ARTICLE

Prosecuting Foreign States

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In recent years, the Department of Justice has shown increased interest in prosecuting entities associated with foreign states for activities including cybercrime, economic espionage, and sanctions violations. It has also sought third-party evidence from foreign state-owned entities in connection with high-profile criminal investigations, including the Mueller investigation. These actions raise fundamental questions about the immunities of foreign states and state-owned entities from U.S. criminal proceedings. This Article provides the first comprehensive analysis of—and answer to—these basic questions. In doing so, it upends the widespread but misleading perception that the Foreign Sovereign Immunities Act of 1976 (FSIA) provides the sole basis for exercising jurisdiction over foreign states in every context. The better view is that the FSIA neither authorizes nor prohibits criminal proceedings. Until Congress enacts appropriate legislation, claims to immunity from such proceedings will remain a matter of common law.

The common law of foreign state immunity from criminal proceedings warrants legislative attention. First, Congress can and should make explicit that the FSIA only governs civil proceedings. Second, it should clarify that state-owned enterprises are not entitled to blanket immunity from criminal proceedings simply because they are majority-owned by foreign states. Misapplying the FSIA's expansive definition of "foreign state" to preclude criminal proceedings can impede the effective investigation and prosecution of foreign corporations whose activities would otherwise be subject to U.S. jurisdiction, and that international law does not necessarily view as entitled to immunity. 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.

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I. INTRODUCTION

On February 16, 2018, a grand jury in the District of Columbia returned an indictment against three Russian companies for a scheme to interfere in the U.S. political system.[1] The defendants included the Internet Research Agency LLC, a Russian organization that Special Counsel Robert Mueller described as being "engaged in operations to interfere with elections and political processes."[2] Investigators determined that the companies were "tools of the Russian state, acting at the direction of the Kremlin."[3] In September 2018, four state-owned Chinese companies were arraigned on an indictment charging each of them with "conspiring to commit economic espionage and related crimes."[4] Although the companies' precise relationship to the People's Republic of China remains murky, the companies have argued that they are immune from prosecution because they are "instrumentalities" of a foreign state.[5] The Chinese companies' argument echoes that raised by Halkbank, a Turkish state-owned bank charged in 2019 with offenses related to the bank's participation in a "multibillion-dollar scheme to evade U.S. sanctions on Iran."[6] The Department of Justice had previously charged nine individual defendants, including "bank employees, the former Turkish Minister of the Economy, and other participants in the scheme."[7] At the time of writing, the district court for the Southern District of New York had denied Halkbank's claim

1. Press Release, U.S. Dep't of Just., Grand Jury Indicts Thirteen Russian Individuals and Three Russian Companies for Scheme to Interfere in the United States Political System (Feb. 16, 2018), https://tinyurl.com/y2awjhsd.

2. Indictment at 2, United States v. Internet Rsch. Agency, No. 1:18-cr-00032 (D.D.C. Feb. 16, 2018).

3. Katie Benner & Sharon LaFraniere, *Justice Dept. Moves to Drop Charges Against Russian Firms Filed by Mueller*, N.Y. TIMES (May 7, 2020), https://tinyurl.com/voxvp87 (reporting that prosecutors decided to drop charges against two defendant shell companies, Concord Management and Concord Consulting, because "they were exploiting the case to gain access to delicate information that Russia could weaponized").

4. Press Release, U.S. Dep't of Just., Four Chinese State-Owned Industrial Companies Arraigned in Economic Espionage Conspiracy (Sept. 7, 2018), https://tinyurl.com/y72cv39b.

5. The Ninth Circuit heard oral arguments on this issue on October 15, 2020. *See* Oral Argument, United States v. Pangang Grp. Co., No. 19-10306 (9th Cir. Oct. 15, 2020), https://tinyurl.com/y5mctrfm.

6. Press Release, U.S. Dep't of Just., Turkish Bank Charged in Manhattan Federal Court for Its Participation in a Multibillion-Dollar Iranian Sanctions Evasion Scheme (Oct. 15, 2019), https://tinyurl.com/yy6pjq8g.

7. *Id.* One defendant pled guilty in 2017; a second defendant was convicted in a jury trial, while the other individual defendants "are fugitives." *Id.*; *see also* United States v. Atilla, 966 F.3d 118, 121-22 (2d Cir. 2020) (affirming denial of defendant's motion for judgment of acquittal).

to immunity, and the Second Circuit had agreed to expedite Halkbank's interlocutory appeal of that decision.[8]

The doctrine of foreign sovereign immunity has a long historical pedigree.[9] In 1812, Chief Justice John Marshall famously invoked this principle to find the *Schooner Exchange*, a French ship of war, immune from judicial process while it was in a Philadelphia port.[10] Two centuries later, Justice Sonia Sotomayor's opinion for the Supreme Court in *Rubin v. Republic of Iran* held that the Persepolis Collection of ancient clay tablets from Iran was immune from attachment and execution while on loan to the University of Chicago.[11] As these cases show, jurisdictional immunities can prevent U.S. state and federal courts from adjudicating disputes they would otherwise have authority to resolve, and from issuing legal process they would otherwise be competent to compel. Yet while foreign sovereign immunity constitutes a bedrock doctrine for defining the scope of domestic jurisdiction, its contours remain surprisingly contested and even misunderstood.

Congress enacted the Foreign Sovereign Immunities Act of 1976 (FSIA) to separate the exercise of domestic civil jurisdiction from the conduct of diplomacy.[12] The State Department, which had been making case-by-case immunity determinations in the preceding decades, urged the Act's passage "to provide objective standards to be interpreted by the courts" on whether to recognize a foreign state's claim of immunity.[13] The FSIA codified the

8. United States v. Halkbank, No. 20-3499 (2d Cir. Dec. 23, 2020) (granting motion to stay proceedings in the district court and indicating that the appeal will be heard on an expedited basis); United States v. Halkbank, No. 15 Cr. 867, 2020 WL 5849512 (S.D.N.Y. Oct. 1, 2020) (denying motion to dismiss on the grounds of sovereign immunity, extraterritoriality, and lack of personal jurisdiction). On October 29, 2020, *The New York Times* reported that Turkish President Recep Erdogan had repeatedly pressed President Donald Trump to quash the investigation, and that Attorney General William Barr advocated a settlement under which the bank would pay a fine and acknowledge "some wrongdoing" if the Justice Department agreed "to end investigations and criminal cases involving Turkish and bank officials who were allied with Mr. Erdogan and suspected of participating in the sanctions-busting scheme." Eric Lipton & Benjamin Weiser, *Turkish Bank Case Showed Erdogan's Influence with Trump*, N.Y. TIMES (Oct. 29, 2020), https://tinyurl.com/y2rffbbn. On December 23, 2020, the Second Circuit granted appellants' request for a stay and directed the clerk to set an expedited schedule for the appeal. *In re* Turkiye Halk Bankasi, A.S., No. 20-3008 (2d Cir. Dec. 23, 2020), ECF No. 51.

9. 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).

10. The Schooner Exch. v. McFaddon, 11 U.S. (7 Cranch) 116 (1812).

11. Rubin v. Islamic Republic of Iran, 138 S. Ct. 816 (2018).

12. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1332, 1391(f), 1441(d), 1602-1611.

13. Barry E. Carter, *Immunity for Foreign Officials: Possibly Too Much and Confusing as Well*, 99 AM. SOC'Y INT'L L. PROC. 230, 233 (2005).

so-called "restrictive" theory of immunity.[14] Instead of providing foreign states with absolute immunity from the exercise of domestic jurisdiction, the restrictive theory allows one state to exercise jurisdiction over another state's private or commercial activities, but not its public acts.[15] The FSIA also extends this rule to suits against foreign state-owned enterprises.[16]

As the Supreme Court has emphasized, the FSIA was adopted "to assure litigants that decisions regarding claims against states and their enterprises 'are made on purely legal grounds.'"[17] Yet, the FSIA itself has become politicized in recent years, most recently by congressional proposals to strip China of sovereign immunity from civil suits for failing to contain the novel coronavirus.[18] Meanwhile, defendants and third-party witnesses in criminal proceedings have argued that the FSIA prevents the United States from exercising criminal jurisdiction over foreign states and state-owned entities under any circumstances.[19] If they are correct, then this would significantly curtail U.S. prosecutorial authority over conduct by foreign companies that violates U.S. law.

Both Congress and the Supreme Court are in a position to resolve these ambiguities, but neither has done so to date. In early 2019, the Court declined to weigh in on a dispute between U.S. prosecutors and an anonymous foreign state-owned company that arose out of Special Counsel Robert Mueller's investigation of potential links between the Russian government and the 2016 Trump campaign.[20] The drama and speculation surrounding the dispute reached a fever pitch when an entire floor of the D.C. Circuit courthouse was sealed off for oral arguments about a subpoena issued to the company by a grand jury.[21] The crux of the legal dispute was whether the United States can exercise jurisdiction over a foreign state-

14. Saudi Arabia v. Nelson, 507 U.S. 349, 363 (1993); Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 612 (1992).

15. *See id.*

16. 28 U.S.C. § 1603(b)(2).

17. Samantar v. Yousuf, 560 U.S. 305, 323 (2010) (quoting H.R. REP. NO. 94-1487, at 7 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6606).

18. *See also* Civil Justice for Victims of COVID Act, S. 4212, 116th Cong. (2020). *See generally The Foreign Sovereign Immunities Act, Coronavirus, and Addressing China's Culpability: Hearing Before the S. Comm. on the Judiciary*, 116th Cong. (2020) (statement of Chimène Keitner, Alfred and Hanna Fromm Professor of International Law, UC Hastings Law San Francisco), https://tinyurl.com/y5gph9sx.

19. *See, e.g.*, Chimène Keitner, *Deciphering the Mystery Subpoena Case: Corporate Claims to Foreign Sovereign Immunity from U.S. Criminal Proceedings*, JUSTSECURITY (Dec. 31, 2018), https://tinyurl.com/yamuy7ut (describing legal issues in this case); Ingrid Wuerth, *The Mystery Grand Jury Case and Criminal Prosecutions of State-Owned Enterprises*, LAWFARE (Dec. 21, 2018), https://tinyurl.com/y4rs26u3 (noting that criminal prosecutions of foreign-state-owned enterprises is "a topic of growing significance").

20. *In re* Grand Jury Subpoena, 139 S. Ct. 1378 (2019) (denying petition for writ of certiorari).

21. Katelyn Polantz et al., *Mystery Mueller Mayhem at a Washington Court*, CNN (Dec. 15, 2018), https://tinyurl.com/ya9qgp32.

owned company by compelling compliance with a grand jury subpoena.[22] Meanwhile, recent Supreme Court decisions interpreting the FSIA have involved potential immunity from post-judgment discovery,[23] the commercial activity exception to immunity,[24] pleading standards for expropriation claims,[25] immunity from attachment of property,[26] procedures for serving process on foreign states,[27] and the proper application of the state sponsors of terrorism exception, which allows claims for punitive damages.[28] The flow of cases on related questions shows no sign of abating.[29]

This Article provides the first comprehensive analysis of—and answer to—questions about foreign state immunity from criminal jurisdiction in U.S. courts.[30] In doing so, it upends the widespread but misleading perception that the FSIA provides the sole basis for exercising jurisdiction over foreign states in every context.[31] 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.[32] 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.

The analysis proceeds as follows. Part II sets out the basic tenets of foreign sovereign immunity. It then describes Congress's enactment of the

22. *See In re* Grand Jury Subpoena, 912 F.3d 623 (D.C. Cir. 2019).

23. Republic of Argentina v. NML Cap., Ltd., 573 U.S. 134 (2014).

24. OBB Personenverkehr v. Sachs, 577 U.S. 27 (2015).

25. Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co., 137 S. Ct. 1312 (2017).

26. Rubin v. Islamic Republic of Iran, 138 S. Ct. 816 (2018).

27. Republic of Sudan v. Harrison, 139 S. Ct. 1048 (2019).

28. Opati v. Republic of Sudan, 140 S. Ct. 1601 (2020).

29. *E.g.*, Federal Republic of Germany v. Philipp, No. 19-351 (Feb. 3, 2021) (involving the FSIA's expropriation exception).

30. There appears to be only one previous sustained scholarly analysis of criminal proceedings and the FSIA. *See* John Balzano, *Crimes and the Foreign Sovereign Immunities Act: New Perspectives on an Old Debate*, 38 N.C. J. INT'L L. & COM. REGUL. 43 (2012).

31. There is at least one statutory provision outside the FSIA that denies immunity to foreign states in certain circumstances: § 106 of the bankruptcy code, as amended in 1994. *See* Tuli v. Republic of Iraq, 172 F.3d 707 (9th Cir. 1999). The FSIA is thus not quite as comprehensive as has often been assumed.

32. *Cf.* Samantar v. Yousuf, 560 U.S. 305 (2010) (finding that the common law and other specialized statutes, not the FSIA, govern claims to foreign official immunity in U.S. courts unless the foreign state is the real party in interest); First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba, 462 U.S. 611, 620-21 (1983) (describing federal common law in that case as "necessarily informed both by international law principles and by articulated congressional policies"); Ingrid Wuerth, *The Future of the Federal Common Law of Foreign Relations*, 106 GEO. L.J. 1825, 1850 (2018) (noting that "contemporary federal common law, especially that governing immunity, allows courts to give effect to very closely related statutory frameworks").

FSIA, and notes some additional issues raised by criminal proceedings against foreign companies. Part III turns to the treatment of foreign state-owned enterprises in U.S. law. It then explores how concepts of corporate liability and state responsibility translate in the domestic criminal context. Part IV canvasses prior U.S. judicial analyses of foreign sovereign immunity from criminal proceedings against the backdrop provided in Parts II and III. Part V sketches a framework for approaching basic unresolved questions relating to criminal jurisdiction over foreign states and provides recommendations to Congress.

First and foremost, Congress can and should make explicit that the FSIA only governs civil proceedings. Second, it should clarify that foreign state-owned enterprises are not entitled to blanket immunity from criminal proceedings simply because they are majority-owned by foreign states. Misapplying the FSIA's expansive definition of "foreign state" to preclude criminal proceedings can impede the effective investigation and prosecution of foreign corporations whose activities would otherwise be subject to U.S. jurisdiction, and that international law does not necessarily view as entitled to immunity. 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.

II. 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. This Part explores the background assumptions that informed Congress's codification of aspects of foreign sovereign immunity in the FSIA. As the Supreme Court observed in *Samantar v. Yousuf*, the enacting Congress was responding to a "particular problem"—namely, inconsistency and political pressure associated with case-by-case immunity determinations by the State Department.[33] This led Congress to establish what the Court has characterized as "a comprehensive solution for suits against [foreign] states."[34] Some have seized upon the fact that the FSIA's text "does not explicitly limit its grant of immunity to civil cases"[35] to argue that it also shields foreign states and state-owned entities from criminal jurisdiction. However, to date, "no reported court decision has dismissed an indictment or otherwise suppressed a criminal prosecution based on immunity conferred by the FSIA."[36]

33. *Samantar*, 560 U.S. at 323.

34. *Id.*

35. RESTATEMENT (FOURTH) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 451 reporters' note 4 (AM. L. INST. 2018) [hereinafter FOURTH RESTATEMENT].

36. *Id.*

Part II.A traces the evolution of foreign sovereign immunity under U.S. law. Part II.B examines the codification of foreign state immunity in the FSIA. Part II.C highlights contexts in which foreign corporations might find themselves subject to the criminal jurisdiction of U.S. courts. This background sets the stage for an analysis of claims to jurisdictional immunity from criminal proceedings by foreign state-owned entities.

A. Foreign Sovereign Immunity Before the FSIA

The modern state system is based on the idea that each nation-state exercises plenary jurisdiction over its own territory and has equal sovereign status in the international system.[37] As a practical matter, the conduct of international relations typically necessitates interaction among states and their agents. The doctrine of foreign sovereign immunity facilitates this interaction by shielding foreign states and their agents from the exercise of domestic jurisdiction. As Lady Hazel Fox and Professor Philippa Webb emphasize, the law of state immunity enables states "to carry out their public functions effectively."[38] These prudential restraints on the exercise of states' domestic jurisdiction have crystallized into rules of international law.[39]

Although foreign sovereign immunity is rooted in international law, as Fox and Webb note, the domestic law of the forum state "determines the precise extent and manner of application" of these rules.[40] Notably, as they explain, "modern international law does not require the courts of one State to refrain from deciding a case merely because a foreign State is an unwilling defendant."[41] Rather, the circumstances of each case will determine whether or not the exercise of jurisdiction is permitted by domestic law and consistent with international law.

