ALERT MEMORANDUM

U.S. Supreme Court Rules That The FSIA Does Not Immunize Foreign Sovereigns From Criminal Prosecution in U.S. Courts

April 21, 2023

On April 19, 2023, the U.S. Supreme Court issued its highly-anticipated decision in *U.S. v. Halkbank*,[1] holding that the Foreign Sovereign Immunities Act ("FSIA")[2] does not provide foreign sovereigns with immunity from criminal prosecution in U.S. courts.

The Supreme Court affirmed the U.S. Court of Appeals for the Second Circuit's holding that a criminal indictment against the Turkish-owned bank Halkbank could proceed to trial, but on different grounds. The Second Circuit assumed without deciding that the FSIA confers potential immunity in the criminal context and held that Halkbank's conduct fell under the FSIA's commercial activity exception. The Supreme Court affirmed the result but rejected altogether the application of the FSIA's statutory immunity scheme to criminal prosecutions. The Court ultimately remanded the case to the Second Circuit to consider Halkbank's common law immunity arguments.

This holding opens the door to increased criminal investigations and prosecutions of foreign state-owned entities ("SOEs"), and possibly foreign states themselves, in U.S. courts.

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[1] *United States v. Turkiye Halk Bankasi A.S.*, 598 U.S. ___ (2023) ("*Halkbank*").
[2] 28 U.S.C. §§ 1602 *et seq*.

Background

Halkbank, one of Turkey's largest state-owned banks, was indicted in 2019 by the U.S. Attorney's Office for the Southern District of New York for allegedly laundering over $1 billion of Iranian oil and gas proceeds through the U.S. financial system, and approximately $20 billion through the international financial system, in violation of U.S. sanctions laws.

Halkbank moved to dismiss the indictment, arguing, *inter alia*, that it is immune from criminal prosecution under the FSIA and common law.[3] The district court rejected Halkbank's arguments, joining the Tenth and Eleventh Circuits in ruling that the FSIA does not immunize foreign sovereigns from criminal prosecution.[4] The district court also rejected Halkbank's argument that it was entitled to immunity under common law.

The Second Circuit affirmed the district court's ruling, but on somewhat different grounds. Mirroring the D.C. Circuit's reasoning in its 2019 *In re Grand Jury Subpoena* decision,[5] the Second Circuit ruled that 18 U.S.C. § 3231—which provides federal district courts with jurisdiction over "*all* offenses against the laws of the United States"—has no exemption for foreign sovereigns and thus conferred subject matter jurisdiction.[6] As to sovereign immunity, the Second Circuit again joined the D.C. Circuit's approach, declining to rule whether the jurisdictional provisions of the FSIA apply in the criminal context. Assuming *arguendo* that they did, the Second Circuit held that Halkbank's conduct fell within the FSIA's exception for commercial activities.[7]

Finally, the Second Circuit rejected Halkbank's attempt to rely on historical concepts of sovereign immunity under the common law, ruling that (i) the FSIA "displaced any pre-existing common-law practice;" (ii) foreign sovereign immunity at common law also had an exception for commercial activity; and (iii) the prosecution "necessarily manifested the Executive Branch's view that no sovereign immunity existed."[8]

The Supreme Court's Decision

In a majority opinion authored by Justice Kavanaugh, the Supreme Court affirmed that the district court had subject matter jurisdiction under 18 U.S.C. § 3231. Halkbank had argued that this provision should be read as excluding actions against foreign sovereigns because, unlike other U.S. statutes, it does not explicitly refer to actions against foreign states and their instrumentalities. The Supreme Court rejected this argument, holding that Section 3231's plain text applied to "*all* offenses against the laws of the United States," which

[3] The district court equated Halkbank with the state of Turkey, while the Supreme Court emphasized Halkbank's relationship to Turkey as a majority state-owned bank.

