CAN SOVEREIGN-OWNED ENTERPRISES BE PROSECUTED IN NATIONAL COURTS?

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ABSTRACT: Sovereign-owned enterprises – corporate entities owned or controlled by a state – are an energetic and growing presence in the world economy. Their rise coincides with an entirely separate phenomenon, at least in some countries, of corporate criminal prosecutions – that is, efforts to obtain convictions of non-human actors under national criminal laws. The confluence of these two trends will inevitably lead to prosecutions of corporate entities where a national state may claim that the corporate defendant should be protected by the principle of sovereign immunity. A case now pending in the United States, including a recent decision of the Supreme Court of that country, offers an interesting insight into many different components of this important problem.

Key words:

- Sovereign-owned enterprises
- Sovereign immunity
- Customary international law
- Corporate criminal prosecution
- FSIA
- Halkbank

1. INTRODUCTION

In 2019, the federal prosecutor in New York obtained an indictment against the Turkish bank Türkiye Halk Bankasi AŞ, universally known as Halkbank, charging it with money laundering in violation of United States federal criminal laws, in particular to evade United States sanctions against Iran. Halkbank, which is majority-owned by the government of Türkiye, argued that it qualified as a 'sovereign' and thus was immune from criminal prosecution under the Foreign Sovereign Immunities Act of 1976 (FSIA). This defense was rejected by the trial court, as well as by the United States Court of Appeals for the Second Circuit, which ruled that, while Halkbank qualified as a 'sovereign' under the FSIA, its activities were 'commercial' and thus fell within a specific exception to immunity listed in the FSIA. The Supreme Court of the United States agreed to hear Halkbank's request to review this outcome, and in April 2023 the Court issued its decision: the FSIA does not apply to criminal prosecutions *at all*; rather, Congress intended the law to apply only to civil actions against sovereigns and did not address criminal prosecutions. Since Halkbank could claim no statutory defense to prosecution, the Court remanded the case to the Court of Appeals to determine whether Halkbank could be protected by non-statutory principles of sovereign immunity under customary international law (CIL), as applicable in United States

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federal courts. The appeal was argued on 28 February 2024;[1] a decision may come down later this year, or possibly next year.

While definitive on the limited reach of the FSIA, the decision opens the door to complex litigation on at least two separate questions: first, what exactly is the customary international law applicable to the commercial activities of sovereign-owned enterprises (SOEs), and how should this law be applied in national courts? And, second, with specific reference to the United States, is there a risk of prosecutions – perhaps politically motivated – against sovereigns (including, but not limited to, SOEs) by State or local prosecutors?

These questions arise in the context of specific American legislation, but they are of broad importance because the situation will recur. As the World Bank has recently noted,[2] many countries are increasing their creation and deployment of SOEs in a variety of global markets, including finance, tourism, and manufacturing; these companies often compete against purely commercial enterprises, and may act in countries where their activities are subject to regulation, including by the potential imposition of criminal penalties for violation of local laws. It is thus inevitable that – just like their privately owned counterparts – they will face occasional criminal prosecution in those countries that recognize corporate criminal responsibility;[3] such prosecutions would not be limited to sanction-related money-laundering as alleged in the *Halkbank* case, but could include any area that a host country chooses to regulate by criminalizing corporate conduct.

2. SOVEREIGN IMMUNITY IN THE UNITED STATES

2.1 Prior to the FSIA

The core principle of sovereign immunity is that the 'sovereign' – generally meaning a national state or a subdivision of one – cannot be sued without its consent. Derived from the adage that 'the King can do no wrong,' the concept first developed as national common law in many countries and has generally been addressed by legislation. When applied internationally – that is, when the courts of one state are asked to entertain a claim against another state or an entity owned or controlled by it – the principle includes the notion of comity as recognized in customary international law.[4]

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1 *United States v Zarrab(Halkbank)* (2024) (No 20-3499), Oral Argument, <https://ww3.ca2.uscourts.gov/decisions/isysquery/201a25ee-3800-40ed-b013-cbaf4b3a5287/302/doc/20-3499%20(R).mp3> accessed 16 August 2024; for a description of the argument. see 'Second Circuit Hears Halkbank Oral Argument' (*TLB*, 5 March 2024) <https://tlblog.org/second-circuit-hears-halkbank-oral-argument/> accessed 16 August 2024.

2 World Bank, *The Business of the State* (World Bank, 2023) <www.doi.org/10.1596/978-1-4648-1998-8> accessed 16 August 2024.

3 See Section 4.3.3 of this article for further discussion of the issue of corporate criminal responsibility.

4 In the oft-cited case of *The Schooner Exchange v McFaddon*, 11 US (7 Cranch) 116 (1812) 137, Chief Justice Marshall noted that foreign states and governments benefited from 'absolute' immunity, on the reasoning that the 'perfect equality and absolute independence of sovereigns' required that a 'foreign sovereign is not understood as intending to subject himself to a jurisdiction incompatible with his dignity, and the dignity of his nation.' See William S Dodge, 'International Comity in American Law' (2015) 115 Columbia L Rev 2071.

Prior to the adoption of the FSIA in 1976, United States courts handled questions of sovereign immunity on a case-by-case basis. A prominent component of that jurisprudence was the deference that the courts gave to the position taken by the executive branch, which made its immunity determinations known through 'suggestions of immunity,' often filed as 'statements of interest' in cases in which it was not a party.[5] Beginning in 1952, the State Department adopted the so-called 'restrictive' theory of sovereign immunity, reflecting its view that 'customary international law had evolved to permit adjudication of disputes arising from a state's commercial activities (*acta jure gestionis*) while preserving immunity for sovereign or 'public' acts (*acta jure imperii*).'[6]

2.2 The FSIA – Goals

The case-by-case approach attracted significant criticism, which led to the adoption of the FSIA in 1976.[7] The FSIA's three principal goals are evident in its text and explained by its proponents.[8] First, it emphasizes that the ultimate decision on immunity must rest with the courts. As the Government has stated in an official publication concerning the FSIA, '[u]nder the FSIA, decisions on state immunity are the purview of the Judicial branch.'[9] Second, it provides that decisions concerning immunity are to be governed by the text of the FSIA itself, thereby ensuring consistency. Finally, it creates a series of procedures to guarantee that immunity decisions are litigated exclusively in federal – as opposed to State – courts, thus ensuring that immunity issues are resolved through 'one voice.'