A plea of foreign state immunity does not absolve a defendant from legal responsibility for wrongdoing, but it can create obstacles to seeking a remedy. As presently understood, foreign state immunity operates as a jurisdictional defense, not a defense on the merits.[42] Immunity doctrines

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37. *See, e.g.*, Robert B. von Mehren, *The Foreign Sovereign Immunities Act of 1976*, 17 COLUM. J. TRANSNAT'L L. 33, 34 (1978).

38. HAZEL FOX & PHILIPPA WEBB, THE LAW OF STATE IMMUNITY 1 (rev. 3d ed. 2013).

39. *Id.* at 13. U.S. courts have been outliers in characterizing foreign sovereign immunity as a matter of "comity." The Santissima Trinidad, 20 U.S. 283, 353 (1822), discussed in INTERNATIONAL LAW IN THE U.S. SUPREME COURT: CONTINUITY AND CHANGE 40 (David L. Sloss et al. eds., 2011); *see also* Chimène I. Keitner, Germany v. Italy *and the Limits of Horizontal Enforcement: Some Reflections from a United States Perspective*, 11 J. INT'L CRIM. JUST. 167, 173 (2013) (comparing the International Court of Justice's approach to state immunity with the U.S. approach).

40. FOX & WEBB, *supra* note 38.

41. *Id.*

42. As a procedural matter, adverse immunity determinations are generally subject to interlocutory appeal in U.S. courts. *See* Carlos M. Vázquez, Altmann v. Austria *and the Retroactivity of the Foreign Sovereign*

proscribe coercive proceedings against certain categories of foreign defendants in certain types of disputes. By preventing a domestic court from reaching the merits of a dispute, this prohibition—like other procedural hurdles—can effectively deprive the claimant of a remedy, unless there is an alternate means of seeking redress, such as diplomacy or international adjudication.[43]

The remedial gap created by immunity doctrines has both practical and conceptual justifications. At a basic level, one state's exercise (or purported exercise) of jurisdiction over another runs counter to the foundational idea that states are sovereign equals.[44] Subjecting a foreign country to the forum's parochial procedures can create legitimacy deficits when the defendant challenges the neutrality of the forum country's courts. It can also prove highly impractical, especially if the foreign country is recalcitrant. As a result, domestic courts have not traditionally been the forum of choice for transnational dispute resolution. Rather, states tend to view dispute resolution between sovereign entities as a matter for diplomacy or consent-based international adjudication.

International dispute resolution thus remains predominantly state-to-state, whether in the form of diplomatic negotiations or consent-based adjudication or arbitration.[45] The absolute theory of foreign state immunity operates as a forum selection doctrine by precluding domestic adjudication of claims against foreign states, absent a waiver of immunity. The constraints imposed by the absolute theory become problematic, however, when a state seeks to enter the marketplace and engage in transnational commerce. In conceptual terms, it becomes more difficult for states to argue that they should be treated differently from private enterprises when they are engaged in substantively similar activities. In practical terms, the limited capacity of diplomacy and international adjudication to address the full range of issues raised by the increased transnational movement of goods and people creates

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Immunities Act, 3 J. INT'L CRIM. JUST. 207, 213 (2005) (noting the U.S. Supreme Court's view of immunity under the FSIA as "a present protection from the burdens of suit").

43. *See, e.g.*, Lorna McGregor, *Torture and State Immunity: Deflecting Impunity, Distorting Sovereignty*, 18 EUR. J. INT'L L. 903 (2007).

44. *See* von Mehren, *supra* note 37, at 35; *see also* Jurisdictional Immunities of the State (Ger. v. It.: Greece intervening), Judgment, 2012 I.C.J. 99, ¶ 57 (Feb. 3) (indicating that the rule of state immunity "derives from the principle of sovereign equality of States" and that "[t]his principle has to be viewed together with the principle that each State possesses sovereignty over its own territory").

45. This is so, even though an increasing number of international tribunals and human rights bodies have become open to direct petitions from individuals and other non-state actors. *See, e.g.*, Francisco Orrego Vicuña, *Individuals and Non-State Entities Before International Courts and Tribunals*, 5 MAX PLANCK Y.B. U.N. L. 53, 59 (2001) ("Increasingly the possibility for the individual to claim in his own right has been recognized and diplomatic protection is acquiring a residual role rather than the principal one it had in the past."). This is certainly the case with the rise of investor-state arbitration, which is grounded in state consent, and which enables aggrieved investors to bring certain claims directly. *See id.*

demands for additional avenues of recourse for aggrieved parties. These demands put pressure on a system of absolute immunity, while at the same time creating more occasions for foreign states to invoke immunity as a defense to the exercise of domestic jurisdiction.

In contrast to the absolute theory, the restrictive theory of foreign sovereign immunity permits one state to exercise jurisdiction over another state with respect to the defendant's commercial activities. The restrictive theory gained traction in the early decades of the twentieth century, particularly in disputes involving a foreign state's agencies or instrumentalities, rather than the foreign state itself.[46] Professor David Bederman recounts:

> The rule in United States courts, as elsewhere in the period from 1920 to 1952, was that agencies or instrumentalities of foreign sovereigns that were engaged in commercial activities, were amenable to suit for causes of action arising in connection to those activities. Indeed, a number of cases from that period held that to the extent that agencies or instrumentalities of foreign sovereigns were separately constituted legal entities, they were not covered by foreign sovereign immunity protections at all.[47]

In other words, the United States has long rejected the idea of absolute immunity, especially for separate legal entities.[48]

Other countries have also embraced the restrictive theory. As Lord Denning observed in a foundational 1977 opinion for the U.K. Court of Appeals, "[i]n the last 50 years there has been a complete transformation in the functions of a sovereign state. Nearly every country now engages in commercial activities."[49] The restrictive theory "gives immunity to acts of a governmental nature, described in Latin as *jure imperii*, but no immunity to acts of a commercial nature, *jure gestionis*."[50] As Lord Shaw explained in the same case, "[s]o long as sovereign institutions confined themselves to what may in general terms be described as the basic functions of government[,] a total personal or individual immunity from suit was unobjectionable since the area in which it operated had its own inherent limits."[51] However, he continued, to "apply a universal doctrine of sovereign immunity" to a state's

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46. *See* Aff. of David J. Bederman ¶ 11, Abrams v. Société Nationale des Chemins de per Francais, No. 01-9442, 2001 WL 34764368 (E.D.N.Y. Apr. 13, 2001).

47. *Id.*

48. *See also infra* notes 145-148 and accompanying text.

49. Trendtex Trading Corp. v. Cent. Bank of Nigeria [1977] 2 W.L.R. 356, 366 (UK) (speech of Lord Denning).

50. *Id.*

51. *Id.* at 385 (speech of Lord Shaw).

commercial activities "is more likely to disserve than to conserve the comity of nations on the preservation of which the doctrine is founded."[52]

During the second half of the twentieth century, the contours of the restrictive theory took shape as a matter of international law.[53] Customary international law is formed by near-uniform state practice accompanied by a sense of legal obligation that international lawyers call *opinio juris*.[54] In a process typical of customary international law formation, new understandings of immunity at the international level became embedded in domestic legal practice, and vice versa.

The United States was an early proponent of the restrictive theory. The State Department formally announced its adoption of the theory in a now-famous 1952 letter from Acting State Department Legal Adviser Jack Tate to Acting Attorney General Philip Perlman.[55] Shortly thereafter, William Bishop wrote in the *American Journal of International Law* that "one could hardly maintain that customary international law today requires that immunity be granted" when a foreign government "engages in commerce."[56] Customary international law continues to reflect the restrictive theory.[57]

The Tate Letter announced the official U.S. adoption of the restrictive theory, but it did not offer "specific guidelines or criteria for differentiating between a sovereign's private and public acts."[58] U.S. courts therefore looked to the State Department to apply the restrictive theory in particular disputes. As a practical matter, this meant that a foreign state's first action upon being served with process in litigation was typically to petition the

52. *Id.* at 386.

53. For a study of the global trend towards adopting the restrictive theory and its implications for customary international law, see Pierre-Hugues Verdier & Erik Voeten, *How Does Customary International Law Change? The Case of State Immunity*, 59 INT'L STUD. Q. 209 (2015).

54. DAVID J. BEDERMAN & CHIMÈNE I. KEITNER, INTERNATIONAL LAW FRAMEWORKS 18 (4th ed. 2015).

55. Letter from Jack B. Tate, Acting Legal Adviser, Dep't of State, to Philip B. Perlman, Att'y Gen., Dep't of Just. (May 19, 1952), *in* 26 DEP'T OF STATE BULL. 984, 984-85 (1952).

56. William W. Bishop, Jr., *New United States Policy Limiting Sovereign Immunity*, 47 AM. J. INT'L L. 93, 95 (1953). In 1976, State Department Legal Adviser Monroe Leigh testified that although "the Soviet Union and other such countries will normally—if they think they can put it across—assert a sovereign immunity, the fact is that [even] they realize that the restrictive theory is the international law principle that is applied in the countries in which they trade." *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings on H.R. 11315 Before the Subcomm. on Admin. L. and Governmental Rels. of the H. Comm. on the Judiciary*, 94th Cong. 56 (1976) (statement of Monroe Leigh, Legal Adviser, Department of State).

57. The process of negotiating the 2004 United Nations Convention on Jurisdictional Immunities of States and their Property also reinforced and clarified certain widely shared understandings about the scope and operation of the restrictive theory, even though the treaty has not yet entered into force. G.A. Res. 59/38, annex, United Nations Convention on Jurisdictional Immunities of States and Their Property (Dec. 2, 2004) (not yet in force).

58. von Mehren, *supra* note 37, at 41.

State Department to assert immunity on its behalf. The Department developed an internal administrative procedure to handle such requests.[59] In the period between the Tate Letter and the enactment of the FSIA, U.S. courts generally deferred to the outcome of this State Department process. In the absence of a State Department determination, they endeavored—or at least purported—to apply the standards developed by the Department, to the extent these could be discerned.[60]

The Supreme Court had endorsed the practice of deferring to the State Department's views on a foreign state's immunity from civil suit in the decade preceding the Tate Letter, in two World-War-II era cases that involved seizures of foreign ships.[61] This posture of judicial deference resulted in increased pressure on the State Department by foreign states seeking immunity in U.S. courts.[62] The intensity of this pressure, coupled with the need to provide greater stability and predictability to litigants, led the Department to urge Congress to codify the restrictive theory of foreign sovereign immunity, as the next section describes.

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59. *Id.* (indicating that the Department "allowed the parties to a litigation in which the issue of sovereign immunity was presented to attend an informal hearing at the Department with an opportunity for oral argument and the submission of briefs"); *see also* J. Roderick Heller, *Litigation of Sovereign Immunity Questions*, 70 AM. SOC'Y INT'L L. PROC. 42, 46 (1976) (noting the process allowed in litigation involving sovereign immunity questions). A similar, although less formal, process has emerged when a current or former foreign official asks the State Department to provide a suggestion of immunity. *See Remarks from the Panel: Sovereign Immunity Revisited: Immunity of States and Their Officials for Atrocities or Terrorist Acts*, 113 AM. SOC'Y INT'L L. PROC. 279 (2019) (remarks of former State Department Legal Adviser John Bellinger).

60. At least one careful student of judicial opinions from this period expressed deep skepticism about whether this is what courts were actually doing, writing that: "[a]ccording to judicial theory, the State Department was supposed to prescribe the national standards against which claims were judged, but in practice each Circuit had a body of law which differed in detail from the State Department's prescriptions and which might be applied in the absence of a definitive State Department determination." Frederic Alan Weber, *The Foreign Sovereign Immunities Act of 1976: Its Origin, Meaning and Effect*, 3 YALE J. INT'L L. 1, 6 (1976); *see also id.* at 9 (citing *Republic of Mexico v. Hoffman* for the proposition that "courts must apply State Department prescriptions in resolving claims to immunity even in the absence of State Department action on a particular claim"); *id.* at 16 (observing that "[t]he restrictive theory applied by the courts, however, was not always identical to the one applied by the Department").

61. *See Ex parte* Republic of Peru, 318 U.S. 578, 588 (1943) (deferring to Executive Branch determination); Republic of Mexico v. Hoffman, 324 U.S. 30, 34 (1945) (indicating in *dicta* that courts would follow Executive Branch determinations); *see also* Nat'l City Bank of N.Y. v. Republic of China, 348 U.S. 356, 360 (1955) (indicating that the State Department's "failure or refusal to suggest such immunity has been accorded significant weight by this Court").

62. *See, e.g.*, Weber, *supra* note 60, at 117 n.282 (quoting *Immunities of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims & Governmental Rels. of the H. Comm. on the Judiciary*, 93d Cong. 34 (1973) (testimony by Secretary of State William Rogers and Attorney General Richard Kleindienst that codifying foreign sovereign immunity would "free the Department from pressures by foreign states to suggest immunity" and put the Department "in a position to assert that the question of immunity is entirely one for the courts")).

B. Codifying the Restrictive Theory in Civil Disputes

Congress enacted the FSIA to facilitate, and to 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."[63] He explained that "[t]he intent was to depoliticize commercial and routine legal disputes involving foreign states" because "[s]imply put, 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."[64]

The FSIA applies to suits filed in both state and federal courts.[65] Congress intended it to "provide the sole basis upon which foreign states (and their agencies and instrumentalities) may be *sued*."[66] If an exception to immunity applies, the FSIA "functions as a federal long-arm statute" that brings the foreign state within the personal jurisdiction of a U.S. court, assuming proper service of process.[67] Proper service plus an applicable exception also confers subject-matter jurisdiction on the federal courts.[68]

The FSIA's basic structure is straightforward, even though its provisions are codified in different sections of the U.S. Code. As Dame Rosalyn Higgins emphasized, from an international law perspective, sovereign immunity "is a derogation from the normal rule of territorial sovereignty. It is sovereign immunity which is the exception to jurisdiction and not jurisdiction which is the exception to the basic rule of immunity."[69] The FSIA turns this analytic framework on its head by creating a presumption of foreign state immunity from domestic civil jurisdiction. Congress codified this provision in Title 28, Part IV of the U.S. Code, which contains rules governing jurisdiction and venue. Section 1604 of Title 28 provides that "a foreign state shall be immune from the jurisdiction of the courts of the

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63. *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. 2 (1987) [hereinafter *FSIA Hearing*].

64. *Id.*

65. 28 U.S.C. § 1441(d) provides for the removal of a civil action against a foreign state from state court to federal court for a non-jury trial.

66. FOURTH RESTATEMENT, *supra* note 35, pt. IV, ch. 5, intro. note (emphasis added) (internal citation omitted). *But cf. supra* note 31 (indicating that 11 U.S.C. § 106 abrogates the sovereign immunity of "a governmental unit" in bankruptcy proceedings, and that 11 U.S.C. § 101(27) defines "a governmental unit" to include a foreign state or "other foreign or domestic government").

67. FOURTH RESTATEMENT, *supra* note 35, pt. IV, ch. 5, intro. note.

68. *Id.*

69. Rosalyn Higgins, *Certain Unresolved Aspects of the Law of State Immunity*, 29 NETH. INT'L L. REV. 265, 271 (1982).

United States and of the States *except* as provided" in the FSIA.[70] Despite this sweeping language, the structure of the FSIA supports the view that it does not create—but also does not preclude—criminal jurisdiction over foreign states and their agencies and instrumentalities.

The absence of the word "civil" before the word "jurisdiction" in section 1604 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.[71] The absence of this qualification has not been explained.[72] The most likely explanation is that, because Congress was legislating to address issues raised by cross-border commercial disputes, it was simply not thinking about criminal proceedings one way or the other.[73] 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.[74]

The core exceptions to the FSIA's grant of jurisdictional immunity are codified in section 1605. The section 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 certain enumerated criteria.[75] Consistent with Congress's intent to codify the restrictive theory, these criteria include "any case in which the action is based upon a commercial activity carried on in the United States by the foreign state."[76] A foreign state also shall not be immune if the action is based "upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere," or,

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70. 28 U.S.C. § 1604 (emphasis added).

71. *See infra* Parts IV.A & IV.B.

72. Some other countries enacted statutes governing foreign sovereign immunity that explicitly exclude criminal proceedings, 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, c. 33, § 16(4) (UK); State Immunity Act, R.S.C. 1985, c S-18, s 18 (Can.); *cf.* G.A. Res. 59/38, at 2 (Dec. 2, 2004) (noting the "general understanding" that the U.N. Convention on Jurisdictional Immunities of States "does not cover criminal proceedings").

