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# International Law: Prosecuting Foreign States

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# International Law

## *Prosecuting Foreign States*

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### *Introduction*

This chapter summarizes the first comprehensive analysis of—and answer to—questions about foreign sovereign immunity from criminal jurisdiction in U.S. courts. In doing so, it upends the widespread but misleading perception that the Foreign Sovereign Immunities Act (FSIA) provides the sole basis for exercising jurisdiction over foreign states in every context. The better view of current law is that the FSIA neither authorizes nor prohibits criminal proceedings. Absent further legislation, claims to immunity from such proceedings will remain a matter of common law rooted in historical practice and judicial decisions, informed by Congress's statutory choices in the civil context.[2] Although foreign states themselves are not generally subject to prosecution in domestic courts, there is no categorical bar to criminal proceedings against foreign state-owned enterprises in either domestic or international law.

### *Foreign State Immunity and U.S. Law*

An analysis of foreign sovereign immunity under U.S. law begins, but does not end, with the FSIA. Some have seized upon the fact that the FSIA's text "does not explicitly limit its grant of immunity to civil cases"[3] to argue that it also shields foreign states and state-owned entities from criminal jurisdiction. However, to

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[1] Excerpted and adapted from Chimène I. Keitner, *Prosecuting Foreign States*, 61 VA. J. INT'L L. 221 (2021).

[2] For additional historical background, see Chimène I. Keitner, *Between Law and Diplomacy: The Conundrum of Common-Law Immunity*, 54 GA. L. REV. 217 (2019) (chronicling nineteenth- and early twentieth-century practice); Chimène I. Keitner, *The Forgotten History of Foreign Official Immunity*, 87 N.Y.U. L. REV. 704 (2012) (chronicling late eighteenth-century practice).

[3] RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 451, reporters' note 4 (2018).

date, "no reported court decision has dismissed an indictment or otherwise suppressed a criminal prosecution based on immunity conferred by the FSIA."[4]

The FSIA codifies the restrictive theory of foreign sovereign immunity, which permits one state to exercise jurisdiction over another state regarding the defendant's commercial activities. Congress enacted the FSIA to facilitate and circumscribe the exercise of civil jurisdiction over foreign states. Congressman Hamilton Fish, Jr., who was a member of the House Judiciary Committee in 1976, recounted that the FSIA was viewed "[f]irst and foremost . . . as a Federal long-arm statute allowing both the Federal and State courts to assume in personam jurisdiction over foreign entities for nongovernmental actions."[5] He explained that "[t]he intent was to depoliticize commercial and routine legal disputes involving foreign states" because "when a nation chooses to enter the marketplace, it should be placed on the same footing as any other party with respect to legal rights and liabilities."[6]

Congress codified the restrictive theory in Title 28, Part IV of the U.S. Code, which contains rules governing 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.[7] The absence of the word "civil" before the word "jurisdiction" has prompted some parties to argue that the FSIA precludes *any* exercise of jurisdiction over foreign states by U.S. courts unless it falls within an explicitly enumerated exception. The absence of this qualification has not been explained.[8] The most likely explanation is that, because

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[4] *Id.*

[5] *Foreign Sovereign Immunities Act: Hearing on H.R. 1149, H.R. 1689, and H.R. 1888 Before the Subcomm. on Admin. L. & Governmental Rels. of the H. Comm. on the Judiciary*, 100th Cong., 2d sess. (1987).

[6] *Id.*

[7] 28 U.S.C. § 1604 (emphasis added).

[8] Some other countries enacted foreign sovereign immunity statutes that explicitly exclude criminal proceedings from the scope of the statute, reinforcing the idea that the codification movement in the 1970s and 1980s focused on civil proceedings against foreign states and their instrumentalities. *See, e.g.*, State Immunity Act 1978, ch. 33, § 16(4) (UK); State Immunity Act, R.S.C. 1985, ch. S-18, § 18 (Can.); *cf.* G.A. Res. 59/38, at 2 (Dec. 2, 2004) (U.N.) (noting the "general

Congress was focused on issues raised by cross-border commercial disputes, it did not consider criminal proceedings at all. The same is true of bankruptcy proceedings, which the Ninth Circuit has held are not precluded by the FSIA despite § 1604's seemingly comprehensive language.[9]

The core exceptions to the FSIA's grant of jurisdictional immunity are codified in § 1605, which provides that "[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case" that satisfies specified criteria.[10] Consistent with Congress's intent to codify the restrictive theory, these criteria include actions based upon "a commercial activity carried on in the United States by the foreign state," "an act performed in the United States in connection with a commercial activity of the foreign state elsewhere," or "an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States."[11]

The language of the FSIA sounds in civil, rather than criminal, procedure. Under the statutory framework created by the FSIA, § 1330(a) gives the federal district courts original subject-matter jurisdiction over any nonjury action against a foreign state where a statutory exception to immunity applies.[12] Section 1330(b) grants 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.[13] In this respect, the FSIA offers civil claimants one-stop shopping for both personal and subject-matter jurisdiction.