[4] Contrary to the approach taken by the Tenth and Eleventh Circuits, the Sixth Circuit held that the FSIA "grants immunity to foreign sovereigns from criminal prosecution, absent an international agreement stating otherwise." *Keller v. Central Bank of Nigeria*, 277 F.3d 811, 820 (6th Cir. 2002). *C.f. Southway v. Central Bank of Nigeria*, 198 F.3d 1210, 1215 (10th Cir. 1999); *United States v. Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997). Like the Second Circuit in this case, the D.C. Circuit assumed *arguendo* that the FSIA applied but found the conduct to fall within the commercial activity exception. *In re Grand Jury Subpoena*, 912 F.3d 623 (D.C. Cir. 2019).

[5] 912 F.3d 623; *see also supra* note 4, setting forth the D.C. Circuit's approach to the application of the FSIA to criminal cases.

[6] *United States v. Turkiye Halk Bankasi A.S.*, 16 F.4th 336, 347 (2d Cir. 2021) (quoting 18 U.S.C. § 3231) (emphasis added); *see In re Grand Jury Subpoena*, 912 F.3d 623, 634 (D.C. Cir. 2019) (same).

[7] *See* 28 U.S.C. § 1605(a)(2) (exception to sovereign immunity for a suit based upon (1) "a commercial activity carried on in the United States by the foreign state"; (2) "an act performed in the United States in connection with a commercial activity of the foreign state elsewhere"; or (3) "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").

[8] *Halkbank*, 16 F.4th at 350-51.

was not overcome by Halkbank's arguments based on "[u]nrelated" statutes and "distinct contexts."[9]

The Supreme Court then turned to sovereign immunity, rejecting Halkbank's arguments that it was immune from criminal prosecution but on different grounds than the Second Circuit's decision. Noting that it had "never applied the [FSIA]'s immunity provisions in a criminal case"—but also observing that it had "not expressly held that the FSIA covers only civil matters"—the Supreme Court held for the first time "that the FSIA does not grant immunity to foreign states or their instrumentalities in criminal proceedings."[10]

First, the Supreme Court cited the plain text of FSIA Section 1330, which grants jurisdiction over a "nonjury *civil* action against a foreign state" and enumerates a detailed statutory scheme concerning solely civil cases.[11] In "stark contrast," the FSIA's text is "silent as to criminal matters."[12]

Second, the Supreme Court held that "[c]ontext reinforces this text."[13] The fact that there were occasional criminal proceedings involving foreign SOEs when the FSIA was enacted in 1976 made it "even more unlikely" that Congress intended to silently codify sovereign immunity from criminal proceedings.[14] Moreover, the FSIA was placed within Title 28, which focuses on civil actions, whereas criminal proceedings are primarily covered by Title 18.

Third, the Supreme Court rejected Halkbank's arguments based on the Court's often repeated statement that the FSIA provides the "sole basis for obtaining jurisdiction over a foreign state in federal court," noting that this quote was from a civil case in which it had "no occasion to consider criminal jurisdiction," so it "does not translate to the criminal context."[15] Similarly, the Supreme Court held there would not be a void of "congressional guidance" for criminal proceedings against the foreign state or instrumentality, because the Federal Rules of Criminal Procedure would provide guidance as in any criminal prosecution.[16]

Finally, the Supreme Court held that the Second Circuit did not fully consider the arguments raised in the parties' briefs regarding common-law immunity in criminal cases—such as whether the Executive Branch can "unilaterally abrogate common-law immunity by initiating prosecution" and whether immunity applies differently to foreign states versus instrumentalities—and thus remanded these questions to the Second Circuit for further proceedings, though it is unlikely Halkbank will succeed.[17]

In a separate opinion, Justices Gorsuch and Alito concurred in part and dissented in part. They agreed that Section 3231 confers subject matter jurisdiction in matters involving foreign sovereigns, but departed from the majority in finding that the FSIA applies equally to civil and criminal cases. Like the Second Circuit, Justices Gorsuch and Alito concluded that Halkbank lacks sovereign immunity in this matter based on the FSIA's commercial activity exception. They also expressed concern that the majority's decision to remand the question of common-law immunity requires either deference to the Executive Branch's determination of immunity or application of