73. A compilation of all State Department determinations of immunity in the two and a half decades between the Tate Letter and the FSIA contained only *one* reference to a criminal proceeding, which involved a subpoena *duces tecum*. JOHN A. BOYD, *Sovereign Immunity Decisions of the Department of State—May 1952 to January 1977*, *in* DIG. U.S. PRAC. INT'L L. 1017, 1038 (Michael Sandler et al. eds., 1977) [hereinafter *Sovereign Immunity Decisions of the Department of State*]; *see also infra* note 154 and accompanying text (reporting the denial of immunity on the basis that the Philippine National Lines engaged in commercial activities); *cf.* Samantar v. Yousuf, 560 U.S. 305, 323 (2010) (finding foreign official immunity outside the scope of the FSIA in part because "[t]he immunity of officials simply was not the particular problem to which Congress was responding when it enacted the FSIA").

74. *See supra* note 31 (indicating that 11 U.S.C. § 106 abrogates the sovereign immunity of "a governmental unit" in bankruptcy proceedings, and that 11 U.S.C. § 101(27) defines "a governmental unit" to include a foreign state or "other foreign or domestic government"); Tuli v. Republic of Iraq, 172 F.3d 707, 711 (9th Cir. 1999) (finding that foreign states can no longer assert sovereign immunity from liability for certain actions under the Bankruptcy Code).

75. 28 U.S.C. § 1605.

76. 28 U.S.C. § 1605(a)(2).

finally, "upon 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."[77]

The FSIA defines "commercial activity" to mean "either a regular course of commercial conduct or a particular commercial transaction or act."[78] The nature of the act, not its purpose, determines its commercial character.[79] The FSIA requires two elements in order for the commercial activities exception to provide U.S. courts with civil jurisdiction over a foreign state: an action "based upon" a commercial activity (or an act in connection with a commercial activity) of the foreign state, plus a nexus between the act and U.S. territory. It thus combines the permissive features of the restrictive theory (allowing U.S. courts to exercise subject-matter jurisdiction over a foreign state's commercial activities) with a nexus requirement that codifies limits on the territorial reach of personal jurisdiction.

As noted above, the language of the FSIA sounds in civil, rather than criminal, procedure. Under the statutory framework created by the FSIA, 28 U.S.C. § 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.[80] 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.[81] In this respect, the FSIA offers civil claimants one-stop shopping for both personal and subject-matter jurisdiction.[82] The House Report accompanying the FSIA described § 1330(b) as providing "in effect,

77. *Id.* Other exceptions include waiver, commercial activities with a sufficient nexus to the United States, expropriation in violation of international law, and certain tortious acts by a foreign state's officials or employees while in the United States. 28 U.S.C. § 1605. More recent exceptions cover certain acts by designated state sponsors of terrorism, and certain tortious acts in connection with an act of international terrorism on U.S. soil. 28 U.S.C. §§ 1605A, 1605B.

78. 28 U.S.C. § 1603.

79. *Id.* As the Supreme Court explained in *Republic of Argentina v. Weltover*, "the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in 'trade and traffic or commerce.'" 504 U.S. 607, 614 (1992); *see also* DAVID P. STEWART, THE FOREIGN SOVEREIGN IMMUNITIES ACT: A GUIDE FOR JUDGES 51 (2d ed. 2018) (highlighting the focus on the nature of the conduct as opposed to its purpose); FOURTH RESTATEMENT, *supra* note 35, § 454 (commenting on immunity from claims arising from commercial activity).

80. 28 U.S.C. § 1330(a).

81. 28 U.S.C. § 1330(b).

82. Mary Kay Kane observed in 1982 that lingering questions about "whether section 1330 was intended to be the exclusive source of jurisdiction for cases brought under the Act" revealed "the confusion that arises from the blend of substantive and procedural criteria in the Act." Mary Kay Kane, *Suing Foreign Sovereigns: A Procedural Compass*, 34 STAN. L. REV. 385, 392 (1982). In her view, "[e]ven if Congress intended to specify the exclusive procedures to be used in suits against foreign governments, section 1330 need not provide the sole basis for federal subject matter jurisdiction." *Id.*

a Federal long-arm statute over foreign states" that embodies "[t]he requirements of minimum jurisdictional contacts and adequate notice."[83] These requirements have been understood as applying in the context of civil, but not necessarily criminal, proceedings.

In 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."[84] David Stewart has noted that "[t]he reference to 'civil actions' [in *Verlinden B.V. v. Central Bank of Nigeria*] does not suggest, however, that states or their agencies or instrumentalities can be subject to criminal proceedings in U.S. courts [under the FSIA]; nothing in the text or legislative history [of the FSIA] supports such a conclusion."[85] To be sure, as indicated above, section 1330 provides subject-matter jurisdiction over "any nonjury civil action."[86] However, 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.[87] 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.

The Supreme Court's frequently-cited statement in a 1989 opinion 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" also does not resolve the question of criminal jurisdiction.[88] In that case, *Argentine Republic v. Amerada Hess Shipping Corp.*, the Court considered whether to interpret the Alien Tort Statute (ATS), 28 U.S.C. § 1350, as providing an additional basis for exercising jurisdiction over civil

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83. von Mehren, *supra* note 37, at 46 n.60 (quoting H.R. REP. NO. 94-1487, at 13-14 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6606). Although state courts generally apply the FSIA's exceptions to determine whether they have subject-matter jurisdiction over civil claims against foreign states, they appear to rely on minimum contacts to establish personal jurisdiction. *See, e.g.*, Interlotto, Inc. v. Nat'l Lottery Admin., 689 A.2d 148, 151 (N.J. Super. Ct. App. Div. 1997) (indicating that "because personal jurisdiction is not automatically delegated to state courts, defendants here must be subject to the jurisdictional prerequisites of New Jersey").

84. Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 488 (1983) (emphasis added).

85. DAVID P. STEWART, THE FOREIGN SOVEREIGN IMMUNITIES ACT: A GUIDE FOR JUDGES 1 n.2 (2d ed. 2018)); *cf.* Country A's Reply Brief Supporting Its Petition for A Writ of Certiorari at 8, *In re* Grand Jury Subpoena, 139 S. Ct. 1378 (2019) (No. 18-948), 2019 WL 1014181, at *8 (inaccurately citing this footnote as an "expla[nation]" by the Federal Judicial Center "that foreign agencies and instrumentalities enjoy absolute immunity from American criminal proceedings"). The guide, which is published by the FJC but does not represent an official position of that organization, does not answer the question of immunity from criminal jurisdiction.

86. 28 U.S.C. § 1330(a).

87. *See supra* note 31.

88. Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 434 (1989).

actions against foreign states.[89] The Court cited *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, meaning that the ATS did not provide an alternative basis for bringing civil suit.[90] 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.

The Supreme Court's statements in 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."[91] The Court has not relied solely on the words of the FSIA, but rather has interpreted 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, 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.

Subsequent Congressional hearings support this understanding of Congress's intent, which should continue to guide judicial interpretation of the statute. In 1987, Congress held hearings on proposals to amend the FSIA to, among other things, facilitate the enforcement of arbitral awards.[92] There was also public pressure on Congress to allow injured parties to bring private lawsuits to challenge foreign states' conduct, even if no existing FSIA exception applied. The State Department's consistent position was that private lawsuits against a foreign state should not be allowed for that state's governmental acts. Deputy State Department Legal Adviser Elizabeth

89. *Id.*

90. *Id.* In its most recent decision interpreting the FSIA, the Supreme Court considered the statute's "text, context, and history" to discern and effectuate Congress's intent. Federal Republic of Germany v. Philipp, *supra* note 29, at *9.

91. Samantar v. Yousuf, 560 U.S. 305, 313 (2010); *see also id.* at 313 n.7 (citing 28 U.S.C. §1602). ("The Congress finds that the determination by United States courts of the claims of foreign states to immunity from the jurisdiction of such courts would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts. Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned . . . .").

92. *FSIA Hearing*, *supra* note 63, at 2. *See generally* Mark B. Feldman, *Amending the Foreign Sovereign Immunities Act: The ABA Position*, 20 INT'L LAW. 1289 (1986).

Verville testified that, as a general matter, "wrongful state action, even within the territory of another state, is a problem that states deal with on the plane of international relations and public law, *including criminal prosecution in appropriate cases*, rather than through private domestic legal remedies against foreign states."[93] Under the prevailing view, the FSIA did not affect the U.S. government's ability to pursue diplomatic or criminal measures for international crimes.

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.[94] 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.

The context of the 1987 proceedings, which followed years of private litigation against Chile that failed to yield a judicial remedy, underscores this point. At the time of Ms. Verville's testimony, the United States was engaged in ongoing (and, according to some, inadequate) diplomatic efforts to secure accountability and compensation for the 1976 assassination of exiled Chilean diplomat Orlando Letelier and researcher Ronni Moffitt in a car bombing in Washington, DC.[95] A grand jury had indicted three Chilean military officers working for the Chilean intelligence service, but Chile refused to extradite them for trial.[96] The victims' family members sought

93. *FSIA Hearing*, *supra* note 63, at 18-19 (emphasis added). Although Ms. Verville likely had in mind criminal prosecution of individuals, she nevertheless distinguished this remedy from "private domestic" civil actions.

94. *See, e.g.*, United States v. Noriega, 117 F.3d 1206, 1212 (11th Cir. 1997) (opining that "by pursuing Noriega's capture and this prosecution, the Executive Branch has manifested its clear sentiment that Noriega should be denied head-of-state immunity"). *But cf.* MICHAEL P. SCHARF & PAUL R. WILLIAMS, SHAPING FOREIGN POLICY IN TIMES OF CRISIS 94 (2010) (observation by former Acting State Department Legal Adviser Michael Matheson that "the process of indictments in the U.S. system is not well integrated with foreign policy concerns"). For an example of potential foreign policy conflicts created by prosecutorial decisions, see Thomas W. Lippman & Lynne Duke, *U.S. Refusal to Drop Case Against S. African Firm Causes Friction*, WASH. POST (Feb. 21, 1996), https://tinyurl.com/y53487ho. *See generally* United States v. Armaments of S. Afr., Ltd., No. 91-602 (E.D. Pa. Oct. 31, 1991); Litigation Release No. 13077, 1991 SEC LEXIS 2521 (Nov. 5, 1991).

95. *See* Taylor Branch, *The Letelier Investigation*, N.Y. TIMES, July 16, 1978, at SM7 (detailing investigation of the murder plot).

96. *See* Letter from J. Edward Fox, Assistant Sec'y for Legis. & Intergovernmental Affs., to Dan Glickman, Chairman, Admin. L. & Governmental Rels. Subcomm., Comm. of the Judiciary, House of Representatives (June 30, 1996), Doc. No. 4, *reprinted in* 1 LEGISLATIVE HISTORY OF THE FOREIGN SOVEREIGN IMMUNITIES ACT 55 (1988).

other avenues of redress, including by filing a civil lawsuit against Chile in U.S. court under the FSIA's exception for certain torts on U.S. territory.[97] The court ultimately entered damages judgments against Chile and several individual defendants.[98] When the plaintiffs sought to execute upon assets belonging to Chile's national airline to satisfy the judgment, however, the FSIA's provisions on immunity from execution proved an insurmountable obstacle.[99] That the FSIA deals separately with immunity from execution also underscores Congress's understanding that the exercise of different types of jurisdiction warrants differently tailored immunity regimes.

Although the criminal prosecution in the Letelier case involved charges brought against natural persons, criminal proceedings in U.S. courts can also reach legal persons.[100] Prosecutions of foreign corporations have become more common in the past two decades.[101] While specialized statues afford jurisdictional immunity to certain categories of natural persons who act on behalf of foreign states (such as foreign diplomats), other jurisdictional immunities (such as foreign head of state immunity and foreign official immunity) have not yet been codified.[102] This does not mean that no such immunities exist, but it does mean that they currently lack a statutory basis. The same is true of criminal jurisdiction over foreign states and state-owned enterprises. The next section explores how state-owned enterprises could

97. de Letelier v. Republic of Chile, 488 F. Supp. 665, 671 (D.D.C. 1980).

98. de Letelier v. Republic of Chile, 502 F. Supp. 259, 266-67 (D.D.C. 1980).

99. The Second Circuit Court of Appeals found that the airline's assets could not properly be treated as belonging to Chile itself or executed upon under the relevant provisions. de Letelier v. Republic of Chile, 748 F.2d 790 (2d Cir. 1984). In the end, progress toward a degree of individual criminal accountability for some perpetrators and civil compensation for the families only came after the fall of Chilean dictator Augusto Pinochet's regime. *See* Sarah Anderson, *Over 40 Years, Measures of Justice*, INST. FOR POL'Y STUD. (Sept. 15, 2016), https://ips-dc.org/40-years-measures-justice/; *see also* Dispute concerning responsibility for the deaths of Letelier and Moffitt (U.S./Chile), 25 R.I.A.A. 1, 11 (1992) (determining, pursuant to a bilateral agreement, "the final amount of compensation to be paid by the State of Chile").

100. *See infra* Part II.C.

101. *See* Brandon L. Garrett, *Globalized Corporate Prosecutions*, 97 VA. L. REV. 1775 (2011) (identifying and analyzing this trend).

102. *See, e.g.*, 22 U.S.C. § 254d (providing that "[a]ny action or proceeding brought against an individual who is entitled to immunity with respect to such action or proceeding under the Vienna Convention on Diplomatic Relations . . . or under any other laws extending diplomatic privileges and immunities, shall be dismissed"). Presumably, the Executive Branch would not initiate criminal proceedings against a person or entity that it believed was entitled to jurisdictional immunity. It remains an open question whether this means that, as a matter of U.S. law, the Executive Branch could prosecute a sitting foreign head of state, even though this would violate customary international law. *See* Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. 3, 24 (Feb. 14) (describing customary international law). *See generally* Chimène I. Keitner, *Foreign Official Immunity After* Samantar, 44 VAND. J. TRANSNAT'L L. 837, 843 (2011) (examining foreign official immunity determinations following the Supreme Court's *Samantar* decision). For contrasting views on Executive Branch authority over immunity determinations, compare Ingrid B. Wuerth, *Foreign Official Immunity Determinations in U.S. Courts: The Case Against the State Department*, 51 VA. J. INT'L L. 1 (2011), with Lewis S. Yelin, *Head-of-State Immunity as Sole Executive Lawmaking*, 44 VAND. J. TRANSNAT'L L. 911 (2011).

become subject to criminal investigation or even prosecution, thereby raising potential questions of immunity.

C. Criminal Jurisdiction Over Foreign Entities

Although we tend to think of criminal proceedings as intended to constrain natural persons, legal persons can also be implicated in criminal investigations and even prosecutions, especially in the United States.[103] Indeed, the United States has earned a reputation as "a magnet for organizational prosecutions."[104] This phenomenon post-dated the FSIA's enactment, so it is perhaps not surprising that Congress did not have criminal jurisdiction in mind when it codified the restrictive theory.

Among other criminal statutes, the Foreign Corrupt Practices Act (FCPA) can be, and has been, enforced against foreign companies.[105] This statute was enacted in 1977 in the wake of the Watergate scandal, and Congress extended its reach to encompass foreign firms in 1998.[106] Current or formerly state-owned firms have been implicated in 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.[107] In 2011, formerly state-owned companies Magyar Telekom and Deutsche Telekom paid almost $64 million in criminal penalties for FCPA violations.[108] 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.[109]

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103. *See generally* V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477 (1996). For an early proposal on how to think about U.S. jurisdiction over foreign corporations, see David James Homsey, *Criminal Jurisdiction Over Foreign Corporations: The Application of a Minimum Contacts Theory*, 17 SAN DIEGO L. REV. 429 (1980).

104. Garrett, *supra* note 101, at 1788.

105. *See* Michael S. Diamant et al., *FCPA Enforcement Against U.S. and Non-U.S. Companies*, 8 MICH. BUS. & ENTREPRENEURIAL L. REV. 353, 355 (2019).

106. Garrett, *supra* note 101, at 1829-30.

107. Press Release, U.S. Dep't of Just., U.S. Resolves Probe Against Oil Company That Bribed Iranian Official (Oct. 13, 2006), https://tinyurl.com/yyymya6r. Interestingly, DOJ did not mention at the time that the company was state-owned. *See* Kara Brockmeyer et al., *The Year 2018 in Review: Continued Globalization of Anti-Corruption Enforcement*, FCPA UPDATE (Debevoise & Plimpton LLP), Jan. 2019, at 1, 7 n.9, https://tinyurl.com/yytzgam4.