2.3 The FSIA – Structure

The FSIA can perhaps best be understood by placing its provisions into three groups: (1) the grant of immunity, (2) exceptions to the grant, and (3) jurisdictional procedures. The core of the FSIA is the simple statement that:

> Subject to existing international agreements to which the United States is a party at the time of enactment of this Act *a foreign state shall be immune from the jurisdiction of*

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5 28 USC § 517 authorizes the Attorney General to designate an officer 'to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State.'

6 David P Stewart, *The Foreign Sovereign Immunities Act: A Guide for Judges* (2nd edn, Federal Judicial Center, 2018); for a recent discussion of the commercial activities exception to immunity in different jurisdictions, see Katherine Reece Thomas, *The Commercial Activity Exception to State Immunity: An Introduction* (Edward Elgar, 2024).

7 28 USC § 1602.

8 28 USC § 1602, entitled the 'Findings and Declaration of Purpose' of the FSIA, provides that:
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, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities. Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.

9 'Foreign Sovereign Immunities Act' (*Travel.State.Gov*, 19 December 2023), <https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/internl-judicial-asst/Service-of-Process/Foreign-Sovereign-Immunities-Act.html> accessed 16 August 2024.

> *the courts of the United States and of the States* except as provided in sections 1605 to 1607 of this chapter.[10]

The impact of this straightforward provision is significantly amplified by the FSIA's definition of 'foreign state,' which includes any entity 'a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof.'[11] In an important sense, this 'definitional' provision is the cause of the difficulties the *Halkbank* case raises: It provides that *any* entity – irrespective of its actual activities – is 'sovereign,' with exactly the same rights and immunities as a foreign nation in all its majesty, provided only that a foreign state or subdivision owns a majority of its shares. From this it follows that, at least as far as the FSIA is concerned, any interpretation of the statute's applicability to criminal prosecutions will govern not only commercial entities such as Halkbank but also true sovereigns – countries – acting as such.

The FSIA then specifies in §§1605 through 1607 those limited exceptions where the overall grant of immunity under §1604 does not apply. Prominent among these exceptions is the provision that:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case … *in which the action is based upon a commercial activity* carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or 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.[12]

Logically, then, the FSIA seems straightforward: a 'foreign state' (including, by definition, any SOE) is absolutely immune from the 'jurisdiction of the courts of the United States and of the States,' unless its activity falls within the 'commercial activity,' or another FSIA exception.[13]

These provisions thus addressed the FSIA's goal of ensuring 'judicial review' and 'consistency' by providing a legislative framework by which courts could evaluate claims of immunity. It then addressed the 'one voice' principle by requiring that all 'actions' against a foreign state be litigated in federal court, to the exclusion of State courts. It did this by adding two procedural provisions: first, that federal courts have 'original jurisdiction' of 'any nonjury civil action against a foreign state as defined,'[14] and, second, that any 'civil action brought in a State court against a foreign state' be removed to federal court.[15] As a result, all 'civil actions' against a 'foreign state,' including an SOE, must be heard and decided only in federal court, which will apply the FSIA to determine whether or not to grant immunity.

2.4 The FSIA – Criminal Prosecutions

The problem, which avoided clear judicial resolution until highlighted in the *Halkbank* case, was that it is very unclear whether – and if so, how – the FSIA applies to criminal prosecutions.

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10 28 USC § 1604 (emphasis added).
11 28 USC §1603(b)(2).
12 28 USC §1605(a)(2) (emphasis added).
13 While §§1605–8 provide for other 'exceptions' to the immunity granted by §1604, none is applicable here.
14 28 USC §1330.
15 28 USC §1441(d).

The starting point is that the FSIA does not specifically reference criminal prosecutions; this is apparent from its text and was conceded by the Deputy Solicitor General of the United States in his argument in the Supreme Court in *Halkbank*.[16] As one Justice put it during oral argument, 'I don't see anything in this statute that suggests that Congress was focused on or was thinking about immunity for criminal prosecution.'[17] The Justices were thus left to interpret statutory language without any real guidance on Congress's intent.

The Court considered three possible interpretations of the FSIA:

The position taken by Halkbank was that:

- the FSIA governs *all* actions against sovereigns, including criminal prosecutions;
- §1604 by its terms does not distinguish between civil and criminal matters, and rendered Halkbank immune from *any* suit in the United States, whether civil or criminal;
- in contrast, the 'commercial activity' exception of §1605(a)(2) by its terms only applies to *civil actions*; and
- all 'foreign states,' including SOEs, are thus absolutely immune from criminal prosecution because they fall within the general grant of immunity of §1604 but not within any exception.

The principal position of the United States, and of several *amici curiae*, was that:

- the FSIA applies to criminal prosecutions; but that
- if the FSIA is applicable, that would bring with it the commercial activities exception of §1605(a)(2), and Halkbank's activities were demonstrably commercial.

An alternative position of the United States was that:

- the FSIA in its entirely is limited to civil actions, and does not apply at all to criminal prosecutions;
- Halkbank thus has no immunity under the FSIA; and
- under 'federal common law,' applying CIL, it is prosecutable for its commercial activities.

By far the tidiest, and arguably the most sensible as a matter of public policy, was the second outcome, which was the position adopted by the United States Court of Appeals for the Second Circuit in the decision from which Halkbank sought review: under it, Halkbank's claim for immunity is governed by the FSIA but Halkbank (and SOEs generally) are not immune from prosecution when they engage in commercial activities. This approach would respect the FSIA's goals of judicial review and consistency by providing for judicial evaluation of immunity claims on a consistent basis under federal law. It would not and could not, however, require that immunity claims in criminal cases be resolved on a unitary, 'one voice' structure in federal courts because it is unambiguous that the federal jurisdiction and removal provisions of 28 USC §§ 1330 and 1441(d) (quoted above) by their terms apply only to 'civil actions,' and no parallel provision exists applicable to criminal cases. In short, under the Second Circuit's outcome, prosecutions for

[16] *Turkiye Halk Bankasi AS v United States*, 143 S Ct 940 (2023) (No 21-145), E Feign, 'Transcript of Oral Argument' 54.