[9] *Halkbank*, at 3-4 (emphasis added).
[10] *Id*. at 7.
[11] *Id*. (citing 28 U.S.C. 1330(a) (emphasis added)); *see also id*. at 7-8 (citing various civil actions pursuant to the FSIA).
[12] *Id*. at 8.
[13] *Id*.
[14] *Id*. at 9 (citing *In re Grand Jury Investigation of Shipping Industry*, 186 F. Supp. 298, 318-20 (D.D.C. 1960) (violations of the Sherman Act by Filipino instrumentality); *In re Investigation of World Arrangements*, 13 F.R.D. 280, 288-91 (DC 1952) (antitrust violations with criminal penalties brought against British instrumentality)).
[15] *Id*. at 12-13.
[16] *Id*. at 13.
[17] *Id*. at 14-15.

customary international law, which have difficult implications and questions.

Takeaways

The Supreme Court's decision for the first time rejects the application of statutory foreign sovereign immunity to criminal investigation and prosecution. It therefore confirms that SOEs, and potentially foreign states themselves, who do business in the U.S. market or whose foreign conduct causes actionable effects in the U.S., may be exposed to criminal charges in the United States.[18]

Most directly, the Supreme Court's ruling provides the Department of Justice ("DOJ") with an additional tool to coerce compliance with U.S. sanctions regimes. In addition to the threat of potential secondary sanctions, SOEs and foreign sovereigns may find themselves facing investigation and prosecution in the United States for violating U.S. sanctions. But the decision also has broad implications outside of the sanctions context, including in other areas which have been the focus of prosecutors in corporate prosecutions—including potential violations of the federal securities laws for SOEs and sovereigns that issue securities in the U.S. and the FCPA for states entities whose employees may be considered "foreign officials" under the statute.

This concern over an uptick in cases against foreign sovereigns was highlighted in Pakistan's *amicus curiae* brief in support of Halkbank, which cautioned that subjecting foreign states to criminal proceedings "would be unprecedented [] and make the United States an extreme outlier."[19] As certain countries—including Canada, Singapore, and South Africa—have legislation specifically prohibiting exercise of criminal jurisdiction over other states,[20] the United States may now present a less hospitable regulatory environment for SOEs and sovereigns concerned with the costs and risks associated with complying with U.S. criminal laws.

In light of the Court's decision, SOEs and foreign states should consider and address their U.S. criminal exposure, including by potentially tailoring compliance programs to the unique risks and business activities within U.S.. In particular, U.S. prosecutors may now scrutinize activities of SOEs that have been in the traditional subject of corporate prosecutions as well as conduct that may interest the government for political reasons, such as violating sanctions, corruption, human rights abuses, and terrorism.

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[18] On remand, the lower court will evaluate the reach of common-law immunity in criminal cases and determine if a prosecutor's decision to bring charges itself manifests the Executive Branch's position that no common law immunity should apply, which may also cause confusion as to the interaction of the FSIA and the Foreign Corrupt Practices Act ("FCPA"). 15 U.S.C. §§ 78 *et seq*. While the FSIA defines a foreign state as including an instrumentality, which includes SOEs, the FCPA does not define an instrumentality. Accordingly, this decision creates a lack of clarity regarding whether SOEs can claim immunity when facing FCPA charges.

[19] Br. for *Amici Curiae* Islamic Republic of Pakistan, *et al.* in Supp. of Pet'r at 3, *Türkiye Halk Bankasi A.Ş. v. United States of America*, No. 21-1450 (U.S. June 16, 2022).

[20] By contrast, the U.K. State Immunity Act was amended in February of 2023 to not apply to criminal proceedings.