108. Press Release, U.S. Dep't of Just., Magyar Telekom and Deutsche Telekom Resolve Foreign Corrupt Practices Act Investigation and Agree to Pay Nearly $64 Million in Combined Criminal Penalties (Dec. 29, 2011), https://tinyurl.com/y2keyy7n. For other examples of FCPA prosecutions, see PIERRE-HUGUES VERDIER, GLOBAL BANKS ON TRIAL: U.S. PROSECUTIONS AND THE REMAKING OF INTERNATIONAL FINANCE (2020).

109. Press Release, U.S. Dep't of Just., Petróleo Brasiliero S.A.—Petrobras Agrees to Pay More Than $850 Million for FCPA Violations (Sept. 27, 2018), https://tinyurl.com/yausotxz. This was

There are a variety of 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. In determining whether there is jurisdiction over a foreign corporation in the criminal context, some courts have looked to the effects of the corporation's activities in the United States, as well as contacts between the corporation or its agents and the United States.[110] It is not clear that such an analysis is necessary. For example, the Southern District of New York recently reaffirmed its prior ruling in a case involving a state-owned bank that "[i]t is axiomatic that where, as here, a District Court has subject-matter jurisdiction over the criminal offenses charged, it also has personal jurisdiction over the individuals charged in the indictment."[111]

The role of due process in a jurisdictional analysis involving a foreign state or its agencies or instrumentalities also remains unclear in the civil context under the FSIA. In a 2007 *amicus* brief in a case involving the status of a wholly-owned subsidiary of a foreign government agency, the United States explained that the FSIA made foreign state agencies and instrumentalities "subject to suit for their commercial activities" while according them "certain procedural protections."[112] The Supreme Court has assumed without deciding that foreign states could be "persons" entitled to due process protections under the Fifth Amendment;[113] either way, in the

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reportedly the first time the United States "charged a state-owned entity for effectively *taking* bribes and thereby misstating its financial statements." Brockmeyer et al., *supra* note 107, at 7. The Securities and Exchange Commission (SEC) also reached a settlement with the company for the same conduct, while pursuing charges against another Brazilian state-owned company on the same theory. *See id.*

110. *See* United States v. Chitron Elecs. Co., 668 F. Supp. 2d 298, 30 (D. Mass. 2009) (indicating that "[t]he case law discussing the specific issue of personal jurisdiction over foreign corporations in the criminal context is surprisingly sparse and poorly developed"). On the question of relationships among corporate entities and their jurisdictional significance, compare Lea Brilmayer & Kathleen Paisley, *Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracies, and Agency*, 74 CALIF. L. REV. 1 (1986), with Lonny Sheinkopf Hoffman, *The Case Against Vicarious Jurisdiction*, 152 U. PA. L. REV. 1023 (2004). For an analysis of the apparent contradiction between jurisdictional narrowing in the civil context and increased prosecutorial activities targeting foreign banks, see Pierre-Hugues Verdier, *The New Financial Extraterritoriality*, 87 GEO. WASH. L. REV. 239 (2019).

111. United States v. Halkbank, No. 15 Cr. 867, 2020 WL 5849512, at *7 (S.D.N.Y. Oct. 1, 2020); *see also* United States v. Halkbank, 426 F. Supp. 3d 23, 35 (S.D.N.Y. 2019) ("[I]t is improper to make a personal jurisdiction motion based upon the absence of minimum U.S. contacts in a criminal case" because "minimum contacts challenges . . . do not apply to criminal matters."). The district court found that *United States v. Chitron Elecs. Co.* was an "outlier" and should not be followed. *Id.* at 38.

112. Brief for the United States as Amicus Curiae Supporting Petitioner at 19, Powerex Corp. v. Reliant Energy Servs., Inc. 551 U.S. 224 (2007) (No. 05-85), 2007 WL 697887.

113. *See* Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 619 (1992) (suggesting in a citation that, if foreign states are analogous to sovereign states of the U.S. federal union, they would not qualify as "persons" for due process purposes). The D.C. Circuit has held that foreign states themselves are not "persons" entitled to due process protections under the Fifth Amendment. Price v. Socialist People's Libyan Arab Jamahiriya, 294 F.3d 82, 96 (D.C. Cir. 2002).

civil context, it is likely that the FSIA's service provisions and nexus requirements satisfy whatever standard applies.[114]

A foreign state-owned enterprise (SOE) likely enjoys due process protections in civil proceedings, unless it is deemed to be an agent of the foreign state.[115] However, as indicated above, due process standards in the civil context do not necessarily translate directly into the criminal context.[116] Whatever the precise standard for personal jurisdiction, the court's exercise of that jurisdiction must comport with applicable understandings of procedural due process, and there must be federal subject-matter jurisdiction if the proceedings are in federal court.[117]

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,"[118] without regard to the identity or status of the defendant. In 2016, the Judicial Conference amended Federal Rule of Criminal Procedure 4 to facilitate service on foreign corporations.[119]

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114. *See* I.T. Consultants, Inc. v. Islamic Republic of Pakistan, 351 F.3d 1184, 1191 (D.C. Cir. 2003) (indicating that, if an action satisfies the requirements of the FSIA, courts need not examine whether there are "minimum contacts" between the defendant and the forum); *cf.* Ingrid Wuerth, *The Due Process and Other Constitutional Rights of Foreign Nations*, 88 FORDHAM L. REV. 633 (2019) (arguing that it makes little sense to "afford litigation-related constitutional protections to foreign corporations" but to "deny categorically such protections to foreign states"). For an analysis of due process requirements under the Fifth Amendment, see Chimène I. Keitner, *Personal Jurisdiction and Fifth Amendment Due Process Revisited*, *in* THE RESTATEMENT AND BEYOND: THE PAST, PRESENT, AND FUTURE OF U.S. FOREIGN RELATIONS LAW (Paul B. Stephan & Sarah A. Cleveland eds., 2020).

115. *See, e.g.*, Frontera Res. Azer. Co. v. State Oil Co., 582 F.3d 393, 399 (2d Cir. 2009) (holding that a foreign company does not enjoy due process protections if it is an agent of a foreign state); TMR Energy Ltd. v. State Prop. Fund of Ukr., 411 F.3d 296, 300 (D.C. Cir. 2005) (relying on circuit precedent that "it is not to the due process clause but to international law and to the comity among nations, as codified in part by the FSIA, that a foreign state must look for protection in the American legal system"); *id.* at 301 (invoking the so-called *Bancec* presumption of separate juridical status for a foreign state's instrumentality, subject to a showing that there is a principal-agent relationship between the two).

116. *See, e.g.*, United States v. Murillo, 826 F.3d 152, 156 (4th Cir. 2016) (citing United States v. Brehm, 691 F.3d 547, 552 (4th Cir. 2012)) (indicating that there must be "a sufficient nexus between the defendant and the United States" so that applying the statute "would not be arbitrary or fundamentally unfair").

117. *See* STEWART, *supra* note 85, at 21 n.56. A practitioners' note for attorneys representing corporate criminal defendants notes that "the criminal rules do not provide a perfect avenue for moving to dismiss for lack of personal jurisdiction" because Federal Rule of Criminal Procedure 12(b)(2) has been interpreted as allowing motions to dismiss for lack of subject-matter jurisdiction. Instead, the note advises that clients rely on Rule 12(b)(1) and have counsel enter a special appearance to challenge jurisdiction. Because Federal Rule of Criminal Procedure 4 now allows service of a summons on foreign corporations through "any means that gives notice," the note recommends arguing that "the minimum-contacts test from the civil context should apply." C. Kevin Marshall & Andrew J. Bentz, *Personal Jurisdiction: A New Battlefront in Corporate Criminal Cases*, JONES DAY INSIGHTS (Aug. 2017), https://tinyurl.com/y2up8dqs.

118. 18 U.S.C. § 3231.

119. *See* Memorandum from Hon. Reena Raggi, Chair, Advisory Comm. on Crim. Rules, to Hon. Jeffrey S. Sutton, Chair, Standing Comm. on Rules of Prac. & Proc., Jud. Conf. of the United States 3 (May 6, 2015), https://tinyurl.com/y3ma63pv. In addition, the Patriot Act conferred authority on the

The terms of that amendment extend to "organization[s] not within a judicial district of the United States," including SOEs.[120] The Rules Committee explicitly indicated, with respect to service on state-owned enterprises, that "the Department of Justice provided written assurance [to the Committee] that it had consulted with appropriate authorities in the Executive Branch about the potential international relations ramifications of the proposed amendment."[121] As for potential constitutional due process objections to amended Rule 4, the Committee stated that "[i]t is always assumed that a rule will be interpreted against the backdrop of existing rules, statutes, and constitutional doctrine."[122] This caveat would presumably include applicable jurisdictional immunities, whether based in statute or on federal common law.

Questions about the reach of U.S. jurisdiction over foreign companies have also arisen in the context of subpoenas. For example, in the *Marc Rich & Co.* case, the Second Circuit affirmed the district court's jurisdiction to order compliance with a grand jury subpoena and to impose monetary sanctions to compel compliance by a Swiss company.[123] Marc Rich & Co. was a Swiss commodities trading corporation that did not maintain an office in the United States. However, its wholly owned subsidiary did business in New York. The Second Circuit held that the company was subject to the exercise of personal jurisdiction to compel production of business records as part of a federal grand jury's investigation of an alleged tax evasion scheme.[124] The court acknowledged that the exercise of jurisdiction over a foreign corporation based on injurious effects in the United States requires "caution in matters which have international complications."[125] Despite that caveat, the court opined that "it may well be that the occurrence of the offense itself is sufficient to support a claim of jurisdiction, provided adequate notice and an opportunity to be heard has been given."[126] If

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Attorney General or the Treasury Secretary to issue a summons or subpoena to "any foreign bank that maintains a correspondent account in the United States" as part of anti-money-laundering investigations and prosecutions. *See* 31 U.S.C. § 5318(k) (2014). For a recent analysis and application of these provisions, see *In re* Sealed Case, 932 F.3d 915 (D.C. Cir. 2019).

120. *See* Raggi, *supra* note 119, at 5 (rejecting opposition to the amendment from a law firm representing a Chinese state-owned company on the grounds that "[t]he amendment is intended to allow reliable service with adequate notice on these organizations so that U.S. courts can adjudicate the merits of criminal allegations and ensure appropriate accountability").

121. *Id.* at 6.

122. *Id.*

123. *In re* Marc Rich & Co., 707 F.2d 663 (2d Cir. 1983).

124. *Id.* The court also found that Swiss law prohibiting production of the records was not a bar to the production order.

125. *Id.* at 667.

126. *Id.* at 667-68. *See generally* S. Cass Weiland, *Congress and the Transnational Crime Problem*, 20 INT'L LAW. 1025 (1986) ("[T]here are definite limits to the continual extensions of U.S. criminal law and policy and Congress is probably already reaching those limits.").

personal jurisdiction exists, a subpoena can compel the witness to produce all documents in the witness's custody and control, even if those documents are located outside of the United States.[127]

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.[128] There are indications that the Department of Justice does not view the fact that a natural person is a former state official or acted on behalf of a foreign state as shielding that person from criminal proceedings.[129] For example, in the corruption context, the Department of Justice has indicted Mexico's former Secretary of Public Security for cocaine trafficking and making false statements, and "former" (according to the U.S.) president of Venezuela Nicolás Maduro and other senior Venezuelan officials for corruption, narco-terrorism, and other charges.[130] The Department has also been active in indicting foreign individuals and entities for hacking and other computer-related crime, including when those individuals or entities are associated with, or even

127. The Department of Justice has come to refer to the *Marc Rich* type of subpoena as a "Bank of Nova Scotia" subpoena based on an Eleventh Circuit case with a similar fact pattern. *See* Anthony J. Caggiano, Case Note, *International Law – Grand Jury Proceedings – Comity of Nations Fails to Justify a Showing of Relevance Prior to Enforcement of Grand Jury Subpoena*, Grand Jury Proceedings v. Bank of Nova Scotia, *691 F.2d 1384 (11th Cir. 1982)*, 7 SUFFOLK TRANSNAT'L L.J. 565 (1983). For a discussion of contemporaneous cases and their implications, see Roger M. Olsen, *Discovery in Federal Criminal Investigations*, 16 N.Y.U. J. INT'L L. & POL. 999 (1984).

128. For student notes examining U.S. government responses to traditional and cyber economic espionage, respectively, see Darren S. Tucker, *The Federal Government's War on Economic Espionage*, 18 U. PA. J. INT'L L. 1109 (1997) and Genna Promnick, *Cyber Economic Espionage: Corporate Theft and the New Patriot Act*, 9 HASTINGS SCI. & TECH. L.J. 89 (2017). *See generally* NAT'L COUNTERINTELLIGENCE & SEC. CTR., FOREIGN ECONOMIC ESPIONAGE IN CYBERSPACE (2018), https://tinyurl.com/y7xeptua (describing the threat foreign economic espionage poses to the United States); CHARLES DOYLE, CONG. RSCH. SERV., R42681, STEALING TRADE SECRETS AND ECONOMIC ESPIONAGE: AN OVERVIEW OF THE ECONOMIC ESPIONAGE ACT (2016) (describing how the Trade Secrets Act could undermine claims of jurisdictional immunity).

129. *See, e.g.*, United States v. Noriega, 117 F.3d 1206, 1212 (11th Cir. 1997); United States v. Belfast, 611 F.3d 783 (11th Cir. 2010) (upholding prosecution of defendant for torture committed under color of Liberian law).

130. Press Release, U.S. Att'y Office, U.S. Dep't of Just., Former Mexican Secretary of Public Security Arrested for Drug-Trafficking Conspiracy and Making False Statements (Dec. 10, 2019), https://tinyurl.com/sjhr7g4; Press Release, U.S. Dep't of Just., Nicolás Maduro Moros and 14 Current and Former Venezuelan Officials Charged with Narco-Terrorism, Corruption, Drug Trafficking and Other Criminal Charges (Mar. 26, 2020), https://tinyurl.com/vpwley2. On avenues of accountability for human rights abuses by the Maduro regime, see Gissou Nia & Rodrigo Diamanti, *How to Hold Venezuela's Maduro Accountable for Human Rights Abuses*, JUSTSECURITY (Apr. 28, 2020), https://tinyurl.com/y2sre3us. More recently, the United States reversed its decision to prosecute a former Mexican defense minister on drug trafficking charges in response to diplomatic pressure from Mexico. *See* Alan Feuer & Natalie Kitroeff, *Mexico, Outraged at Arrest of Ex-Official, Threatened to Toss U.S. Agents*, N.Y. TIMES (Nov. 18, 2020), https://tinyurl.com/y38z79bx.

controlled by, a foreign government.[131] By and large, the U.S. government has endeavored to characterize the proscribed actions as non-sovereign in nature, perhaps to avoid confronting or eroding norms of foreign sovereign immunity.[132]

This needle is becoming ever-more difficult to thread. Notably, indictments of foreign actors for conducting "information warfare against the United States" are not susceptible to a commercial characterization.[133] This observation cautions against importing the FSIA's immunity provisions wholesale into the criminal context without further consideration of the special circumstances of SOEs (and natural persons) whose actions can violate legal obligations, and warrant appropriate penalties, separate from the foreign state itself.

The next Part explores the relationships among concepts of corporate criminal liability, state responsibility, and foreign state immunity. Part IV discusses recent cases that have grappled with the doctrinal implications of these relationships. Part V identifies certain steps Congress could take to address persistent ambiguities.

III. CORPORATE LIABILITY IN DOMESTIC AND INTERNATIONAL LAW

Jurisdictional immunities mediate the relationship between the international and domestic legal orders—the first premised on sovereign equality and non-intervention, and the second premised on plenary territorial jurisdiction and control. Arguments in U.S. courts about the

131. *See generally* Chimène I. Keitner, *Attribution by Indictment*, 113 AM. J. INT'L L. UNBOUND 207 (2019) (detailing U.S. indictment of foreign state actors for malicious cyber activity).

132. *See, e.g.*, Paul Rosenzweig, *More Thoughts on the DOJ China Indictment*, LAWFARE (May 20, 2014), https://tinyurl.com/y6n292m4 (observing that "the United States is doubling down on the economic espionage distinction that it seeks to draw between national security level snooping and spying for corporate gain"); David E. Sanger, *With Spy Charges, U.S. Draws a Line That Few Others Recognize*, N.Y. TIMES (May 19, 2014), https://tinyurl.com/yypgu3g9 (noting the U.S. argument that "there is a major difference between spying for national security purposes, something the United States does daily, and the commercial, for-profit espionage carried out by China's military"). Russell Buchan's important book on cyber espionage looks at the substantive legal rules governing state activity but does not consider questions of foreign sovereign immunity. RUSSELL BUCHAN, CYBER ESPIONAGE AND INTERNATIONAL LAW 22-23 (2019) (distinguishing between "political cyber espionage" and "economic cyber espionage").