[17] Ibid, J Jackson, 'Transcript of Oral Argument' 24.

violations of federal criminal laws, which by statute can only proceed in federal courts,[18] would be addressed consistently by federal courts, but the FSIA would provide no bar against, or procedures to govern, State prosecutions in State courts.

The problem is that the outcome the Second Circuit adopted is simply difficult to justify textually. In a thorough analysis of the FSIA, Jack Goldsmith of Harvard Law School and Curtis Bradley of Chicago Law School concluded that 'the §1605 exceptions are limited to civil suits,' and that as a result, 'the federal government would not currently be able to bring criminal prosecutions against foreign state-owned instrumentalities.'[19] Their nuanced analysis focused principally on the contrast between the unlimited and unambiguous blanket grant of immunity in §1604, and the explicitly limited scope of the 'commercial activities' and other exceptions. Under this analysis, Halkbank would win, and neither it nor any SOE could ever be prosecuted in any federal or State court: the FSIA would grant total immunity from criminal prosecution, without any exceptions, for all 'sovereigns' including SOEs.

3. THE SUPREME COURT'S DECISION IN *HALKBANK*

A majority of the Supreme Court rejected both Halkbank's argument and the Second Circuit's analysis. It squarely held that 'the [FSIA] does not provide foreign states and their instrumentalities with immunity in *criminal* proceedings.'[20] Forced to work around the rather stark statement in §1604 that 'a foreign state [which by definition includes an SOE] shall be immune from the jurisdiction of the courts of the United States and of the States,' the Court read into the FSIA a particular hierarchical structure. The Court reasoned that, rather than acting as a departure point of the entire FSIA, §1604 was dependent on the provisions found elsewhere that focus exclusively on civil actions. Noting that '[i]n contrast to those many provisions concerning civil actions, the FSIA is silent as to criminal matters,'[21] the Court concluded that while '[i]n complete isolation, §1604 might be amenable to [Halkbank's] reasoning,' §1604 needed to be interpreted 'alongside its neighboring FSIA provisions' that only described civil matters.[22] Two dissenting judges would have adopted the reasoning of the Second Circuit.[23]

Whatever the intellectual merit of this reasoning, the opinion was definitive on the core question of whether courts can look to the FSIA when faced with questions of immunity in prosecutions of 'sovereigns' including SOEs: they cannot. The decision nonetheless left at least two important legal issues open for development.

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18 18 USC §3231.

19 Curtis Bradley and Jack Goldsmith, '*Turkiye Halk Bankasi AS v United States,* Part 1: The FSIA and Criminal Prosecutions' (*LAWFARE*, 11 January 2023*)* <www.lawfareblog.com/turkiye-halk-bankasi-v-united-states-part-1-fsia-and-criminal-prosecutions> accessed 16 August 2024; Curtis Bradley and Jack Goldsmith, '*Turkiye Halk Bankasi AS v United States*, Part 2: What to Do If the FSIA Does Not Apply?' (*LAWFARE*, 13 January 2023) <www.lawfareblog.com/turkiye-halk-bankasi-v-united-states-part-2-what-do-if-fsia-does-not-apply> accessed 16 August 2024; Curtis Bradley and Jack Goldsmith, '*Turkiye Halk Bankasi AS v United States*, Part 3: The Odd Executive Agreement Preemption Argument' (*LAWFARE*, 19 January 2023) <www.lawfareblog.com/turkiye-halk-bankasi-v-united-states-part-3-odd-executive-agreement-preemption-argument> accessed 16 August 2024. See also Megan O Liu, 'The Scope of Sovereign Criminal Immunity: Instrumentalities Under the Foreign Sovereign Immunities Act' (2021) 60 Colum J Trans L 276.

20 *Turkiye Halk Bankasi AS v United States*, 143 S Ct 940 (2023) 5 (emphasis in original) (*Halkbank* Supreme Court Opinion).

21 Ibid 8.

22 Ibid 10.

23 Ibid at 1–4 (Gorsuch and Alito JJ dissenting).

First, the Court noted that the Second Circuit did not address whether CIL would protect Halkbank from prosecution; it thus remanded to that Court for briefing and resolution of that question, which is now underway.[24] And second, the Court took note of an issue that is *not* presented in the *Halkbank* case itself but could arise in other proceedings, namely, what happens if a State or local prosecutor were to prosecute an SOE or other 'sovereign' in State court.

The remainder of this article will discuss these two issues.

4. CUSTOMARY INTERNATIONAL LAW AND CRIMINAL PROSECUTIONS OF SOES

4.1 Overview

The principal issue *sub judice* in the Second Circuit is whether CIL, as applied in United States federal courts, prohibits or limits criminal prosecution of SOEs. In making this consequential determination, the Second Circuit faces an unsettled body of law. In their briefs before the Second Circuit and the Supreme Court, Halkbank and the government paint vastly different pictures of the protections afforded under common law.[25] The gulf between their depictions reflects not just the uncertain status of CIL as a component of federal common law, but the relative absence of criminal prosecutions of SOEs both domestically and abroad.

A close look into existing case law, however, as well as executive branch policy and international practice, reveals a clearer picture: while customary international law affords sovereigns broad protection from criminal prosecution, the restrictive theory of immunity, as applied in the United States before the FSIA and now embedded in it, largely allows for the prosecution of SOEs for their purely commercial activities.[26] It thus appears virtually certain that United States courts will ultimately rule that SOEs are not protected from prosecution for overtly commercial activities such as those alleged against Halkbank. This analysis, however, while likely sufficient in a case as apparently clear as *Halkbank*, does not by itself resolve important questions that will arise in future cases. In the absence of statutory protection, does a 'common law' of sovereign immunity protect sovereigns from criminal prosecution in another country? Does such immunity apply to SOEs? Is there an exception for 'commercial' activities, and if so, what test should courts apply to make such a determination? And what 'deference' do courts owe to the views of the executive branch, which in a federal crime case appears in court as the prosecutor but inherently must represent the position of the diplomatic services?

4.2 Is CIL 'federal common law'?

An initial question peculiar to the constitutional structure of the United States is whether CIL generally, and laws relating to sovereign immunity in particular, are viewed as part of federal law, or rather whether they depend on the laws of a State, such as the State in which a litigated matter takes place. The authors will address this issue below in the context of the possibility of a State prosecution of an SOE or other sovereign in section 5.1. Halkbank is accused of federal crimes,

[24] *United States v Zarrab* (n 1). Oral argument took place on 28 February 2024.