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understanding" that the U.N. Convention on Jurisdictional Immunities of States "does not cover criminal proceedings").

[9] At least one statutory provision outside the FSIA denies immunity to foreign states in certain circumstances: § 106 of the bankruptcy code. *See* Tuli v. Republic of Iraq, 172 F.3d 707 (9th Cir. 1999) (indicating that § 106 abrogates the sovereign immunity of "a governmental unit" in bankruptcy proceedings, and that § 101(27) defines "a governmental unit" to include a foreign state or "other foreign or domestic government").

[10] 28 U.S.C. § 1605.

[11] *Id.* § 1605(a)(2).

[12] *Id.* § 1330(a).

[13] *Id.* § 1330(b).

In 1983, the Supreme Court in *Verlinden B.V. v. Central Bank of Nigeria* 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."[14] The Court's frequently cited statement in *Argentine Republic v. Amerada Hess Shipping Corp.* 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.[15] In that case, the Court considered whether the Alien Tort Statute (ATS) provides an additional basis for exercising jurisdiction over civil actions against foreign states.[16] The Court answered no, citing *Verlinden* for the proposition that Congress intended the FSIA to provide the "sole basis" for obtaining jurisdiction over a foreign state in a court in the United States.[17] However, the Court did not consider or make any findings about whether a different statute could provide courts with jurisdiction over criminal proceedings against a foreign state.

Both *Verlinden* and *Amerada Hess* attribute a particular intent to Congress when it enacted the FSIA—namely, "(1) to endorse and codify the restrictive theory of sovereign immunity, and (2) to transfer primary responsibility for deciding claims of foreign states to immunity from the State Department to the courts."[18] They do not rely solely on the words of the FSIA, but rather interpret those words 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. 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.

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[14] 461 U.S. 480, 488 (1983) (emphasis added).
[15] 488 U.S. 428, 434 (1989).
[16] *Id.*
[17] *Id.*
[18] Samantar v. Yousuf, 560 U.S. 305, 313 (2010) (internal quotation marks omitted).

There are many contexts in which a foreign bank or other corporation might find itself on the receiving end of criminal process in a U.S. court. The question of immunity does not arise unless the court would otherwise be able to exercise jurisdiction over the foreign entity. Federal criminal subject-matter jurisdiction rests on 18 U.S.C. § 3231, which provides the district courts with original jurisdiction "of all offenses against the laws of the United States,"[19] without regard to the identity or status of the defendant. Increased prosecutorial attention to cyber espionage, trade-secret theft, and foreign corrupt practices could set criminal investigations of foreign entities on a collision course with potential claims of jurisdictional immunity.

*Corporate Liability in Domestic and International Law*

Corporations, though "legally deemed to be single entities, distinct and separate from all the individuals who comprise them,"[20] can act only through natural persons. Standards for imputing an agent's acts to the corporation can vary among jurisdictions, but it is generally accepted that individuals' actions can be imputed to the corporation for purposes of liability.

Attribution questions regarding state-owned enterprises (SOEs) can involve an additional layer. Although domestic law generally governs the activities of corporations (including foreign corporations) without regard to the identity of their shareholders, certain international conduct-regulating rules apply only to state actors. Further, international law has developed rules governing when and whether a natural or legal person's conduct is attributable to a state. Questions can thus arise about whether a particular corporation should be treated as a state-owned enterprise for various purposes, as well as whether that corporation's activities are attributable to a foreign state for purposes of liability. The question of whether corporations themselves can be held criminally liable also arises in international law, although domestic law generally provides the answer.

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[19] 18 U.S.C. § 3231.

[20] Celia Wells, *Corporate Criminal Responsibility*, *in* RESEARCH HANDBOOK ON CORPORATE LEGAL RESPONSIBILITY 147 (Stephen Tully ed. 2005).