133. *See* Press Release, U.S. Dep't of Just., Grand Jury Indicts Thirteen Russian Individuals and Three Russian Companies for Scheme to Interfere in the United States Political System (Feb. 16, 2018), https://tinyurl.com/y2awjhsd. For this reason, the Russian Federation was deemed immune from suit for such activities under the FSIA. *See* Democratic Nat'l Comm. v. Russian Federation, 392 F. Supp. 3d 410, 418 (S.D.N.Y. 2019) (finding that "the Russian Federation cannot be sued in the courts of the United States for governmental actions, subject to certain limited exceptions not present in this case, just as the United States government generally cannot be sued in courts abroad for its actions," and observing that "[t]he remedies for hostile actions by foreign governments are state actions, including sanctions imposed by the executive and legislative branches of government").

contours of sovereign immunity generally privilege relevant domestic law, but they are also sites of international legal contestation. Authoritative interpreters translate international legal concepts into domestic doctrine, and then re-encode domestic practice as an element of customary international law.[134]

As discussed in Part II.B, the purpose of the FSIA was to put foreign states and SOEs on the same footing as private parties with respect to their commercial activities.[135] The same logic that drove the codification of the restrictive theory in the civil context counsels against absolute immunity for SOEs in the criminal context. This Part takes a closer look at Congress's decision to include SOEs within the definition of "foreign state" in the FSIA, and the relationship between domestic ideas of corporate criminal liability and the international law concept of state responsibility.

A. The Domestic Legal Treatment of Foreign State-Owned Enterprises

Before delving further into arguments about the relationship between the FSIA and criminal proceedings, it is worth asking what would entitle a corporate entity to claim sovereign immunity in the first place. The answer as a matter of statutory law is the FSIA's definition of "foreign state," which includes "a political subdivision of a foreign state or an agency or instrumentality of a foreign state."[136] An agency or instrumentality, in turn, means "a separate legal person, corporate or otherwise" that is either an "organ" of a foreign state, or an entity, the majority of whose "shares or other ownership interest" are owned directly by a foreign state.[137] The FSIA does not treat foreign states exactly the same as agencies and instrumentalities for all purposes, but it accords certain jurisdictional immunities to both.[138]

The FSIA's relatively broad definition of "foreign state" could be explained, at least in part, by Congress's desire in 1976 to enact a multi-purpose statute that would fix problems relating to federal long-arm jurisdiction, as well as codify civil immunity.[139] The Restatement (Fourth) of U.S. Foreign Relations Law notes that "[t]he FSIA provides a broader

134. *See supra* note 54 and accompanying text.

135. *See supra* note 63 and accompanying text.

136. 28 U.S.C. § 1603(a).

137. 28 U.S.C. § 1603(b).

138. For differences regarding service, see 28 U.S.C. § 1608(a)-(b). On additional issues that can arise in determining the legal status and proper treatment of SOEs, see *infra* Part III.A.

139. As for the question of "whether a particular territorial, political, or regional body is a foreign state under the FSIA, courts consider whether it has been formally recognized by the United States, as well as the criteria of statehood from international law." FOURTH RESTATEMENT, *supra* note 35, § 452 reporters' note 1. To date, courts have not identified direct conflicts between these two factors. *Id.*

definition of 'foreign state' than is typical under foreign and international practice, by including agencies and instrumentalities for most purposes."[140] This expansive definition does not necessarily preclude civil proceedings, since SOEs engaged in commercial activities will not enjoy immunity for those activities if there is a sufficient connection to the United States. Its primary effect is to force courts to engage in an immunity analysis when the defendant is a SOE. A defendant that does not fall within the definition of "foreign state" cannot invoke immunity from civil proceedings under the FSIA, although natural persons can assert immunity under other statutes or federal common law.

In her 1987 testimony, Deputy State Department Legal Adviser Verville indicated that, in the Department's view, it would be appropriate to place state-owned commercial enterprises "on the same footing as their privately-owned counterparts regarding torts and other conduct" for which they might be subject to suit.[141] Ms. Verville registered "doubt that the state-owned purely commercial enterprise is considered part of the state for sovereign immunity purposes by the international community generally,"[142] meaning that a narrower definition of "foreign state" in the FSIA would not conflict with settled expectations under international law. However, she recognized that reasons for leaving such entities "in the act" might include "purposes such as service of process and federal court jurisdiction, given the foreign relations interests these cases can have."[143] The down-side, as subsequent cases have shown, is that the FSIA's expansive definition of "foreign state" can embolden foreign state-affiliated entities to claim immunity and create delays in unforeseen contexts, such as third-party subpoenas for financial records and other documents.[144]

The problem of asserting different types of domestic jurisdiction over foreign SOEs is not a new one. For example, in 1927, the Attorney General brought an antitrust suit against the Société Commerciale des Potasses d'Alsace, an "organization created and controlled by the Republic of France."[145] The State Department indicated that "it has long been the view

140. FOURTH RESTATEMENT, *supra* note 35, § 452 reporters' note 12. Under the approach taken by the UN Convention on Jurisdictional Immunities, "[p]rovided it is proved that the act performed was . . . an act in exercise of sovereign authority and not coming within any of the exceptions to State immunity, the entity performing it, whatever the nature and degree of its connection with the State, may benefit from immunity." FOX & WEBB, *supra* note 38, at 353.

141. *FSIA Hearing*, *supra* note 63, at 26 (statement of Elizabeth G. Verville, Deputy Legal Adviser, Department of State).

142. *Id.*; *see also id.* ("Even absolute immunity states generally agree that state-owned purely commercial entities may be sued abroad and establish them with the ability to sue and be sued generally.").

143. *Id.* at 26-27.

144. *See infra* Parts IV.A & IV.B.

145. United States v. Deutsches Kalisyndikat Gesellschaft, 31 F.2d 199, 200 (S.D.N.Y. 1929).

of the Department of State that agencies of foreign governments engaged in ordinary commercial transactions in the United States enjoy no privileges or immunities not appertaining to other foreign corporations, agencies, or individuals doing business here, and that they should conform to the laws of this country governing such transactions."[146] France argued that the Société Commerciale and its agents were entitled to immunity "because they are engaged in performing what the Republic of France considers a governmental function,"[147] even if it was commercial in nature. The district court rejected this argument in an early application of the restrictive theory in an enforcement proceeding.[148]

Another pre-FSIA case further illustrates this point. In 1952, the Anglo-Iranian Oil Company, Ltd. moved to quash a subpoena *duces tecum* served on the company in conjunction with an investigation of a possible violation of the Sherman Antitrust Act.[149] In response to a request from the district court for its views, the Department of State transmitted a note from Anthony Eden, the British Secretary of State for Foreign Affairs, which invoked "a claim of sovereignty."[150] The Department neither endorsed nor rejected this claim. The district court observed that "[w]here the political branch of the [U.S.] government declines to assert an opinion as to the status of a foreign sovereign, involved in a legal proceeding, the courts may decide for themselves whether all the requisites of immunity exist."[151] It went on to determine that the Anglo-Iranian Oil Company was "indistinguishable from the [g]overnment of Great Britain,"[152] and that the company was therefore immune from a subpoena relating to "a fundamental government function serving a public purpose."[153]

In 1960, the State Department declined to suggest immunity for a Philippine state-owned company.[154] The Philippine National Lines, which was owned and operated by the government of the Republic of the Philippines, had received a subpoena *duces tecum* to appear before a grand

146. *Id.*

147. *Id.* at 201.

148. *Id.* at 203. The court also noted that "[t]he suit was brought by the Attorney General," and that "[t]hese facts indicate that the Executive Department of the government also is of the opinion that this suit is not a suit against the Republic of France, or any representative of that republic." *Id.*

149. *In re* Investigation of World Arrangements, 13 F.R.D. 280 (D.D.C. 1952).

150. Eden's note also approved and certified the authenticity of a prior communication from Great Britain's Minister of Fuel and Power that had directed the company "not to produce any documents which were not in the United States of America and which do not relate to business in the United States" without prior governmental authorization. *Id.* at 289.

151. *Id.* at 290 (citing Republic of Mexico v. Hoffman, 324 U.S. 30 (1945)).

152. *Id.* at 291.

153. *Id.* at 290; *see also id.* at 291 (observing that "[t]o cite a foreign sovereign into an American Court for any complaint against him in his public capacity is contrary to the law of nations").

154. *Sovereign Immunity Decisions of the Department of State*, *supra* note 73, at 1038.

jury "with certain documents relating to shipping freight and other shipping practices."[155] The Department declined to suggest immunity on the grounds that the Philippine National Lines was engaged in commercial activities.[156] The court observed that this case fell "somewhere in between" the Société Commerciale case and the Anglo-Iranian Oil case, and reserved enforcement of the subpoena pending a showing that the company's activities were "substantially, if not entirely, commercial" and that the subpoenaed records were necessary to further a criminal investigation of others, or that the company had "join[ed] with others to violate federal laws."[157]

In a 1975 *amicus* brief regarding liabilities arising from Cuba's nationalization of cigar companies, the Department of Justice characterized Supreme Court cases as "long recogniz[ing] that a commercial enterprise owned or controlled by a sovereign is not immune from suit on a cause of action arising out of its business dealings."[158] It observed that "[t]his rule also has long been applied to the separate commercial enterprises owned or controlled by foreign states."[159] Against this backdrop, it is difficult to imagine that the State and Justice Departments in proposing the FSIA, and Congress in passing it, would have deprived the Department of Justice of the ability to investigate and potentially prosecute SOEs without so much as a word on the matter.[160]

By enacting the FSIA, Congress created a federal long-arm statute for foreign states and SOEs and placed authority to apply the restrictive theory in the hands of the judicial branch. However, this statutory regime did not address other related issues, such as the rules governing criminal proceedings involving these entities. A convergence of factors now requires addressing this gap.

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155. *Id.*

156. *Id.* at 1039. No other State Department decisions in this compilation appear to contain the words "subpoena," "prosecution," or "criminal."

157. *In re* Grand Jury Investigation of the Shipping Indus., 186 F. Supp. 298, 319-20 (D.D.C. 1960).

158. Brief for the United States as Amicus Curiae, Alfred Dunhill of London, Inc. v. Republic of Cuba, 425 U.S. 682 (1976) (No. 73-1288), 1975 WL 173732, at *18.

159. *Id.*

160. *Cf.* JOSEPH W. DELLAPENNA, SUING FOREIGN GOVERNMENTS AND THEIR CORPORATIONS 37 (2d ed. 2003) (noting that the "Act and its legislative history do not say a single word about possible criminal proceedings under the statute").

B. Corporate Criminal Liability and State Responsibility

A corporation, like a state, acts through natural persons.[161] Corporations are "legally deemed to be single entities, distinct and separate from all the individuals who comprise them."[162] Although standards for imputing an agent's acts to the corporation can vary among jurisdictions,[163] the basic idea that individuals' actions can be imputed to the corporation for purposes of liability cuts across these differences.[164]

Attribution questions regarding 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, rather than private, actors.[165] Moreover, international law rules of attribution have evolved to determine when and whether a natural or legal person's conduct is attributable to a state for purposes of state responsibility—the international law analogue of liability.[166] Questions can thus arise about whether a particular corporation should be treated as a

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161. *See* Celia Wells, *Corporate Criminal Responsibility*, *in* RESEARCH HANDBOOK ON CORPORATE LEGAL RESPONSIBILITY 147 (Stephen Tully ed., 2005) ("Legal personality means that corporations can sue and be sued, hold property and transact, and incur criminal liability in their own name and on their own account"). The fact that an act is attributable to a corporation or to a state does not, in itself, absolve individuals from personal responsibility for tortious or criminal acts. *See* CHARLES DOYLE, CONG. RSCH. SERV., R43293, CORPORATE CRIMINAL LIABILITY: AN OVERVIEW OF FEDERAL LAW 5 (2013) ("With rare exception, statutes which expose a corporation to criminal liability do not absolve the officers, employees, or agents whose violations are responsible for the corporation's plight."). Stefan Lo has called the idea that the corporate entity bears *sole* legal responsibility for all misconduct by directors the "dis-attribution fallacy." Stefan H. C. Lo, *Dis-Attribution Fallacy and Directors' Tort Liabilities*, 30 AUSTL. J. CORP. L. 215, 216 (2016) (identifying "serious problems of accountability if directors can, through the corporate vehicle, effectively engage in tortious conduct without bearing any responsibility under the law").

162. Wells, *supra* note 161, at 147.

163. *See id.* at 150 (describing three legal theories for attributing blame to corporations).

164. *See* Guy Stessens, *Corporate Criminal Liability: A Comparative Perspective*, 43 INT'L & COMPAR. L.Q. 493, 519 (1994) (observing that "[e]ven the jurisdictions that do not accept the concept of corporate criminal liability as such have come to realize this and try to target the corporation by introducing *ersatz* models of corporate liability"). *But cf.* Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443, 519 (2001) (noting that "[t]he relations among parts of a business enterprise can make the determination of the boundaries of that entity difficult").

165. *See, e.g.*, Kadic v. Karadzic, 70 F.3d 232, 239 (1995) ("[C]ertain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals."). Hence the much-studied footnote 20 of the Supreme Court's opinion in *Sosa v. Alvarez-Machain*, in which the court noted that "[a] related consideration is whether international law extends the scope of liability for violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual." Sosa v. Alvarez-Machain, 542 U.S. 692, 732 n.20 (2004); *see also* Chimène I. Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 HASTINGS L.J. 61, 72 (2008) (interpreting this footnote as asking "whether a private actor, as opposed to a state actor, can violate international law, not with whether a corporation, as opposed to an individual, can do so").

166. *See* Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at 35 (2001).

state-owned enterprise for various purposes,[167] as well as whether that corporation's activities are attributable to a foreign state.[168] The question whether corporations themselves can be held criminally liable also arises in international law, although it generally falls to domestic law to provide an answer.[169]

The international legal responsibility of foreign states is largely *sui generis*, but it has generally not been conceptualized as criminal in nature.[170] This is so, even though international arbitral decisions have occasionally awarded punitive damages against states.[171] Nor has international law generally envisioned foreign states themselves as subject to criminal sanction.[172] However, individuals who act on behalf of foreign states, and entities

167. *See, e.g.*, Minwoo Kim, *Regulating the Visible Hands: Development of Rules on State-Owned Enterprises in Trade Agreements*, 58 HARV. INT'L L.J. 225, 233 (2017) (noting in the trade regulation context "how arduous it can be . . . for investigative authorities to determine whether government action was involved in an apparently innocuous business transaction"); *id.* at 254 (indicating that the Trans-Pacific Partnership's new definition of SOEs addresses this issue by defining SOEs "in terms of state control or ownership of a quantifiable interest in a corporation"); Shixue Hu, *Clash of Identifications: 'State Enterprises' in International Law*, 19 U.C. DAVIS BUS. L.J. 171, 172 (2019). The FSIA uses the ownership interest approach to defining SOEs. 28 U.S.C. § 1603(b)(2).

168. *See* Judith Schönsteiner, *Attribution of State Responsibility for Actions or Omissions of State-Owned Enterprises in Human Rights Matters*, 40 U. PA. J. INT'L L. 895, 907 (2019) (noting that, under the ILC Draft Articles, "the sole criterion on whether there is a link between the company and the State is the degree of control the latter exercises over the enterprise," and that the commentary to Draft Article 8 "explicitly excludes that government ownership and the initial establishment of the entity by the State *automatically* ensue [sic] state responsibility"); *id.* at 915 (arguing that "it would be a logical error to uphold, simultaneously, that a SOE should enjoy state immunity, but not generate state responsibility").

169. On the interface between domestic and international law on corporate criminal liability, see, e.g., Brief of Professors of Federal Jurisdiction and Legal History as *Amici Curiae* in Support of Plaintiffs-Appellees Seeking Affirmance of District Court's Decision, Balintulo v. Daimler AG, 727 F.3d 174 (2013) (No. 09-2778-CV), 2009 WL 7768332, at *3 (indicating that "[l]egal actions for violations of the law of nations were not limited to natural persons in the late-eighteenth and early-nineteenth centuries"); *cf.* Ronald C. Slye, *Corporations, Veils, and International Criminal Liability*, 33 BROOK. J. INT'L L. 955, 964-69 (2008) (surveying approaches to holding corporations liable for the acts of individual officers, managers, and employees); Nadia Bernaz, *Corporate Criminal Liability Under International Law*, 13 J. INT'L CRIM. JUST. 313, 318-21 (2015) (discussing the history of corporate criminal liability in international criminal law).