[25] The expression 'common law' most broadly refers to substantive law developed through precedent by courts rather than through legislative action. As developed in sections 4.2 and 5.1.2 below, identifying such law in the United States is complicated by the federal structure of its legal system, which raises the question whether 'federal common law' on sovereign immunity even exists.

[26] See discussion in section 4.3 below.

none of which appears to have a deep link to the State of New York where the federal prosecutor is located, and none of the parties before the Second Circuit has argued that New York law applies to the prosecution. As a matter of common sense, it would appear clear that questions of sovereign immunity, which go to the heart of international diplomacy, are precisely the kind that should be governed by federal, as opposed to State, law. This article will assume that sovereign immunity under CIL is, at least in federal prosecutions, a matter of 'federal common law.'

4.3 Common Law Immunity for Sovereigns

Halkbank and several *amici* argue that sovereign immunity provides absolute protection to sovereigns and their instrumentalities from criminal prosecution.[27] These arguments rely on state practices as summarized in treatises, the lack of criminal prosecutions of foreign states both domestically and abroad, and international law principles. A study of immunity as interpreted by United States courts and the executive, however, not surprisingly suggests that such immunity does not extend to SOEs for their purely commercial conduct and is thus not likely to protect Halkbank from prosecution.

4.3.1 CIL on sovereign immunity from criminal prosecution

Halkbank argues that '[f]or more than two centuries, an entity "owned and operated by a government" has qualified as a sovereign instrumentality' and has thereby been immune to both civil and criminal pursuits.[28] To support this assertion, the bank relies on several international treatises.[29] While states enjoyed absolute immunity for much of modern history, they became subject to suit for their commercial conduct in the early decades of the 20th century when the United States, and eventually much of the world, adopted the 'restrictive theory' of sovereign immunity.[30] Lady Hazel Fox and Professor Philippa Webb maintain that when the United States and others adopted the restrictive theory, absolute immunity of sovereigns from *criminal prosecutions* remained in place.[31] A treatise on international immunity confirms this interpretation, stressing that international law on state immunity consists of a 'general prohibition with a number of limited exceptions … [which] involve exclusively civil matters.'[32] Similarly, the Third Restatement on United States Foreign Relations Law maintains, '[a] state itself is generally not subject to the criminal process of another state.'[33]

Halkbank bolsters these assertions by citing an absence of prosecutions – or even indictments – of sovereigns or their enterprises, either in the United States or outside of it.[34] This

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[27] See, for example, *Turkiye Halk Bankasi AS v United States,* 143 S Ct 940 (2023) (No 21-1450) (*Halkbank*), 'Brief for Lord Daniel Brennan KC as *Amici Curiae* Supporting Petitioners' and 'Brief for Turkish Red Crescent, the Union of Chambers and Commodity Exchanges of Turkiye, and the Banks Association of Turkiye as *Amici Curiae* Supporting Petitioners.'

[28] *United States v Halkbank,* United States Court of Appeals for the Second Circuit, Dkt.No 20-3499, 'Brief for Appellant', Document 146 (7 July 2023) at 13.

[29] Under international law, the 'teachings of the most highly qualified publicist of the various nations' are treated as 'subsidiary means for the determination of rules of law,' Statute of the International Court of Justice.

[30] Chimene I Keitner, 'Prosecuting Foreign States' (2021) 61 Va J Intl L 221, 231.

[31] Hazel Fox and Phillipa Webb, *The Law of State Immunity* (3rd edn, 2013) 91–2.

[32] Xiaodong Yang, *State Immunity in International Law* (Cambridge University Press, 2012) 426.

[33] American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States* (1987) § 111 cmt (d) (*Restatement (Third)*).

[34] *Turkiye Halk Bankasi AS v United States,* 143 S Ct 940 (2023) (No 21-1450), 'Brief for Petitioner' 37, 'The proof is in the pudding: the government identifies no criminal trial of a foreign state-owned company (let alone a

absence, Halkbank and others maintain, reflects principles deeply embedded in international law. Fox and Webb, for example, argue that the customary prohibition on criminal prosecution recognizes the equality of sovereignty of states on the international stage, as it prevents one state from using its criminal law to regulate other states' 'public governmental activity.'[35] More practically, the prohibition facilitates interaction by states by removing fears that a state or its agent might be subject to another state's criminal jurisdiction.[36]

4.3.2 Defining 'foreign state' for the purposes of immunity

A deeper look into the evidence upon which Halkbank relies reveals a more complicated picture. Case law and executive action suggest that when the United States adopted the restrictive theory of immunity in the early 20th century, sovereign instrumentalities were not protected from civil *or* criminal jurisdiction for their commercial conduct. This is because, under the restrictive theory, SOEs engaged in 'purely commercial' activities were not considered 'foreign states' for the purposes of sovereign immunity. State practice around the world demonstrates that many other states did, and continue to, employ a similarly limited definition of 'state' in their immunity statutes and case law.

The FSIA in essence created a new issue by choosing to define a 'sovereign' to include any entity – irrespective of its activities – majority-owned by a state.[37] This definition was, and continues to be, more inclusive than the definition of a state under CIL. In a series of congressional hearings held to assess proposals to amend the FSIA, the Deputy State Department Legal Adviser Elizabeth Verville explained that the FSIA's definition of 'foreign state' was at odds with the 'international community generally' explaining that 'even absolute immunity states generally agree that state-owned purely commercial entities may be sued abroad.'[38] Verville reasoned that the FSIA's expansive definition was included to serve purposes related to service of process and federal court jurisdiction.[39]

Verville's account of international practice is reflected in treatises, foreign states' immunity laws, and international agreements. The Fourth Restatement on United States Foreign Relations law, for example, notes that 'the FSIA provides a broader definition of 'foreign state' than is typical under foreign and international practice, by including agencies and instrumentalities for most purposes.'[40] Fox and Webb explain that under CIL, immunity only extends to the agencies or instrumentalities of a state 'to the extent that they are … actually performing acts in the exercise of sovereign authority of the State.'[41] This definition is included in several international agreements, including the United Nations Convention on Jurisdictional Immunities of States and

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sovereign) by any other nation, regardless of whether the activity could be characterized as commercial'; see also, *United States v Halkbank,* No 15 CR 867 (RMB), 2020 WL 5849512 (SDNY, 1 October 2020) 'Reply Memorandum in Support of Defendant's Motion to Dismiss' 2, 'The government's dicta cannot overcome this simple fact: Prior to the FSIA, there do not appear to be any indictments of foreign sovereigns.'