Even though holding a foreign state criminally responsible in a domestic court is difficult to imagine, 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."[21] 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."[22] Depending on the circumstances, enforcing such obligations could create opportunities for imposing punitive measures under domestic jurisdiction.

The task of characterizing a SOE's activity as either commercial or governmental is not as straightforward as it might at first appear. Professor Anne van Aaken has noted that, with the rise of sovereign wealth funds (SWFs) and return to SOEs in the early twenty-first century, "the boundaries between state activities and commercial activities [have] become blurred."[23] She observes that, as a general matter, "the legal form of sovereign or public authority is the first test to be treated like a state, [and] the second test is always whether a public function is exercised."[24] As van Aaken emphasizes, this "opens a Pandora's box to an even bigger question, namely what public functions are."[25] This problem is especially acute with respect to corporate entities associated with planned economies that do not differentiate clearly between governmental and market activities.

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[21] Government Response to Lithuanian Shipping Company's Motion to Quash Grand Jury Subpoena Dated June 10, 2010, at 12, *In re* Grand Jury Proceeding Related to M/V Deltuva, No. 10-223 (D.P.R.).

[22] CAMILLA WEE, INT'L COMM'N OF JURISTS, REGULATING THE HUMAN RIGHTS IMPACT OF STATE-OWNED ENTERPRISES: TENDENCIES OF CORPORATE ACCOUNTABILITY AND STATE RESPONSIBILITY 16 (2008), https://tinyurl.com/y5z3d25m.

[23] Anne van Aaken, *Blurring Boundaries Between Sovereign Acts and Commercial Activities: A Functional View on Regulatory Immunity and Immunity from Execution* 2 (Univ. of St. Gallen L. Sch., Working Paper No. 2013-17).

[24] *Id.* at 15.

[25] *Id.* at 15–16.

The FSIA defines "commercial activity" to mean "either a regular course of commercial conduct or a particular commercial transaction or act" and indicates that the commercial character of an activity shall be determined by reference to its "nature," rather than by reference to its "purpose."[26] If a central goal of the restrictive theory is to put foreign states on the same footing as private actors when they choose to enter the marketplace, then the idea of "commercial" activity subject to domestic jurisdiction (in Latin, *acta jure gestionis*) can be defined as the type of activity engaged in by persons that are not sovereign states.

*Judicial Approaches to Immunity from Criminal Proceedings*

The interaction between evolving notions of corporate criminal responsibility in domestic law and state responsibility in international law suggests the need for clearer immunity doctrines to circumscribe the exercise of criminal jurisdiction by U.S. courts. The default position should be that foreign state-owned companies are subject to the criminal jurisdiction of U.S. courts, at least with respect to their commercial activities. More difficult questions will arise in investigations and prosecutions involving non-commercial conduct that other countries would view as entitled to jurisdictional immunity, and for which the United States might wish to assert immunity on behalf of its agencies or instrumentalities if the roles were reversed.

In addition to clarifying that the FSIA does not confer blanket immunity on foreign state-owned entities from actions that are not civil in nature, Congress could take several actions. First, Congress could, in the definition of "foreign state" in § 1603(b)(2), differentiate between state-owned enterprises and "organs" of a foreign state. Or it could remove SOEs from the scope of § 1603 altogether. If it chose this route, it could add language to ensure that the FSIA's long-arm provisions continue to apply to SOEs, and that SOEs can invoke immunity defenses when exercising sovereign authority.

Second, Congress could draft a statutory framework for criminal and regulatory proceedings against foreign state-owned agencies and instrumentalities that accounts for the strong U.S.

[26] 28 U.S.C. § 1603(d).

interest in being able to investigate and prosecute a range of activity with harmful effects in the United States.

Third, with federalism concerns in mind, it could make clear that criminal or regulatory proceedings 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 applicable to foreign state-owned companies in the criminal context, including by endorsing the use of Federal Rule of Criminal Procedure 4.

Finally, Congress should 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. Beyond encouragement, Congress could design reporting requirements for the initiation and conduct of criminal proceedings that arguably fall within a grey zone of non-governmental activity under the restrictive theory. This reporting 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.

### *Conclusion*

The FSIA has generally served the U.S. interest in de-politicizing immunity determinations, but it left important issues unaddressed that Congress should now resolve. Most importantly, Congress—and, pending new legislation, the courts—should clarify that the FSIA does not deprive U.S. courts of the ability to exercise criminal jurisdiction over defendants or subpoena targets that happen to be owned by foreign states.

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