

# Foreign Sovereign Entities Should Heed 9th Circ. IP Ruling

By **Carmine Boccuzzi and Matt Yelovich** (June 6, 2025)

On April 28, the U.S. Court of Appeals for the Ninth Circuit **issued** a significant published opinion addressing, for the first time, the scope and domain of sovereign immunity under the common law in the criminal context.

In *United States v. Pangang Group Co. Ltd.*, the court held that four Chinese state-controlled companies were not immune from criminal indictment for alleged economic espionage.[1] Foreign sovereign-controlled entities should conduct a considered analysis of the court's ruling to assess whether their operations, activities and affiliation with their parent state qualify for sovereign immunity under the common law.

Although some of the same considerations from the Foreign Sovereign Immunities Act, or FSIA, context may prove informative, the common-law analysis differs in important respects as discussed below.

## Background

In 2016, a federal grand jury returned a superseding indictment charging four affiliated companies, i.e., the Pangang companies, controlled by the People's Republic of China, or PRC, with violations of the Economic Espionage Act. The companies allegedly stole and received stolen trade secrets relating to the production of titanium dioxide in order to benefit the PRC and the companies themselves.

Over years of litigation, the Pangang companies have repeatedly sought dismissal of the indictment on sovereign immunity grounds.

In the previous interlocutory appeal on immunity grounds, the Ninth Circuit held that the FSIA did not immunize the Pangang companies because they were not "foreign instrumentalities" within the meaning of the FSIA. That was because, the court held, the Pangang companies had not established that they were majority-owned directly by a foreign state.

Since the Pangang companies did not contend that they were "organ[s]" under the FSIA, no other statutory basis for immunity was presented in the first appeal.

Returning to the district court, the Pangang companies again moved to dismiss the indictment on immunity grounds, this time raising both FSIA and common-law immunity arguments. The district court denied this second motion, and the case again went to the Ninth Circuit.

Meanwhile, as discussed in contemporaneous coverage,[2] in 2023, the U.S. Supreme Court held in *Turkiye Halk Bankasi A.S. v. U.S.*[3] that district courts have jurisdiction over criminal prosecutions under Title 18 of the U.S. Code, Section 3231, even when the defendants are "foreign states or their instrumentalities," and that "the FSIA does not grant



Carmine Boccuzzi



Matt Yelovich



Sam Blankenship

immunity to foreign states or their instrumentalities in criminal proceedings." [4]

While this conclusively ended the Pangang companies' statutory claim to immunity, Halkbank left open the question of whether immunity from criminal proceedings may extend to foreign states and their instrumentalities under the common law.

### **The Ninth Circuit Breaks New Ground on Scope and Domain of Foreign Sovereign Immunity Under Common Law**

Facing "a near-total lack of directly applicable precedent," the Ninth Circuit affirmed the denial of the Pangang companies' motion to dismiss, concluding that common-law sovereign immunity did not preclude prosecution of these entities.

The court relied on the 1965 Restatement (Second) of Foreign Relations Law's articulation of the standard of eligibility for common-law immunity: A corporation falls within the domain of foreign sovereign immunity only if it was "created under [a foreign state's] laws and exercis[ed] functions comparable to those of an agency of the [foreign] state." [5]

The court analyzed the question of whether the Pangang companies acted as agents of the PRC by reference to cases assessing whether entities were organs of a sovereign state — the applicable analysis under the FSIA — in comparable criminal, quasi-criminal and grand jury subpoena litigation. It also relied on the historic development of the sovereign immunity doctrine and actions by Congress and the executive branch concerning the same.

The court held that the Pangang companies had not made a prima facie showing that they "exercise functions comparable to those of an agency of the PRC." [6] The Pangang companies had argued that they were acting as an agency of the PRC because espionage is a sovereign activity. The court rejected that assertion, holding that "the commercial espionage alleged here [was] not a function comparable to that of an agency of the state and therefore d[id] not qualify the Pangang Companies for immunity under" the Restatement's standard. [7]

It was not enough that the companies were allegedly controlled by an agency of the PRC — at base, the corporate espionage alleged in the indictment amounted to commercial activity dissimilar from the function of any agency of the PRC.

The court also rejected an argument that the Pangang companies' alleged actions were qualified for immunity merely because they happened to align with the PRC's stated goal of developing titanium dioxide production technology. As the court put it, a "generalized public benefit from a commercial enterprise's economic exploitation of stolen trade secrets is not enough to transform that industrial espionage into the exercise of a function comparable to that of a state agency." [8]

Finally, the court noted the deference it owed to the executive branch in cases involving foreign relations and sovereign immunity under the common law. The court found compelling the federal government's continued prosecution of the Pangang companies over the preceding 13 years, noting that this "reflect[ed] the Executive Branch's considered judgment that the companies do not qualify for immunity." [9]

### **Key Takeaways**

Pangang Group provides significant further explication as to the circumstances under which foreign (non-U.S.) state-owned entities may be subject to criminal prosecution in the U.S.