35 Fox and Webb (n 32) 91.

36 Keitner (n 31) 228.

37 28 USC §1603.

38 Foreign Sovereign Immunities Act: Hearing on HR 1149, HR 1689 and HR 1888 Before the Subcomm on Admin L Governmental Res of the H Comm on the Judiciary, 100th Cong 2 (1987).

39 Ibid 26–7.

40 American Law Institute, *Restatement (Fourth) of the Foreign Relations Law of the United States* (2018) 451 Reporters' Note 4.

41 Fox and Webb (n 32) 360–1

Their Property, as well as the European Convention on State Immunity.[42] Moreover, many states exclude foreign state-owned enterprises from their immunity statutes entirely.[43] The United Kingdom's immunity statute defines sovereign-owned enterprises and foreign states separately and maintains the former enjoys immunity 'if, and only if … the proceedings relate to anything done by it in the exercise of sovereign authority.'[44]

Several pre-FSIA cases in the United States also demonstrate that SOEs engaged in economic activities were not considered 'foreign states' under common law. In *United States v Deutsches Kalisyndikat Gesellschaft*, the United States brought suit against the Société Commerciale des Potasses d'Alsace, a French-owned mining corporation, to enjoin violations of federal anti-trust laws.[45] In denying a motion to intervene by the Republic of France, the court held that corporations cannot claim immunity from suit 'on the ground that they are acting as agents of a foreign government.'[46] The court reasoned that '[c]orporations in which a government has an interest … are not departments of government,' even where, as was the case here, the sovereign claiming immunity owns a majority of the enterprise.[47] In coming to this conclusion, the court relied upon a letter from the Secretary of State to the Attorney General regarding his ability to sue to the French corporation:

> It has long been the view 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, and that none of the French defendants has any consular or diplomatic status in this country.[48]

The extent to which the FSIA's definition of 'foreign state' is distinct from its common law counterpart is also demonstrated in several cases involving government efforts to serve SOEs with subpoenas in connection with criminal investigations. In *In Re Investigations of World Arrangements,* the government served a subpoena on the Anglo-Iranian Oil Company Ltd in

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42 United Nations Convention on Jurisdictional Immunities of States and Their Property (adopted 2 December 2004) UN GA Res 59/38 art 2(1); European Convention on State Immunity art 27 (allowing proceedings against 'any legal entity of a Contracting State which is distinct therefrom and is capable of suing or being sued, even if that entity has been entrusted with public functions').

43 *Halkbank* (n 28), 'Brief for Mark B Feldman, Esq, and Professor Chimene I Keitner as *Amici Curiae* Supporting Respondent 6' (listing nations who do not include foreign sovereign owned enterprises in their immunity statutes, including: Foreign States Immunities Act 1985 (Cth) s 22 (Australia); Immunities and Privileges Act, c 16:01 § 16(2) (Malawi); State Immunity Ordinance, Ordinance No 6 of 1981, § 15(2) (Pakistan); State Immunity Act 1979 c 313 § 16(2) (Singapore); Foreign States Immunities Act, Act No 48 of 1985 § 15(1) (South Africa); State Immunity Act 1978, c 33 §§ 14(1)–(2) (UK))

44 State Immunity Act 1978, c 33 §§ 14(1)–(2) (UK) ('A separate entity is immune from the jurisdiction of the courts of the United Kingdom if, and only if – (a) the proceedings relate to anything done by it in the exercise of sovereign authority; and (b) the circumstances are such that a State … would have been so immune.')

45 31 F2d 199 (SDNY 1929).

46 Ibid 202.

47 Ibid.

48 Ibid 200. See also *Molina v Comision Reguladora del Mercado de Henequen*, 103 A 397, 398–9 (NJ 1918); (noting that protecting SOEs under the principle of immunity would give them a competitive advantage over domcestic companies that are 'compellable to pay their debts by means of judicial process'); *Coale v Société Co-op Suisse des Charbons, Basle,* 21 F2d 180 (1921); *In re Grand Jury Investigation of the Shipping Industry*, 186 F Supp 298, 319–20 (DDC 1960).

conjunction with an investigation into possible violations of the Anti-Trust Act.[49] After the British Secretary of State for Foreign Affairs invoked sovereign immunity and the State Department declined to intervene, the District Court determined that sovereign immunity protected the company from process – not because of the status of its sovereign ownership but because of the sovereign nature of its activities.[50] The Court held that 'it is not material whether the government owns all the stock … none of the stock … or only part of the stock,' but rather that the relevant inquiry was on the 'object and purpose' of the corporation.[51] It reasoned that because Great Britain acquired ownership of the corporation to 'insure the proper supply of petroleum, crude oil, and other products for the British Naval Fleet,' the corporation's object and purpose were public, as opposed to commercial. As such, the corporation qualified as a state for the purposes of immunity.[52]

4.3.3 Absence of criminal prosecutions

History also suggests that the lack of criminal prosecutions of SOEs has little to do with immunity, but rather reflects several factors, including the relatively recent rise of SOEs on the international stage, the wide range of corporate criminal responsibility principles outside the United States, and the increasing use of negotiated outcomes in criminal matters. Even if, as *Halkbank* argues, the United States has not successfully prosecuted an SOE, SOEs have been the subject of criminal charges filed as part of deferred prosecution agreements.

Halkbank stresses that that United States fails to cite a single prosecution of an SOE abroad as evidence that CIL prohibits criminal prosecutions of states and their instrumentalities. As a number of states do not consider SOEs states for the purposes of sovereign immunity, however, this absence is likely attributable to the relatively recent rise of SOEs and historical lack of corporate criminal responsibility outside the United States. While 'a few SOEs have had operations abroad for decades,' SOEs became major players on the international stage in the last 20 years: today SOEs make up 132 of the world's largest companies – up from 32 just two decades ago.[53] The absence of prosecutions may also reflect the lack of corporate criminal prosecutions abroad. While states across Europe have to some degree embraced corporate criminal responsibility in the last decade, the doctrine is 'generally more restrictive [in Europe] than in the United States.'[54] In 2016, the OECD published a thorough study of corporate criminal liability,[55] in which it noted that in several states, at least until very recently, the principle of corporate criminal liability 'was essentially a foreign concept, alien to their legal traditions and practices.' These restrictions derive

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49 13 FRD 280, 284 (DDC 1952).