170. *See* Chimène I. Keitner, *Categorizing Acts by State Officials: Attribution and Responsibility in the Law of Foreign Official Immunity*, 26 DUKE J. COMPAR. & INT'L L. 451, 461 (2016) (noting that, while domestic law differentiates between civil responsibility and criminal responsibility, the traditional view of state responsibility holds that states can owe duties of reparation but cannot owe duties akin to those arising under municipal criminal law).

171. *Id.* at 462; *see also id.* at 463 (noting that, in the final version of the ILC's Draft Articles, "[s]tate responsibility continued to elude categorization as either civil or criminal in nature").

172. The Nuremberg Tribunal famously stated that "crimes against international law are committed by men, not by abstract legal entities;" however, national legal systems have increasingly recognized theories of corporate criminal responsibility under which "a legal entity can be an actor, with its own *mens rea* and *actus reus*." ELIES VAN SLIEDREGT, INDIVIDUAL CRIMINAL RESPONSIBILITY IN INTERNATIONAL LAW 18 (2012).

controlled by foreign states, can bear civil or criminal responsibility and incur legal consequences for their acts in certain circumstances.[173]

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."[174] 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."[175] Depending on the circumstances, enforcing such obligations could provide additional occasions for the exercise of domestic jurisdiction, including the potential imposition of punitive measures.[176]

Under the restrictive theory, an entity's status as a foreign SOE is less important to determining its potential exemption from domestic jurisdiction than the nature of the conduct at issue in the proceeding. For example, a company that is majority-owned by a foreign state is defined as a foreign state under the FSIA, but it is still subject to suit if the claims fall within an enumerated exception to immunity.[177] Under the U.K. State Immunity Act of 1978 (SIA), by contrast, the general provisions of the act 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."[178] Consequently, a "distinct" entity can claim jurisdictional immunity from civil proceedings under the act "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."[179]

As a matter of international law, the fundamental question under the restrictive theory is whether an entity's conduct is sovereign or non-

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173. *See id.* (indicating that "the origins of the international concept of international criminal responsibility lie in its break with the immunity of state officials").

174. 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, 752 F. Supp. 2d 173 (D.P.R. 2010) (No. 10-223); *see* 28 U.S.C. § 1606 (providing that "a foreign state except for an agency or instrumentality thereof shall not be liable for punitive damages").

175. 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.

176. Note, however, that this bifurcation could exacerbate a "disjunction between the state as perpetrator and the SOE as the party held accountable." Paula Kates, *Immunity of State-Owned Enterprises: Striking a New Balance*, 51 N.Y.U. J. INT'L L. & POL. 1223, 1234 (2019).

177. *See* 28 U.S.C. § 1605.

178. State Immunity Act 1978, c. 33, § 14(1) (UK). The SIA explicitly does not apply to criminal proceedings. *Id.* § 16(4).

179. *Id.* § 14(2).

sovereign in nature.[180] The FSIA additionally asks whether the entity claiming immunity qualifies as an agency, instrumentality, or organ of a foreign state.[181] SOEs might be treated differently from private enterprises under domestic substantive or procedural law because of their partial or full public ownership.[182] However, their commercial activities are not exempt from 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. For example, 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."[183] 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."[184] As van Aaken emphasizes, this "opens a Pandora's box to an even bigger question, namely what public functions are."[185] This problem is especially acute with respect to corporate entities associated with planned economies that do not differentiate clearly between governmental and market activities.

As indicated above, 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."[186] 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

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180. ANDREW DICKINSON, RAE LINDSAY & AUDLEY SHEPPARD, CLIFFORD CHANCE LLP, STATE IMMUNITY AND STATE-OWNED ENTERPRISES 2 (2008), https://tinyurl.com/y2j9hjbn. This report notes that international law regarding state immunity from criminal jurisdiction "is less developed than in relation to civil proceedings." *Id.* at 3. In the authors' view, "a foreign State [itself] probably enjoys immunity from the criminal jurisdiction of another State's courts," and, subject to specific exceptions, "that immunity also seems capable of protecting the servants and agents (whether natural or legal persons) of a foreign State with respect to criminal proceedings relating to official acts performed on behalf of the State." *Id.* at 19.

181. 28 U.S.C. § 1603.

182. *See* Org. for Econ. Coop. & Dev. [OECD], *Competition Law and State-Owned Enterprises — Contribution from the United States*, at 2, DAF/COMP/GF/WD(2018)55 (Nov. 22, 2018); Victorino J. Tejera, *The U.S. Law Regime of Sovereign Immunity and the Sovereign Wealth Funds*, 25 U. MIAMI BUS. L. REV. 1, 15 (2016); David Gaukrodger, *Foreign State Immunity and Foreign Government Controlled Investors* 5 (OECD Working Papers on Int'l Inv., Working Paper No. 2010/02, 2010), https://www.oecd.org/corporate/mne/WP-2010_2.pdf.

183. 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, 2013).

184. *Id.* at 15.

185. *Id.* at 15-16.

186. 28 U.S.C. § 1603(d).

jurisdiction (in Latin, *acta jure gestionis*) can be defined negatively as the type of activity engaged in by actors that are not sovereign states.[187]

The FSIA puts the authority to determine whether a particular act counts as "commercial" for the purposes of civil jurisdiction in the hands of U.S. courts. From a political perspective, however, legislators might view certain activities as "public functions" when they are performed by U.S. government agents, and yet seek to subject similar activities by foreign governments to legal proceedings in the United States.[188] For example, the proposed Homeland and Cyber Threat Act (HACT Act) would have created an exception to foreign state immunity for any unauthorized access to a computer located in the United States, regardless of the commercial or governmental nature of the act.[189] It is highly unlikely that the United States would accede to the jurisdiction of a foreign court for similar alleged misconduct.

The reciprocity dilemma can also arise in the course of making judgments about whether to treat a particular entity as an "organ" of the foreign state for immunity purposes.[190] On the one hand, states might act through distinct legal entities in order to provide themselves with plausible deniability and attempt to avoid state responsibility. On the other hand, foreign states—and state-affiliated entities—can seek to invoke state immunity to shield their acts from scrutiny.[191]

In the civil context, Congress has by and large entrusted courts with making these potentially sensitive determinations about the contours of statutory exceptions to foreign state immunity. In the criminal and regulatory contexts, by contrast, an Executive Branch agency (such as the Department of Justice or the Securities and Exchange Commission)

187. *See supra* notes 49-50 and accompanying text.

188. Ongoing attempts to develop internationally accepted substantive rules governing state conduct in cyberspace routinely confront a version of this reciprocity problem. *See, e.g.*, Chimène I. Keitner, *Foreign Election Interference and International Law*, *in* DEFENDING DEMOCRACIES: COMBATING FOREIGN ELECTION INTERFERENCE IN A DIGITAL AGE (Jens David Ohlin & Duncan B. Hollis eds., 2021), and sources cited therein.

189. H.R. 4189, 116th Cong. (2019). Allison Peters and I have argued against amending the FSIA to permit such lawsuits. Chimène Keitner & Allison Peters, *Private Lawsuits Against Nation-States Are Not the Way to Deal With America's Cyber Threats*, LAWFARE (June 15, 2020), https://tinyurl.com/y8afxb8c.

190. *See* Jaemin Lee, *State Responsibility and Government-Affiliated Entities in International Economic Law*, 49 J. WORLD TRADE 117, 139 (2015) (noting in the context of state responsibility that international investment tribunals have "put significant emphasis on cultural and/or societal contexts in their state organ analyses"); *see also id.* at 140 (noting "the continuing expansion of the governmental functions").

191. For example, some private entities claim derivative immunity by alleging that they are exercising governmental functions. *See, e.g.*, Russell Buchan & Daniel Franchini, *WhatsApp v. NSO Group: State Immunity and Cyber Spying*, JUSTSECURITY (Apr. 16, 2020), https://tinyurl.com/yytwo9do; Erik Manukyan, *Why Is NSO Group Asserting Sovereign Immunity in WhatsApp Litigation?*, LAWFARE (May 22, 2020), https://tinyurl.com/y9qovjc7; Motion of Foreign Sovereign Immunity Scholars for Leave to File Brief as Amici Curiae in Support of Plaintiffs-Appellees, NSO Grp. Techs. Ltd. v. Whatsapp Inc., No. 20-16408 (9th Cir. Dec. 23, 2020), 2020 WL 7693729; *cf.* Lee, *supra* 190, at 151.

expresses its views on immunity in the first instance by initiating—or refraining from initiating—legal proceedings against a foreign state actor or entity. Interpreting the FSIA to deprive U.S. courts of jurisdiction over criminal proceedings against such actors and entities, contrary to the intent of Congress, would deprive the Executive Branch of the ability to make this type of determination in a variety of contexts, including those described in Part IV.B below.

Part IV canvasses relevant jurisprudence regarding claims to foreign sovereign immunity by entities that fall within the FSIA's definition of "foreign state" to assess the current doctrinal landscape in this area. Part V suggests steps that Congress should take to clarify the reach of domestic criminal jurisdiction over SOEs.

IV. JUDICIAL APPROACHES TO IMMUNITY FROM CRIMINAL PROCEEDINGS

The FSIA's text appears to leave the question of criminal immunity for foreign states unanswered, as described in Part II. Yet, as Professor Ingrid Wuerth has observed, and as the cases described above suggest, there is "an unmistakable trend toward the criminal prosecution of foreign organizations with ties to foreign governments."[192] Congress should place the jurisdictional basis for those prosecutions beyond doubt.

This Part begins by telling the story of the "mystery" grand jury subpoena, which brought this statutory lacuna into the spotlight (Part IV.A). It then considers the rather sparse case law on the relationship between the FSIA and criminal proceedings, which until recently had developed primarily in the context of civil Racketeer Influenced and Corrupt Organizations (RICO) suits (Part IV.B). Finally, it examines cases involving whether U.S. courts can issue contempt orders against foreign states, and impose accompanying sanctions (Part IV.C). Combined with the legislative history of the FSIA canvassed above, this case law counsels strongly against interpreting the FSIA categorically to preclude the exercise of criminal jurisdiction over foreign states, including SOEs.

A. The Mystery Grand Jury Subpoena Case

On July 11, 2018, a federal grand jury sitting in the District of Columbia issued a subpoena to a company that is wholly owned by a foreign state

192. Wuerth, *supra* note 19; *see also supra* Part II.C.

(referred to as "Country A").[193] The grand jury was convened in conjunction with an investigation into "foreign interference in the 2016 presidential election and potential collusion in those efforts by American citizens."[194] The subpoena sought records relevant to the investigation and held by the company in the United States or abroad.[195] The company asserted immunity "from the jurisdiction of U.S. courts as well as the reach of U.S. subpoenas" under the FSIA.[196] The company also "expressed doubt that any exception to the FSIA applied" that would permit the exercise of jurisdiction under the restrictive theory.[197]

The Special Counsel's Office (SCO), which was charged with conducting the investigation, argued in response that the FSIA does not apply in criminal cases and does not "divest[] the district court of power to enforce the subpoena."[198] In the SCO's view, because the FSIA only governs jurisdiction in civil proceedings, it does not bar criminal proceedings against a company owned by a foreign state.[199] In the alternative, the SCO argued that the FSIA's commercial activity exception allowed the exercise of jurisdiction due to "[REDACTED] activities in the United States."[200] After failed attempts to negotiate a solution with the SCO, the company filed a motion to quash the subpoena.[201]

The motion to quash rested on two grounds: (1) foreign sovereign immunity, and (2) that compliance would be "unreasonable or oppressive" because it would require the company to violate foreign law.[202] Chief Judge Beryl Howell denied the motion to quash and imposed civil contempt

193. *In re* Grand Jury Subpoena No. 7409, No. 18-41, 2018 WL 8334867, at *1 (D.D.C. Sept. 19, 2018). According to the corporation's brief on appeal to the D.C. Circuit, Country A "wholly owns" the corporation. Brief for Appellant at 2, *In re* Grand Jury Subpoena, 749 F. App'x 1 (D.C. Cir. 2018) (No. 18-3071), 2018 WL 8619946.

194. *In re* Grand Jury Subpoena No. 7409, No. 18-41, 2018 WL 8334867, at *1 (D.D.C. Sept. 19, 2018).

195. *Id.* at 1-2.

196. *Id.* at 2 (quoting Movant's Letter of July 26, 2018).

197. *Id.* The company's July 26 letter also questioned whether the district court had personal jurisdiction. *Id.* The SCO replied that "[t]he subpoena was served on [REDACTED]" which "is not an independent entity," and that "[b]ecause the subpoena was served on [REDACTED], it is immaterial whether [REDACTED] has access to or visibility into documents in the possession [REDACTED]," as [REDACTED] itself "unquestionably does have such access and visibility." *Id.* at 2 n.2 (quoting SCO's Letter of July 30, 2018 at 2). Subsequent correspondence from the company's counsel did not reference personal jurisdiction. *Id.* The company was thus deemed to have waived any objections to personal (as opposed to subject-matter) jurisdiction. *Id.*

198. *Id.* at 3 (quoting SCO's Letter of July 30, 2018).

199. This has been the long-standing position of the Department of Justice. *See, e.g.*, *In re* Grand Jury Proceedings Related to M/V Deltuva, 752 F. Supp. 2d 173 (D.P.R. 2010); United States v. Hendron, 813 F. Supp. 973 (E.D.N.Y. 1993).

200. *In re* Grand Jury Subpoena No. 7409, No. 18-41, 2018 WL 8334867, at *2 (D.D.C. Sept. 19, 2018) (quoting SCO's Letter of July 30, 2018).

201. *Id.* at 5 (indicating that the company filed a motion to quash on August 16, 2018).

202. FED. R. CRIM. P. 17(c)(2).

sanctions for non-compliance, and the D.C. Circuit affirmed.[203] The identity of both the company and the country were kept secret, and long remained unknown.[204] Eventually, the company reportedly produced enough responsive documents to warrant the cessation of monetary contempt sanctions that had been accruing, at least on paper.[205] It now appears that the investigation was related to a $10 million contribution to the Trump 2016 campaign paid eleven days before the election, which might have amounted to an illegal foreign campaign contribution.[206] SCO investigators reportedly thought the money might have ties to an Egyptian state-owned bank, or even to the president of Egypt.[207] The probe eventually closed with no charges filed.[208]

The crux of the legal dispute was whether the United States could exercise jurisdiction over a foreign state-owned company by compelling compliance with a grand jury subpoena. The company argued that it was absolutely immune from any type of criminal proceeding because the FSIA only provides civil jurisdiction over foreign states in enumerated circumstances.[209] It cited the Supreme Court's statement in *Amerada Hess* that "'jurisdiction in actions against foreign states is comprehensively treated by [] section 1330'"[210] and cannot be based on the Alien Tort Statute, and argued that this rationale also forecloses criminal proceedings. The company

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203. *In re* Grand Jury Subpoena, 749 F. App'x 1 (D.C. Cir. 2018), 912 F.3d 623 (D.C. Cir. 2019). The Supreme Court subsequently declined a petition for certiorari. 139 S. Ct. 1378 (2019).

204. Grand jury proceedings are conducted in secret (FED. R. CRIM. P. 6(e)(5)), as are ancillary judicial proceedings "to the extent necessary to prevent disclosure of matters occurring before a grand jury." *In re* Motions of Dow Jones & Co., 142 F.3d 496 (D.C. Cir. 1998). *Lawfare*'s Scott Anderson speculated that the company is likely a foreign state-owned commercial bank. Scott R. Anderson (@S_R_Anders), TWITTER (Dec. 18, 2018, 10:53 PM), https://twitter.com/S_R_Anders/status/1075237561549930496. The anonymous Twitter account @TheHoarseWhisperer suggested that it might be the Qatari Investment Authority, which acquired an almost twenty-percent stake in Russian oil company Rosneft through a somewhat opaque series of transactions. (@TheHoarseWhisperer), TWITTER (Dec. 18, 2018, 6:55 PM), https://twitter.com/HoarseWisperer/status/1075177855292792832.

205. Katelyn Polantz, *Mystery Company Off the Hook from Mueller Subpoena and Contempt of Court Charge*, CNN (June 7, 2019), https://tinyurl.com/y2bfhtvx. On contempt sanctions and sovereign immunity, see *infra* Part IV.C.

206. Katelyn Polantz, Evan Perez & Jeremy Herb, *Exclusive: Feds Chased Suspected Foreign Link to Trump's 2016 Campaign Cash for Three Years*, CNN (Oct. 14, 2020), https://tinyurl.com/y3rvrg8o.

