by it in the exercise of sovereign authority" and "the circumstances are such that a State . . . would have been so immune." Congress's rationale for including SOEs within the definition of a "foreign state" in the FSIA likely stemmed from a desire to ensure the application of the FSIA's provisions regarding service and long-arm personal jurisdiction, alongside an assumption that the subject-matter of disputes involving SOEs would generally fall within the FSIA's commercial activities exception. Whatever the rationale, the inadvertent result could be to confer broader immunity than international law requires.

Interpreting the FSIA

As Section 451 of the *Restatement (Fourth) of Foreign Relations Law* notes, the FSIA's text "does not explicitly limit its grant of immunity to civil cases." But as the *Restatement* also notes, "no reported court decision has dismissed an indictment or otherwise suppressed a criminal prosecution based on immunity conferred by the FSIA."

The FSIA is codified in Part IV of Title 28 of the U.S. Code, which deals with jurisdiction and venue. [Section 1604](#) provides that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided" in the FSIA. The absence of the word "civil" before the word "jurisdiction" in section 1604 has prompted some defendants to argue that the FSIA precludes *any* exercise of jurisdiction over foreign states by U.S. courts unless it falls within an exception. The most likely explanation for the absence of the word "civil" is that Congress simply was not thinking about criminal proceedings one way or the other. The same is true of bankruptcy proceedings, which the Ninth Circuit has [held](#) are not precluded by the FSIA despite section 1604's seemingly comprehensive language.

The language and structure of the FSIA also sound in civil, rather than criminal, procedure. The FSIA offers civil claimants one-stop shopping for both personal and subject-matter jurisdiction. Under this statutory framework, [Section 1330\(a\)](#) gives the federal district courts original subject-matter jurisdiction over any nonjury action against a foreign state if a statutory exception to immunity applies. Section 1330(b) creates personal jurisdiction over a foreign sovereign "as to every claim for relief over which the district courts have [original] jurisdiction" if the defendant has been properly served. The House Report accompanying the FSIA described § 1330(b) as providing "in effect, a Federal long-arm statute over foreign states" that embodies "[t]he requirements of minimum jurisdictional contacts and adequate notice." It is a separate question whether a different provision of the U.S. Code provides criminal jurisdiction over foreign states or state-owned entities, just as [11 U.S.C. § 106](#) does

in the bankruptcy context. We would expect to find the answer to that question in Title 18, which deals with crimes and criminal procedure, rather than in Title 28.

In *Verlinden* (1983), the Supreme Court described the FSIA as providing “a comprehensive set of legal standards governing claims of immunity in every *civil* action against a foreign state or its political subdivisions, agencies, or instrumentalities” (emphasis added). The Supreme Court’s frequently-cited statement in *Amerada Hess* (1989) that “the text and structure of the FSIA demonstrate Congress’ intention that the FSIA be the sole basis for obtaining jurisdiction over a foreign state in our courts” does not resolve the question of criminal jurisdiction. In that case, the Court considered whether to interpret the [Alien Tort Statute](#) (ATS) as providing an additional basis for exercising jurisdiction over civil actions against foreign states. The Court did not consider or make any findings about whether a different provision in the U.S. Code could provide courts with jurisdiction over criminal or other types of proceedings against a foreign state, which were not at issue in that case. As a general matter, federal criminal subject-matter jurisdiction rests on [18 U.S.C. § 3231](#), which provides district courts with original jurisdiction “of all offenses against the laws of the United States,” without regard to the identity or status of the defendant.

In both *Verlinden* and *Amerada Hess*, the Supreme Court interpreted the language of the FSIA in the light of Congress’s intent. It is difficult to imagine that the enacting Congress silently intended to prevent U.S. law enforcement from seeking to compel foreign state-owned enterprises to produce information in connection with criminal investigations, or to prevent prosecutors from bringing criminal charges against SOEs, without explicitly debating and codifying this choice. It is even more difficult to imagine that Congress would have deprived U.S. courts of jurisdiction over criminal proceedings initiated by governmental authorities while opening those same courts to civil litigation initiated by private parties in commercial disputes.

When the Department of Justice initiates criminal proceedings, courts generally assume (correctly or not) that the executive branch has determined the defendant is not entitled to immunity, and that the proceedings are consistent with U.S. foreign relations interests. The FSIA was not intended to affect the government’s ability to pursue criminal proceedings. The statute simply does not address the exercise of prosecutorial authority or how the restrictive theory applies in the context of criminal proceedings, which serve a different function than private civil actions. One should not read a blanket prohibition on criminal proceedings, including against foreign state-owned enterprises, into this statutory silence.

Finding a Workable Approach

If the FSIA does not preclude criminal proceedings against foreign states and their agencies or instrumentalities, then courts will need to determine how to make decisions regarding the scope of immunity for these entities. As in the case of foreign official immunity, they will need to apply a federal common law of foreign state immunity in the criminal context. This is easier said than done.

Available sources for crafting this body of federal common law include customary international law, executive branch interpretations, prior judicial practice, and relevant analogous statutes. At a minimum, it seems clear that a foreign entity’s commercial acts are subject to criminal jurisdiction, limited by applicable domestic constraints (such as due process). If the answer to the immunity question turns on criteria that the judiciary is competent to ascertain—such as whether the entity’s conduct is properly viewed as commercial rather than governmental—then the court could accord significant weight to the executive branch’s views, while also considering relevant domestic judicial practice and applicable norms of customary international law.

If Congress were to revisit the FSIA, there are several actions it could take in addition to clarifying that the FSIA does not confer blanket immunity on foreign SOEs from actions that

are not civil in nature. First, Congress could further subdivide the definition of “foreign state” in [§ 1603\(b\)\(2\)](#) to differentiate more clearly between “organs” of a foreign state, on the one hand, and state-owned enterprises, on the other. It could also remove state-owned enterprises from the scope of § 1603 altogether. If it chose this route, it could insert supplemental language elsewhere in Title 28 to ensure that the long-arm provisions codified as part of the FSIA continue to apply to SOEs, and that SOEs can invoke immunity defenses where appropriate if they are engaged in the exercise of sovereign authority. Second, Congress could draft a statutory framework for criminal and regulatory proceedings against foreign state-owned agencies and instrumentalities that takes into account the strong U.S. interest in being able to investigate and prosecute a range of activity with harmful effects in the United States. Third, Congress could make clear that criminal or regulatory proceedings against foreign state agencies or instrumentalities can only be initiated by the Department of Justice, and not by any individual state’s Attorney General. Fourth, it could clarify the service and personal jurisdiction provisions that apply to foreign SOEs in the criminal context, including by endorsing the use of [Federal Rule of Criminal Procedure 4](#).

Finally, Congress should explicitly encourage the Department of Justice to coordinate more closely with the Department of State when it brings criminal actions against individuals or entities that are closely tied to foreign states. This would enable Congress to better perform its oversight and coordination functions in an area situated at the intersection of economic policy, foreign relations, national security, and law enforcement.