50 Ibid 290.

51 Ibid.

52 Ibid. See also *In re Grand Jury Investigation of the Shipping Industry* (n 49).

53 OECD, 'State-Owned Enterprises are on The Rise: Should we Worry?' (*OECD: On the level*, 1 February, 2022) <https://oecdonthelevelcom.wordpress.com/2022/02/01/state-owned-enterprises-are-on-the-rise-should-we-worry/> accessed 16 August 2024; International Monetary Fund (IMF), *Fiscal Monitor: Policies To Support People During The Covid-19 Pandemic* (IMF, 20 April 2020) ch 3 <https://www.imf.org/-/media/Files/Publications/fiscal-monitor/2020/April/English/ch3.ashx> accessed 16 August 2024.

54 *Halkbank* (n 28), 'Brief for Professor Roger O'Keefe Supporting Petitioner as *Amici*,' citing VS Khanna, 'Corporate Criminal Liability: What Purpose Does It Serve?' (1996) 109 Harv L Rev 1477, 1491.

55 OECD, *Liability of Legal Persons for Foreign Bribery: A Stocktaking Report* (2016) <https://www.oecd.org/content/dam/oecd/en/topics/policy-sub-issues/fighting-foreign-bribery/Liability-Legal-Persons-Foreign-Bribery-Stocktaking.pdf> accessed 16 August 2024.

from the longstanding notion that 'only natural persons may be held criminally liable.'[56] The lack of prosecutions abroad may also reflect the growing use of negotiated outcomes outside the United States.[57] Such procedures, which include deferred prosecution agreements (DPAs) and non-prosecution agreements (NPAs) allow corporations to 'avoid criminal judgment by reaching an agreement with the prosecutor to perform certain obligations, the successful completion of which will result in charges being dismissed or not even brought.'[58] As countries – and corporations – have strong incentives to negotiate such outcomes, there is less reason to resort to traditional criminal proceedings to ensure corporations are held responsible for their criminal acts.[59]

An increase in negotiated outcomes may also explain the lack of criminal judgments against SOEs in the United States. In the last four years alone, the United States entered into DPAs with KazmunayGas, an oil-company owned by the State of Kazakhstan,[60] 1MalaysisaDevelopment Berhad, a state-owned investment fund,[61] and ZTE Corporation, a Chinese-owned telecommunications company.[62] The United States has even reached a DPA with an SOE granted immunity under the FSIA. In 2006, the United States agreed to defer the prosecution of a Norwegian-owned company for violating the anti-bribery and accounting provisions of the Foreign Corrupt Practices Act (FCPA).[63] In return, the company, Statoil, admitted to violating the FCPA and agreed to pay a USD 10.5 million penalty.[64] In the criminal information filed against Statoil, the government alleged the company paid more than USD 5 million to influence the award of oil and gas contracts in Iran.[65] In 2016, the same company obtained dismissal of a civil suit by successfully claiming immunity under the FSIA.[66]

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[56] Ibid 11. Criminalization of corporate conduct, however, is increasing, and is suggested – although not mandated – by some international conventions. For example, the UN Convention against Corruption (adopted 31 October 2003, entered into force 14 December 2005) 2349 UNTS 41 art 26, provides that 'Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons [that is, corporate entities] for participation in the offences established in accordance with this Convention,' but adds that 'the liability of legal persons may be criminal, civil or administrative.' See also the UN Convention on Transnational Organized Crime (adopted 15 November 2000, entered into force 29 September 2003) 2225 UNTS 209 art 10.

[57] Jennifer Arlen, 'The Potential Promise and Perils of Introducing Deferred Prosecution Agreements Outside the US' in Abiola Makinwa and Tina Sereide (eds), *Negotiated Settlements In Bribery Cases: A Principles Approach* (Edward Elgar 2020) 156, 159, noting that countries around the worlds are 'reforming their corporate criminal liability regimes to introduce deferred prosecution agreements.' See generally, OECD, *Resolving Foreign Bribery Cases with Non-Trial Resolutions* (2019) <https://www.oecd.org/daf/anti-bribery/Resolving-foreign-bribery-cases-with-non-trial-resolutions.pdf> accessed 16 August 2024.

[58] Frederick T Davis, 'Judicial Review of Deferred Prosecution Agreements: A Comparative Study' (2022) 60 Colum J Transnatl L 751.

[59] Arlen (n 58), explaining that that negotiated outcomes bring 'billions of dollars' into state treasuries, allow prosecutors to exercise unparalleled power over compliance, and allow corporations to avoid the costs of trial and repercussions of a criminal judgement.

[60] *United States v SBM Offshore* (No 17-686), 'Deferred Prosecution Agreement' <https://www.justice.gov/opa/press-release/file/1014801/download> accessed 16 August 2024.

[61] Office of Public Affairs, 'US Repatriates $300 Million to Malaysia in Proceeds of Funds Misappropriated from 1Malaysia Development Berhad' (*United States Department of Justice*, 14 April 2020) <https://www.justice.gov/opa/pr/us-repatriates-300-million-malaysia-proceeds-funds-misappropriated-1malaysia-development> 22 December 2024.

[62] *United States v ZTE Corporation* (No 3-17 CR-0120K), 'Deferred Prosecution Agreement' <https://www.justice.gov/opa/press-release/file/946276/download> accessed 16 August 2024.

[63] *United States v Statoil*, ASA No 06-cr-960 (SD NY, 13 October 2006).

[64] Ibid.

[65] Ibid.

[66] *In re N Sea Brent Crude Oil Futures Litigation,* 2016 WL 1271063, *1 (SD NY, 29 March 2016).

The use of DPAs and NPAs suggests that the executive branch – and the SOEs they have threatened to prosecute – did not consider sovereign immunity an absolute bar to criminal prosecution.