207. *Id.*

208. *Id.*

209. *See* Brief for Appellant at 1, *In re* Grand Jury Subpoena, 749 F. App'x 1 (D.C. Cir. 2018) (No. 18-3071), 2018 WL 8619946 (arguing that "when Congress enacted the Foreign Sovereign Immunities Act (FSIA) in 1976, it codified the longstanding rule from international law that U.S. courts may not exercise criminal jurisdiction over a foreign sovereign or otherwise subject a foreign sovereign to the American criminal process").

210. *Id.* at 2 (quoting Argentine Republic v. Amerada Hess Shipping Corp., 488 U.S. 428, 437 n.5 (1989)) (quoting H.R. REP. NO. 94-1487, at 14 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6613).

also contended that, under the FSIA, "a jury may play no part in a case against a foreign state,"[211] including by issuing a grand jury subpoena.

The SCO argued in support of the district court's jurisdiction to compel compliance with the subpoena. It cited different language from the same Supreme Court opinion for the proposition that section 1604 of Title 28 "'work[s] in tandem' with the Act's conferral of jurisdiction over 'civil action[s] against a foreign state' (28 U.S.C. § 1330(a)), and should be understood in that light."[212] In the U.S. government's view, the FSIA is "uniform[ly] focus[ed]" on civil actions.[213] The result is not that criminal actions are categorically foreclosed—to the contrary, according to the U.S. government, the FSIA simply does not affect criminal proceedings one way or the other.[214] To hold otherwise, the SCO argued, would "cast[] aside decades of practice under which the United States has prosecuted and served criminal process on commercial enterprises that are majority-owned by foreign governments."[215]

The company ultimately failed to persuade the court of appeals that the district court "lacked subject-matter jurisdiction" to compel the company to respond to the subpoena, or to hold the company in civil contempt for non-compliance.[216] In affirming the district court's opinion, the D.C. Circuit—like the district court—"decline[d] to resolve whether foreign sovereigns are entitled to claim the protection of the Act's immunity provision, 28 U.S.C. § 1604, in criminal proceedings."[217] Instead, the panel "assume[d] that immunity extends to the criminal context," while finding that the commercial activity exception to immunity permitted the exercise of jurisdiction in the circumstances presented.[218] Because 28 U.S.C. § 1330 only confers subject-matter jurisdiction over nonjury civil actions against foreign states, the court of appeals held that the FSIA left intact the grant of federal

211. *Id.* at 27.

212. Brief for the United States at 13, *In re* Grand Jury Subpoena, 749 F. App'x 1 (D.C. Cir. 2018) (No. 18-3071), 2018 WL 8619947 (citing *Amerada Hess*, 488 U.S. at 434).

213. *Id.* at 14; *see also id.* at 13-14 n.5 (noting that the FSIA's removal provision only covers civil cases, meaning that the company's interpretation would lead to the "striking anomaly" that "a state prosecution against or grand jury proceeding involving a foreign sovereign could not be removed").

214. *Id.* at 11 (quoting Samantar v. Yousuf, 560 U.S. 305, 314 (2010) to argue that "the Supreme Court made clear that the FSIA is comprehensive only 'if it applies'").

215. Brief for the United States in Opposition at 18, *In re* Grand Jury Subpoena, 139 S. Ct. 1378 (2019) (No. 18-948), 2019 WL 916761.

216. Brief for Appellant at 6-7, *In re* Grand Jury Subpoena, 749 F. App'x 1 (D.C. Cir. 2018) (No. 18-3071), 2018 WL 8619946 (arguing that the district court lacked subject-matter jurisdiction to issue an order compelling the company to respond on September 19, and an order holding the company in civil contempt on October 5).

217. *In re* Grand Jury Subpoena, 749 F. App'x 1, 2 (D.C. Cir. 2018).

218. *Id.*

criminal jurisdiction over "offenses against the laws of the United States" in 18 U.S.C. § 3231.[219]

The court's *per curiam* opinion stated that 28 U.S.C. § 1330(a)'s conferral of subject-matter jurisdiction "over certain nonjury civil actions" does not "transmute the entirely separate section 1604 [which grants foreign states immunity from jurisdiction] into a provision about subject-matter jurisdiction."[220] Instead, "section 1604 tells us that, where the Act applies, an action must fall within one of the listed exceptions and says nothing about excluding criminal actions."[221] Thus, in the court's formulation (written before the pandemic), section 1604's grant of immunity "has no effect on the scope of the underlying jurisdiction [of the federal courts], any more than a vaccine conferring immunity from a virus affects the biological properties of the virus itself."[222] In other words, even though section 1604 of Title 28 says that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States" absent an enumerated exception,[223] this provision does not (in the court's view) deprive the federal courts of the criminal jurisdiction provided in Title 18 over actions that fall within the FSIA's enumerated exceptions.

Counsel for the United States acknowledged at oral argument on appeal that applying the FSIA to criminal proceedings is "a little bit of trying to put a square peg in a round hole."[224] Having looked to 18 U.S.C. § 3231 instead of 28 U.S.C. § 1330(a) for a grant of federal subject-matter jurisdiction, the court of appeals next turned to whether the district court could assert personal jurisdiction over the company. Although the district court "expressly said that any personal jurisdiction issue had been waived,"[225] the court of appeals noted that "for an ordinary subpoena [REDACTED] in personam jurisdiction is needed."[226] Counsel for the United States responded by invoking so-called *Bank of Nova Scotia* subpoenas, which may

219. *Id.* at 2; *see also In re* Grand Jury Subpoena, 912 F.3d 623, 628 (D.C. Cir. 2019) (rejecting the company's argument that the FSIA "eliminated all criminal subject-matter jurisdiction over foreign sovereigns, taking the contempt power with it").

220. *In re Grand Jury Subpoena*, 912 F.3d at 627-28.

221. *Id.* at 629.

222. *Id.* at 628.

223. 28 U.S.C. § 1604.

224. Oral Argument at 7:15-17, *In re* Grand Jury Subpoena, 912 F.3d 623 (D.C. Cir. 2019) (No. 18-3071).

225. *Id.* at 10:22-23.

226. *Id.* at 8:16-17 (Judge Williams). Judge Williams wondered whether a company operating in the United States is (still) subject to general personal jurisdiction for purposes of being treated as a witness after the Supreme Court's decisions in *Daimler* and *Goodyear*. *Id.* at 9:02-03. This is another question that will need to be resolved sooner rather than later. Unlike the requirement of federal subject-matter jurisdiction, which cannot be waived, a defendant can consent to personal jurisdiction.

be served on a foreign bank that has a branch in the United States.[227] Because the company had waived the personal jurisdiction argument, the court of appeals did not pursue this inquiry.[228]

In the end, the court of appeals found an applicable exception to jurisdictional immunity in the third clause of § 1605(a)(2), which applies in "any case" in which the proceedings are "based upon" an act outside U.S. territory "in connection with a commercial activity" of the foreign state-owned company elsewhere, and that act causes a "direct effect" in the United States.[229] It held that "a reading [of the FSIA] that embraces absolute immunity in criminal cases is much harder to reconcile with the Act's context and purpose."[230] Under the company's reading of the statute, "a foreign-sovereign-owned, purely commercial enterprise operating within the United States could flagrantly violate criminal laws and the U.S. government would be powerless to respond save through diplomatic pressure."[231] The D.C. Circuit rejected this absurd result.

It seems clear that Congress did not intend to eliminate criminal jurisdiction over foreign-state-owned companies when it enacted the FSIA.

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227. *See In re* Grand Jury Proceedings the Bank of Nova Scotia, 740 F.2d 817 (11th Cir. 1984); *In re* Grand Jury Proceedings the Bank of Nova Scotia, 691 F.2d 1384 (11th Cir. 1982); *In re* Grand Jury Subpoena Directed to Marc Rich & Co., 707 F.2d 663 (2d Cir. 1983); *see also* Caggiano, *supra* note 127. *But see In re* Sealed Case, 832 F.2d 1268, 1272 (D.C. Cir. 1987) (subpoena for records of a foreign company is enforceable only if the company does sufficient business or otherwise has sufficient contacts with the United States to enable court to exercise personal jurisdiction over it).

228. In another case involving such subpoenas, which was also decided by Chief Judge Beryl Howell in the first instance, two Chinese banks were held to have consented to U.S. jurisdiction as a precondition of opening a U.S. branch; in the alternative, the Chief Judge Howell held that the banks were subject to specific jurisdiction for the purpose of being compelled to produce banking records. *See In re* Grand Jury Investigation, 381 F. Supp. 3d 37, 51-54 (D.D.C. 2019), *aff'd*, *In re* Sealed Case, 932 F.3d 915, 923 (D.C. Cir. 2019) (upholding exercise of personal jurisdiction over foreign banks with branches in the United States based on consent). In addition, a foreign bank that does not have a U.S. branch but that maintains a correspondent account at a U.S. bank may be issued an administrative subpoena under a provision of the Patriot Act. *See* 31 U.S.C. § 5318(k)(3)(A)(i). A third bank in the *In re Grand Jury Investigation* case was subject to a subpoena under this provision. *See In re Grand Jury Investigation*, 381 F. Supp. 3d at 55-59, *aff'd*, *In re Sealed Case*, 932 F.3d at 924-25 (upholding exercise of personal jurisdiction based on bank's purposeful direction of its relevant activities at the forum).

229. *In re* Grand Jury Subpoena, 912 F.3d 623, 632-33 (D.C. Cir. 2019). Judge Williams would instead have found an exception to immunity in the first clause of § 1605(a)(2) on the grounds that the subpoena is "based upon" the company's regular course of commercial conduct carried on in the United States by an American office of the corporation. *Id.* at 635 (Williams, J., concurring in part and concurring in the judgment). Judge Williams criticized the government's "outdated" argument that the company's "'considerable business'" in the United States subjects the company to general personal jurisdiction and thus "open[s] all files—wherever they may be—to the prying eyes of U.S. prosecutors." *Id.* However, because the company "raised no objection to the government's outdated understanding of what U.S. contacts were necessary to bring a foreign entity (and the documents it possesses) within the general jurisdiction of our courts," Judge Williams would have upheld the subpoena based on the company's commercial activity in the United States, rather on the "direct effect" in the United States of the company's activity overseas. *Id.* at 636.

230. *In re Grand Jury Subpoena*, 912 F.3d at 629.

231. *Id.* at 629-30.

As the D.C. Circuit emphasized, "the relevant reports and hearings suggest Congress was focused, laser-like, on the headaches born of private plaintiffs' civil actions against foreign states."[232] It reasoned that, "given how unsettled the common law of criminal immunities for a corporation owned by a foreign state was in 1976 and remains today,"[233] there is "scant evidence that Congress sought to resolve such a significant and unsettled issue."[234] Yet, this explanation also makes it difficult to support applying the FSIA's enumerated exceptions in the criminal context without further analysis. The next two sections describe judicial attempts to determine the contours of foreign state immunity in criminal proceedings and other forms of compulsion in U.S. courts, which should inform a future statutory solution.

B. Other Contexts for Asserting Criminal Immunity for SOEs

The case law on foreign state immunity from criminal proceedings remains relatively sparse. The question of whether the FSIA provides criminal immunity has arisen several times in the context of suits for civil damages under the Racketeer Influenced and Corrupt Organizations Act (RICO).[235] The statute requires the plaintiff to show that the defendant has engaged in a pattern of "indictable" acts.[236] Some RICO defendants have argued that this means the particular defendant must be subject to criminal prosecution for the predicate acts. If this is true, then civil RICO claims can only proceed against defendants who are not immune from criminal prosecution.

There is a circuit split on this question, which has become less pressing since the Supreme Court curtailed the geographic reach of civil RICO.[237] The Tenth Circuit found that the FSIA provides jurisdiction over civil RICO claims against the Republic of Nigeria and its central bank.[238] The court read the FSIA's silence about criminal proceedings to mean that criminal proceedings, and thus a defendant's "indictab[ility]," fall outside the scope of the statute. In the Tenth Circuit's view, "[i]f Congress intended defendants such as CBN and RN to be immune from criminal indictment

232. *Id.* at 630.

233. *Id.*

234. *Id.*

235. *See* Brian Rosner, Natalie A. Napierala & Michael D. Sloan, *The Sound of Silence: Criminal Immunity for Foreign Sovereigns Under the FSIA, and Civil RICO Liability for Foreign Sovereigns in the Second Circuit*, LAW.COM (Oct. 3, 2018), https://tinyurl.com/yxvmgp9t.

236. 18 U.S.C. §§ 1961(1), 1962(a), 1964(c).

237. *See* RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2106 (2016) (applying the presumption against extraterritoriality to RICO's civil cause of action).

238. Southway v. Cent. Bank of Nigeria, 198 F.3d 1210 (10th Cir. 1999).

under the FSIA, Congress should amend the FSIA to expressly so state."[239] The Sixth Circuit reached the opposite conclusion in a case that also involved the Central Bank of Nigeria.[240] It interpreted the FSIA's silence on criminal jurisdiction to mean that there is *no exception* for criminal proceedings in the FSIA, and thus that the predicate acts would not be "indictable." The U.S. government has endorsed the Tenth Circuit's reasoning.[241]

The question of criminal immunity also arose in the context of an earlier grand jury subpoena. In *In re Grand Jury Proceeding Related to M/V Deltuva*, the Puerto Rico district court denied Lithuanian Shipping Company's (LSC) motion to quash the subpoena.[242] The United States argued that LSC, which is majority-owned by the government of Lithuania, was not entitled to immunity because it was engaged in commercial service, and because the FSIA does not apply to criminal investigations or actions.[243] The United States took the position that "although the FSIA is inapplicable to criminal proceedings, it supports a finding that commercial instrumentalities of foreign governments, such [as] LSC, are not immune from punitive measures based on their commercial activities in the United States."[244]

According to the record, LSC was formed "for the express purpose of enabling the Republic of Lithuania to own and manage ocean going cargo vessels,"[245] and the M/V Deltuva—which was owned and managed by LSC—was tasked with "further[ing] official Lithuanian state economic policies and purposes."[246] While the M/V Deltuva was docked in San Juan, Puerto Rico, personnel from the U.S. Coast Guard performed a Port State Control inspection and discovered "evidence indicating that the crew of the vessel had engaged in the illegal dumping of oil at sea and concomitant falsification of on-board log books to camouflage evidence of an alleged oil spill."[247] At the time, the vessel was not engaged in official government

239. *Id.* at 1215. Following discovery, the defendants moved for summary judgment based on the argument that the plaintiffs' claims did not fall within commercial activity exception, and that the court therefore lacked subject-matter jurisdiction. The district court granted summary judgment, and the Tenth Circuit affirmed. Southway v. Cent. Bank of Nigeria, 328 F.3d 1267, 1274 (10th Cir. 2003) (finding that "the perpetrators of the fraud were neither agents nor employees of the Nigerian government").

240. Keller v. Cent. Bank of Nigeria, 277 F.3d 811, 820 (6th Cir. 2002) (reasoning that "the FSIA does not provide an exception for criminal jurisdiction").

241. Government Response to Lithuanian Shipping Company's Motion to Quash Grand Jury Subpoena Dated June 10, 2010 at 9-10, *In re* Grand Jury Proceeding Related to M/V Deltuva, 752 F. Supp. 2d 173 (D.P.R. 2010) (No. 10–223).

242. *In re* Grand Jury Proceeding Related to M/V Deltuva, 752 F. Supp. 2d 173 (D.P.R. 2010).

243. *Id.* at 174.

244. *Id.* at 175.

245. *Id.*

246. *Id.*

247. *Id.* at 175-76.

activities, but it was carrying a commercial cargo to the United States.[248] The district court narrowed its inquiry to "whether principles of sovereign immunity as enunciated by the FSIA shield LSC, an instrumentality of the Republic of Lithuania, from the Court's exercise of criminal subject-matter jurisdiction [under 18 U.S.C. § 3231] in the instant case."[249]

The district court began by asking whether LSC could assert a "'constitutional, common-law or statutory privilege'" insulating it from the obligation to produce the materials requested in the subpoena.[250] It found that LSC could not assert a statutory privilege under the FSIA, because there is "no indication that Congress intended for the FSIA to govern criminal proceedings against agencies or instrumentalities of foreign governments."[251] Interestingly, the court did not go on to examine whether there was an applicable common-law protection, concluding simply that there was "no constitutional, statutory or common-law grounds for quashing the grand jury subpoena."[252] A lack of statutory immunity does not necessarily mean no immunity; rather, it means that any such immunity must be grounded in a different source of law, as explored in Part V below.