The Ninth Circuit made clear that sovereign immunity protections will not attach under the common law where a corporate entity takes action in furtherance of its economic goals — even if ancillary public benefits or sovereign objectives may also inure.

This opinion, the previous opinion in this case, the U.S. Supreme Court's Halkbank decision and the U.S. Court of Appeals for the Second Circuit's **opinion** in 2024 in that same litigation further narrow the immunity grounds on which state-controlled entities could resist criminal process, including grand jury subpoenas or corruption, terrorism or sanctions-related proceedings.

The court's analysis tracked some of the more well-tread ground of FSIA cases, with a few significant exceptions. First, the court focused on the entities' function, deeming ownership or control by the parent state irrelevant under the common law.

Second, the court expressly held that it owed deference to the executive branch on common-law immunity determinations — a sharp departure from the FSIA, where such deference was largely displaced by the enactment of the statute. The court left open for future challenge the precise parameters of this deference.

Beyond these differences, there appears to be significant overlap between the FSIA and common-law inquiries in terms of what circumstances trigger or preclude immunity. For example, courts will ask whether the entity is engaged in commercial activity or whether its functions are uniquely sovereign. There will be cases, however, in which there is a meaningful delta between inquiring into the purpose and functions of an entity versus defining its conduct in a particular circumstance.

Finally, the implications go beyond enforcement actions and criminal prosecutions. The court's opinion rejected the idea that economic espionage was a sovereign act, and similarly denied the concept that trade secret theft that happens to benefit a foreign power is an act comparable to that of a state agency. This type of analysis could have consequences for pending and future immunity claims in the civil context, and could certainly inform debates about the reach of the common law or the scope of the commercial activity exception in the FSIA.

Foreign state-owned entities should engage in a considered analysis of the court's ruling to account for the standards established in *Pangang*, paying particular attention to: (1) the nature of the conduct and whether the conduct at issue is of the type that can be engaged in by ordinary, nongovernmental actors; (2) whether the entity or agency is acting as a regulator or participant in the market; and (3) whether the counterparty is a private actor or a state entity, as relations with the latter might counsel in favor of common-law immunity.

Given the new ground tread in this and other recent opinions mentioned above, foreign sovereign entities should anticipate continued legal developments in the common-law immunity space. For example, questions remain unanswered as to how, under the common law, a nexus to the U.S. is determined — a specific and detailed inquiry laid out in the FSIA for statutory cases.

And the reach and force of executive branch deference remains undefined. In *Pangang Group*, the Ninth Circuit determined that no common-law sovereign immunity applied, invoking deference to the executive branch only as an additional point favoring its holding after that holding had been reached.

By contrast, the Second Circuit, considering the remanded question of common-law immunity in the wake of the Supreme Court's Halkbank decision, started with deference to the executive branch's determination that immunity should not be granted. The court then determined that, since the executive branch's determination was consistent with the common law, the court need not decide the limits of such deference were the executive's determination to be in "derogation" of the common law.[10]

Accordingly, foreign sovereign entities should engage in considered evaluations of operations, structure and strategic plans in the U.S. to mitigate risk and maximize potential immunity arguments in future enforcement or civil actions.

---

*Carmine Boccuzzi and Matt Yelovich are partners, and Sam Blankenship is an associate, at Cleary Gottlieb Steen & Hamilton LLP.*

*The opinions expressed are those of the author(s) and do not necessarily reflect the views of their employer, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*

[1] United States v. Pangang Grp. Co., No. 22-10058 (9th Cir. April 28, 2025) ("Pangang Group").

[2] U.S. Supreme Court Holds FSIA Does Not Immunize Foreign Sovereigns From Criminal Prosecution, Cleary Gottlieb (April 21, 2023), available at <https://www.clearygottlieb.com/news-and-insights/publication-listing/us-supreme-court-holds-fsia-does-not-immunize-foreign-sovereigns-from-criminal-prosecution>.

[3] Turkiye Halk Bankasi A.S. v. United States, 598 U.S. 264 (2023).

[4] *Id.* at 268-72.

[5] Pangang Group at 27 (citing Restatement § 66(g)).

[6] *Id.* at 29.

[7] *Id.* at 30-31.

[8] *Id.* at 32.

[9] *Id.* at 36.

[10] See United States v. Türkiye Halk Bankası, A.S., 120 F.4th 41, 48-49 (2d Cir. 2024).