4.3.4 Rationale

In maintaining that CIL provides SOEs with absolute immunity from criminal prosecution, Halkbank and others argue that immunity protects important international legal principles. Immunity from criminal prosecution, they insist, reflects the equality and sovereignty of states, promotes the obligation of non-intervention,[67] and facilitates inter-state engagement.[68] These arguments, however, largely lose their force in the context of SOEs. When foreign sovereigns demand that their state-owned corporations be immune from criminal prosecution in the United States, they are not asking for equal treatment, but rather a market advantage over corporations that are subject to criminal jurisdiction.[69] Moreover, it is not inherently clear that the criminal prosecution of an SOE for its commercial conduct would threaten the sovereignty of the foreign state that owns its shares, as such prosecutions are unlikely to implicate the foreign state's authority over its own territory or freedom from foreign intervention.[70] Finally, it is unlikely that criminally prosecuting SOEs will reduce sovereign-to-sovereign interaction, as the criminal prosecution of SOEs does not implicate the capacity of sovereigns themselves to engage with other states without fear of being subject to an exercise of a foreign state's jurisdiction.

4.3.5 Role of the executive

While it appears virtually certain that in future cases in the United States the courts will permit prosecutions of SOEs that engage in clearly 'commercial' activities, each case may present a 'line-drawing' challenge to determine whether the activities in question are, in fact, wholly or in principal part 'commercial,' or whether (as Halkbank maintains in the current case) the SOEs' activities reflect not only sovereign ownership and direction but the exercise of sovereign functions. Critical in these line-drawing distinctions will be the level of 'deference' courts owe to the executive branch – an issue hotly debated by the parties and *amici* before the Second Circuit. In its October 2021 opinion, the Second Circuit noted in passing that 'at common law, sovereign immunity determinations were the prerogative of the executive branch.'[71] While this sentence is likely indicative of the position the Court will ultimately take, the Supreme Court apparently did not consider it dispositive, as it remanded to the Circuit for fuller development of the issue.

In its brief to the Second Circuit, the Department of Justice (DOJ) takes a strong and unambiguous position: The Executive is responsible for determining whether a given party is

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67 Fox and Webb (n 32) 91,'The exercise of criminal jurisdiction directly over another State infringes international law's requirements of equality and non-intervention.'

68 Keitner (n 31) 228.

69 *Molina v Comision Reguladora del Mercado de Henequen* (n 49) 103 A, 397, 399, stressing that allowing a Mexican-owned company to avoid criminal liability in the United States for its commercial actions would 'grant a privilege so valuable that domestic corporations of our creation, compellable to pay their debts by means of judicial process, would have no chance in the race of competition.'

70 United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, art 2 (4,7). See Samantha Besson, 'Sovereignty' in *Max Planck Encyclopedia of Public International Law* (Oxford Public International Law 2011) <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e1472> accessed 16 August 2024, Guaranteeing state 'sovereignty' by providing that states have 'supreme authority within their territory, the plenitude of internal jurisdiction … their freedom from other States' intervention on their territory.

71 *United States v Turkiye Halk Bankasi AS,* 16 F4th 26.

immune; the courts must not only 'defer' to its position in the sense of giving it significant weight, but must decline to review the issue at all once an indictment has been issued. Noting that 'the Executive, rather than the Judiciary, is best positioned to decide the questions of foreign policy at the heart of whether to extend immunity to a foreign sovereign,'[72] the DOJ argues that the 'Court need not determine the outer boundaries of common-law foreign sovereign immunity in this case because … the common law does not recognize such immunity where, as here, the Executive determines that immunity is unwarranted.'[73] In the context of a criminal prosecution, this position, if adopted, would mean that *any* time the federal government elects to prosecute an SOE, it has already made a decision – unreviewable by a court – that the accused company is not protected by immunity. On its face, this position would appear to contradict the Government's own statements about sovereign immunity, namely that 'the [FSIA] statute shifted the decision making from the Department of State to the courts,'[74] although in context such statements may have been limited to interpreting the specific procedural provisions of the FSIA.

Halkbank and several *amici* argue that, while courts have typically deferred to the Executive in deciding whether or not to grant immunity, this power is not preclusive of judicial review, and in particular that 'a shift in policy by the Executive cannot control the courts.'[75] Professors Ingrid Brunk and William S Dodge argued as *amici* before the Supreme Court and Second Circuit that, under principles of separation of the powers, federal courts have 'the ultimate responsibility to decide whether foreign sovereign immunity applies to a given case.'[76] The gist of their argument is that:

> While the government often frames its arguments in terms of 'deference,' that is an inaccurate term. The government seeks the power to dictate the general rules of common law immunity and to exercise absolute control over the application of those rules to particular cases. That is not 'deference.' That is lawmaking.[77]

While some scholars agree that the government's decision to bring charges should not in itself be sufficient to deny immunity and eliminate any judicial role,[78] they agree federal courts are generally required to defer to executive immunity determinations.

Professor Louis Henkin has explained that while the Executive has a duty to carry out United States international legal obligations, the President may 'make decisions within his

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72 *United States v Turkiye Bankasi AS* (No 20-3299 2nd Cir 2024) 'Brief of the United States' 8.

73 Ibid 9. The DOJ supported its argument by exploring the seminal decision in *The Schooner Exchange v McFaddon* (n 4). It notes that 'in *Schooner Exchange,* the Supreme Court recognized a background 'principle of public law that national ships of war, entering the port of a friendly power open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction,' 145–6, but that the Court emphasized that '[w]ithout doubt, the sovereign of the place is capable of destroying this implication' of immunity, by 'claim[ing] and exercis[ing] jurisdiction … by subjecting such vessels to the ordinary tribunals,' and that the Court made clear that this 'right to demand redress' from foreign sovereigns 'belongs to the executive department, which alone represents the sovereignty of the nation in its intercourse with other nations.' 132.

74 Federal Judicial Center (n 6).

75 *Turkiye Halk Bankasi AS v United States* (n 28) 'Brief for Petitioner' 34–5 (quoting *Alfred Dunhill of London, Inc v Republic of Cuba* 425 US 682, 714 (1976)).

76 *United States v Turkiye Halk Bankasi,* United States Court of Appeals for the Second Circuit Dkt No 20-3499, document 161, filed on 7 August 2023, 'Brief for Professors Ingrid (Wuerth) Brunk and William S Dodge as *Amici* Supporting Neither Party.".