C. Holding Foreign States in Contempt

Some cases have also raised the question whether monetary contempt sanctions are available against foreign states. Lower courts have disagreed, with the D.C. Circuit upholding an order for contempt sanctions, and the Fifth Circuit vacating one as incompatible with the FSIA.[253] In those cases, unlike in the Mueller grand jury subpoena case, the United States opposed the imposition of civil contempt sanctions on foreign states.[254]

The D.C. Circuit's decision involved civil contempt sanctions against the Democratic Republic of Congo for failing to respond to court-ordered

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248. *Id.* at 176.

249. *Id.* at 177. It appears that the Lithuanian Ministry of Transportation sent a diplomatic note to the U.S. Department of Homeland Security requesting that DHS "facilitate the release of the vessel," but DHS "chose not to act upon this note." *Id.* at 176. There is no indication that Lithuania approached the Department of State about a potential claim of immunity.

250. *Id.* at 177 (quoting Blair v. United States, 250 U.S. 273, 282 (1919)).

251. *Id.* at 179-80. The court also noted that, even if the FSIA did apply, the commercial activity exception would "likely" grant the court subject-matter jurisdiction in this case. *Id.* at 180 n.3.

252. *Id.* at 180.

253. *Compare* FG Hemisphere Assocs. v. Democratic Republic of the Congo, 637 F.3d 373 (D.C. Cir. 2011), *with* Af-Cap, Inc. v. Republic of Congo, 462 F.3d 417 (5th Cir. 2006).

254. *E.g.*, Statement of Interest of the United States at 1, Chabad v. Russian Federation, No. 1:05-cv-01548-RCL, 2015 WL 9244220 (D.D.C. Oct. 23, 2015). State Department Deputy Legal Adviser Elizabeth Verville testified in 1987 regarding the FSIA that "[t]he legislative history of the Act properly suggests, we believe, that imposition of a fine on a foreign state or incarceration of its officials for a state's failure to comply with a court order would not be permitted." *FSIA Hearing*, *supra* note 63, at 21 (statement of Elizabeth G. Verville, Deputy Legal Adviser, Department of State).

discovery.[255] The question was whether the court could impose contempt sanctions in the first place, not whether the court could enforce them against a foreign state's assets. The court of appeals reasoned that "whether the court can enforce its contempt sanction is irrelevant to the availability of a contempt order,"[256] and that "there is not a smidgen of indication in the text of the FSIA that Congress intended to limit a federal court's inherent contempt power."[257] The Fifth Circuit, by contrast, found that the apparent non-enforceability of contempt sanctions under the FSIA's provisions on attachment and execution precluded the court from ordering such sanctions to begin with.[258]

In the mystery subpoena case, the U.S. government requested contempt sanctions of $10,000 per day against the recalcitrant defendant.[259] The district court imposed a higher penalty of $50,000 per day in light of "the government's need for prosecutorial expedience in a matter of great concern in the United States" and "'the character and magnitude of the harm threatened by continued contumacy.'"[260] However, the court delayed accrual of the sanctions pending resolution of the appeal.[261] The D.C. Circuit relied on its own precedent to uphold the imposition of sanctions and bracketed the question of execution for future resolution.[262]

Under the FSIA, a separate legal regime governs the immunity of foreign state assets from execution to satisfy monetary judgments, including any accrued monetary sanctions.[263] Over time, these amounts can become substantial.[264] As the D.C. Circuit has noted, however, "[t]he FSIA is a rather unusual statute that explicitly contemplates that a court may have jurisdiction over an action against a foreign state and yet be unable to enforce its judgment unless the foreign state holds certain kinds of property subject to execution."[265] In addition, the FSIA explicitly precludes most

255. *FG Hemisphere Assocs.*, 637 F.3d at 375; *see also id.* at 377 (characterizing the U.S. government's opposition to sanctions as "quite confusing, conflating a contempt order imposing monetary sanctions with an order enforcing such an award through execution").

256. *Id.*

257. *Id.* at 378.

258. *Af-Cap, Inc.*, 462 F.3d at 428; *see also id.* at 429 (noting that "[u]nder the FSIA, a court's power to make an order does not always entail a power of enforcement by sanctions").

259. *In re* Grand Jury Subpoena No. 7409, No. 18-41, 2018 WL 8334866, at *3 n.1 (D.D.C. Oct. 5, 2018).

260. *Id.* (quoting United States v. United Mine Workers of Am., 330 U.S. 258, 304 (1947)).

261. *Id.* at *3.

262. *In re* Grand Jury Subpoena, 912 F.3d 623, 633 (D.C. Cir. 2019).

263. 28 U.S.C. § 1609.

264. *See, e.g.*, Graham Bowley, *Russia Fined $44 Million for Refusing to Hand Over Jewish Books*, N.Y. TIMES (Sept. 11, 2015), https://tinyurl.com/yy7fdrhk (reporting a monetary judgment of $43.7 million against Russia).

265. FG Hemisphere Assocs. v. Democratic Republic of the Congo, 637 F.3d 373, 377 (D.C. Cir. 2011).

punitive damages awards in civil suits against foreign states, but not against SOEs.[266] The issue of contempt sanctions is also one that Congress can and should address explicitly. In so doing, it should distinguish among the civil, criminal, and regulatory contexts, and it should more explicitly define the Executive Branch's role in providing input to courts about whether contempt sanctions are or are not appropriate in a particular case.

V. APPLYING THE COMMON LAW OF FOREIGN CRIMINAL IMMUNITY

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.[267] 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. Absent further guidance from Congress, the baseline for foreign state immunity determinations should be the restrictive theory. This means that, at a minimum, an entity's commercial acts are presumptively subject to jurisdiction, limited by applicable domestic constraints (such as due process). Courts could take the position, as they have in criminal prosecutions of natural persons, that the initiation of criminal proceedings itself constitutes a determination by the Executive Branch that a defendant, target, or witness is not entitled to immunity. This approach would echo the Eleventh Circuit's reasoning in upholding the denial of Panamanian dictator Manuel Noriega's claim to immunity from criminal jurisdiction: that "by pursuing Noriega's capture and this prosecution, the Executive Branch has manifested its clear sentiment that Noriega should be denied head-of-state immunity."[268] 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

266. 28 U.S.C. § 1606. *But cf.* Opati v. Republic of Sudan, 140 S. Ct. 1601 (2020) (upholding award of punitive damages under the FSIA's amended exception to immunity for state sponsors of terrorism).

267. *See generally* Ingrid Wuerth, *The Future of the Federal Common Law of Foreign Relations*, 106 GEO. L.J. 1825, 1848 (2018) ("Common law thus governs when an individual who is sued may be entitled to immunity based on her status . . . or based on her conduct."). This Article cannot do justice to ongoing debates about the existence and operation of federal common law generally. The persistence of these debates highlights the need for a coherent statutory solution.

268. United States v. Noriega, 117 F.3d 1206, 1212 (11th Cir. 1997) (also indicating that Noriega, who "never served as the constitutional leader of Panama," would "likely" not qualify for head-of-state immunity "even if this court had to make an independent determination regarding the propriety of immunity in this case"); *see also supra* note 102 and sources cited therein.

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.

Alternatively, courts could take the extreme position—contrary to the likely intent of Congress and the long-standing view of the Executive Branch—that federal courts do not have subject-matter jurisdiction over criminal proceedings against any entity that the FSIA defines as a "foreign state," including foreign-state-owned corporations and other legal persons. They could base this position on the FSIA drafters' decision to include foreign-state-owned corporations within the definition of a "foreign state" while omitting any explicit statutory restoration of the criminal jurisdiction purportedly withheld under the sweeping language of 28 U.S.C. §1604. Among other problems, this approach would have the paradoxical result of creating a regime of absolute immunity from criminal proceedings, which are initiated by the Executive Branch, alongside restrictive immunity from civil proceedings, which are initiated primarily by private parties. This would not effectuate the overall purpose of the statute, which was to place foreign states and state-owned entities on the same footing as private players in the marketplace.

As indicated above, the D.C. Circuit cobbled together the hybrid position that 18 U.S.C. § 3231 confers subject-matter jurisdiction on federal courts over any type of defendant in criminal proceedings, but that foreign states (as defined in the FSIA) are entitled to immunity from such proceedings unless one of the FSIA's enumerated exceptions applies.[269] This approach grafts provisions of a civil statute onto a grant of criminal jurisdiction, and presumes that the exceptions to immunity from civil and criminal proceedings are congruent. One can justifiably question the doctrinal soundness of this novel approach.

The D.C. Circuit's approach might seem practically appealing (if doctrinally unsatisfying), but it creates more problems than it solves. Criminal and regulatory proceedings have a fundamentally different purpose from civil litigation. As described in Part II.C, the Department of Justice has indicted foreign state agents and entities in circumstances that would not necessarily fall under the commercial activities exception to the FSIA, such as interfering in the U.S. electoral process. The expressive value of criminal prosecutions, and the ability of the United States to use such measures as retorsions or even countermeasures in its relations with foreign states, might argue in favor of a more permissive approach to jurisdiction. On the other hand, the United States might wish to limit its own reciprocal exposure to punitive measures in foreign courts, for the same reason that the FSIA

269. *See supra* Part II.B.

exempts foreign states (but not their agencies or instrumentalities) from punitive damages in most circumstances. The "hybrid" approach of cutting-and-pasting the contours of FSIA immunity and its exceptions directly into Title 18 does not account for these different considerations.

Among imperfect options, a federal common-law approach seems the most doctrinally and practically tenable pending further legislation. As a doctrinal matter, given that the drafters of the FSIA were focused on providing long-arm jurisdiction over certain suits initiated by private parties, the Supreme Court would likely find that the FSIA simply does not apply in criminal cases, just as it does not apply to foreign officials. Congress enacted the FSIA to replace the Tate Letter regime with respect to privately-initiated suits against foreign states. Consequently, the common law of foreign state immunity continues to govern criminal proceedings against SOEs, just as the common law of foreign official immunity governs proceedings against natural persons who do not fall within the scope of a specialized statute.

Adopting a common-law approach involves the difficult task identifying the sources, and content, of the federal common law of foreign state immunity from criminal proceedings. As a practical matter, courts should begin with the jurisdictional grant in 18 U.S.C. § 3231 and a presumption that the government agency that initiated proceedings has made a case-specific determination that there are no applicable immunities. As with criminal proceedings against foreign officials, this presumption should not lightly be disturbed. At the end of the day, however, the Executive Branch's determinations are fundamentally political in nature, since they involve weighing the value of pursuing domestic proceedings against their potential impact on foreign relations.[270] This is precisely the type of determination that the FSIA sought to eliminate in the civil context. The gate-keeping function of the Executive Branch in initiating criminal proceedings means that such proceedings can never be completely apolitical. That said, the more transparent and predictable the standards applied by prosecutorial authorities and by courts, the more likely they are to help shape foreign states' behavior *ex ante*, rather than simply punishing misdeeds *ex post*.

Absent further guidance from Congress, including in the form of a statutory provision that explicitly allow certain types of criminal proceedings against entities owned or controlled by foreign states, courts should proceed on the understanding that foreign states themselves are not generally subject

270. As the Supreme Court noted in *Chicago & Southern Air Lines v. Waterman S.S. Corp.*: "the very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government . . . They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and have long been held to belong in the domain of political power not subject to judicial intrusion or inquiry." 333 U.S. 103, 111 (1948).

to domestic criminal jurisdiction (even for their commercial activities), especially since the Executive Branch has not claimed otherwise. By contrast, separate entities such as SOEs and other agents of foreign states are subject to domestic criminal jurisdiction, at a minimum, for their commercial activities under the restrictive theory, and perhaps for other acts that violate U.S. criminal law.[271]

Other countries' approaches can also be instructive. Although the United States views jurisdictional immunities as a matter of "grace and comity,"[272] their partial codification in the FSIA was part of a broader international trend towards implementing the restrictive theory of immunity as a matter of international law.[273] State immunity statutes in other common law jurisdictions generally make clear that they do not govern immunity from criminal proceedings, but this does not mean that such proceedings are foreclosed under domestic law, depending on the status of the alleged wrongdoer and the nature of the alleged misconduct.[274]

As indicated above, although foreign states themselves have not generally been deemed capable of incurring criminal responsibility under domestic law, the same is not true of other legal persons, such as corporations.[275] As the United States indicated in its brief opposing certiorari in the mystery subpoena case, "many of those [other state immunity acts] make clear that government-owned corporations are generally not treated as the state for purposes of immunity, except where the corporation is engaging in the 'exercise of sovereign authority.'"[276] The Restatement (Fourth) of Foreign Relations also indicates that "[t]he FSIA provides a broader definition of 'foreign state' than is typical under foreign and international practice, by including agencies and instrumentalities for most purposes," but that "U.S. law affords somewhat less protection to agencies and instrumentalities than to the foreign state itself."[277] Although the FSIA defines "foreign state" expansively for purposes of that statute, history and practice support differentiating between state-owned corporations and foreign states for immunity purposes under a common law

271. Other questions, such as the potential exercise of criminal jurisdiction by state courts, would also need to be addressed. Depending on the facts of a particular case, the act of state doctrine might have a role to play, although only if a particular proceeding sought to invalidate the act of a foreign government performed on its own territory. *See generally* John Harrison, *The American Act of State Doctrine*, 47 GEO. J. INT'L L. 507 (2016); Chimène I. Keitner, *Adjudicating Acts of State*, *in* FOREIGN AFFAIRS LITIGATION IN UNITED STATES COURTS 49 (John Norton Moore ed., 2013).

272. *See supra* note 39 and accompanying text.

273. *See supra* Part II.B.

274. *See supra* note 72 and accompanying text.

275. *See supra* Part II.C.

276. Brief for the United States in Opposition at 17, *In re* Grand Jury Subpoena, 139 S. Ct. 1378 (2019) (No. 18-948), 2019 WL 916761.

277. FOURTH RESTATEMENT, *supra* note 35, § 452 reporters' note 12.

approach.[278] Applying the FSIA's enumerated exceptions uncritically in the criminal context does not permit such differentiation, unless one uses the availability of punitive damages in civil proceedings under the FSIA as a proxy for susceptibility to criminal proceedings under Title 18.

In sum, the interaction between evolving notions of corporate criminal responsibility in domestic law and state responsibility in international law suggests the need for more explicitly tailored 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 U.S. criminal jurisdiction, at least with respect to their commercial activities. More difficult questions will arise in investigations and prosecutions involving non-commercial conduct that a critical mass of 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.

Inviting Congress to modify the FSIA in the current political climate could be a risky proposition.[279] Nevertheless, there are several actions Congress could take 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. 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, consistent with any applicable constitutional limits. Third, Congress 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 that apply to foreign state-owned companies in the criminal context, including by endorsing the use of Federal Rule of Criminal Procedure 4.

278. *See supra* Part III.A.

279. *See, e.g.*, *supra* notes 18, 189 (counseling against amending the FSIA to create broad exceptions for pandemics and unauthorized cyber activity, respectively).

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.[280] Beyond mere 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 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.

VI. CONCLUSION

Like Chief Justice John Marshall's 1812 opinion in *Schooner Exchange*, contemporary U.S. practice regarding foreign state immunities both draws on, and shapes, customary international law. The FSIA has generally served the U.S. interest in de-politicizing immunity determinations, but it left important issues unaddressed that Congress should now clarify. Most importantly, Congress—and, pending new legislation, the courts—should leave no doubt that the FSIA does not deprive U.S. courts of the ability to exercise criminal jurisdiction over defendants, subpoena targets, or witnesses that are owned by foreign states.

280. This proposal is consistent with a similar suggestion made by Steven Koh, although it is fair to say that the benefits of further coordination also come with additional bureaucratic costs. Given the high-stakes foreign relations concerns that these cases may implicate, this seems like a worthwhile trade-off, especially if the National Security Council, supported by members of the interagency Lawyer's Group, takes a proactive role in vetting such actions and providing timely guidance to relevant decision-makers. *See* Steven Arrigg Koh, *Foreign Affairs Prosecutions*, 94 N.Y.U. L. REV. 340, 391 (2019). For an example of the problems that can arise absent sufficient (apparent) coordination, see Chimène Keitner, *Trump, Huawei, and the Politics of Extradition: Making Sense of the Meng Case*, FOREIGN AFFAIRS (Jan. 25, 2019), https://tinyurl.com/y3jothkk; *see also* Steven Arrigg Koh, *The Huawei Arrest: How It Likely Happened and What Comes Next*, JUSTSECURITY (Dec. 10, 2018), https://tinyurl.com/ybqean6y.