77 Ibid 3.

78 Ibid, compare with Keitner (n 31) 265; and the three-part article of Profs. Curtis Bradley and Jack Goldsmith (n 20).

constitutional authority that put the United States in violation of international law.'[79] As such, federal courts may not 'require … the President … to observe international law' nor 'invalidate such acts on the ground that they violate international law.'[80] Some commentators have argued that affording the Executive the power to make immunity determinations in individual cases raises separation of powers concerns, as the political branches are generally prohibited from prescribing the rules of decision in a pending case.[81] The Supreme Court has recognized, however, that the President has broad power to make determinations with domestic legal affects where he acts pursuant to his foreign affairs powers.[82]

Scholars disagree, however, about whether the government's decision to prosecute is sufficient to constitute an executive determination to deny immunity. Professor Keitner suggests that while courts should generally treat an initiation of criminal proceedings as determinative, courts should 'consider relevant domestic judicial practice and applicable norms of customary international law,' where 'the answer to the immunity question turns on criteria the judiciary is competent to ascertain.'[83] This approach comports with historical practice, whereby federal courts have 'decide[d] for themselves whether all the requisites of immunity exist' in the absence of clear executive guidance.[84]

Both the Supreme Court and the Second Circuit expressed interest in a set of subsidiary questions during oral arguments:[85] Exactly *how* does the executive branch reach a decision concerning immunity;[86] is such a decision transparent; and, most specifically, should the decision be made by the DOJ (charged with prosecution) or the State Department (charged with managing diplomatic relations)? One writer has expressed the view that when 'the United States brings a criminal proceeding in its sovereign capacity, courts assume that DOJ prosecutors have already weighed the value of domestic proceeding against any foreign policy concerns,'[87] noting that this view 'presumes intra-Executive unanimity.'[88] While such unanimity is likely to be the rule, exceptions may occur; as another writer notes, while the State Department and the DOJ have visibly coordinated on a range of matters, their goals may not always align and could 'easily

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79 Louis Henkin, 'International Law as Law in the United States' (1984) 82 Mich L Rev 1555, 1156.

80 Ibid.

81 *Turkiye Halk Bankasi AS v United States,* 143 S Ct 940 (2023) (No. 21-1450) 'Brief for Professors Ingrid (Wuerth) Brunk and William S Dodge as *Amici* Supporting Neither Party.'

82 *Zivotofsky ex rel Zivotofsky v Kerry*, 576 US 1, 11, 135 S Ct 2076, 2084, 192 L Ed 2d 83 (2015). Recognizing the 'exclusive power of the President to control recognition determinations' despite the power's domestic legal effects, including implications on the ability of recognized sovereigns to sue in federal court and enjoy immunity when they are sued.

83 Keitner (n 31) 265.

84 *Republic of Mexico v Hoffman*, 324 US 30 (1945). 'In the absence of recognition of the claimed immunity by the political branch of the government, the courts may decide for themselves whether all the requisites of immunity exist.'

85 Sotomayor, J, Transcript of Oral Argument 6, *Turkiye Halk Bankasi AS v United States*, 143 S Ct 940 (2023) (No. 21-145). 'But main Justice, does it go seek permission from the Department of State? Because who is the executive to make this decision … [w]e all agree it's the President, but there is no formula out there to tell us who speaks for the President.'

86 See Oral Argument, *United States v Zarrab(Halkbank)* (2024) (No 20-3499), https://ww3.ca2.uscourts.gov/decisions/isysquery/201a25ee-3800-40ed-b013-cbaf4b3a5287/302/doc/20-3499%20(R).mp3 accessed 16 August 2024

87 Liu (n 20) 286.

88 Ibid 311.

generate dissonance within foreign policy decision making mechanisms of the Executive Branch.'[89]

4.4 Conclusion with Respect to Sovereign Immunity with Respect to SOEs

The result of this review seems clear on the core question whether the federal prosecutor will be able to proceed with the prosecution of Halkbank: general principles of customary international law do not prohibit such a prosecution if in fact Halkbank's acts can be determined clearly 'commercial.' The Second Circuit's resolution of this question may shed light on two subsidiary but important issues: assuming that a prosecution may be barred if against a sovereign either acting as such or through an entity whose activities are 'sovereign,' but not for an entity engaged in 'commercial activities,' what is the test for making this determination, and the procedures for doing so? And to what degree must the courts 'defer' to the prosecutor on this question?

5. STATE COURT PROSECUTIONS

Halkbank was indicted for alleged violations of federal criminal laws, and thus the case did and could only proceed in federal court.[90] In its submissions to the Second Circuit and the Supreme Court, and at oral argument, Halkbank nonetheless repeatedly emphasized the hypothetical risk of future prosecutions of sovereigns, including SOEs, in State or local courts. Its strategy was transparent: State or local prosecution of sovereigns would create diplomatic risks and difficult policy issues of a sort normally considered to be the exclusive domain of the federal government, and yet the *only* interpretation of the FSIA that would eliminate these risks was the reading advocated by Halkbank. Under its interpretation, a State prosecution of any sovereign (including an SOE) is barred by the overall grant of immunity found in § 1604, which by its terms applies to State as well as federal proceedings and would presumably lead to the dismissal of any indictment of any kind of sovereign in State court; further, this would be true irrespective of the 'commercial' nature of the sovereign's activities since the exception for such activities in the FSIA by its terms applies only to civil suits.[91] Under any interpretation of the FSIA other than that proposed by Halkbank, if a State or local prosecutor were to obtain an indictment against a sovereign in a State court, there would be no mechanism for removal to federal court because the procedural provisions requiring that all cases against sovereigns be heard in federal courts also by their terms apply only to civil cases,[92] thus necessitating that all issues relating to sovereign prosecution be resolved, at least in the first instance, by judges in State court and pursuant to State procedures.[93]

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[89] Steven A Koh, *Foreign Affairs Prosecutions*, 94 NYU L Rev 340, 386 (2019). See Liu (n 20) 392–3:

> [E]very agency has some degree of 'tunnel vision' as it pursues its statutory mandate . . . In foreign affairs prosecutions, DOJ will doggedly pursue its federal law enforcement mission – which will tend toward more expansive readings of treaties, federal statutes, and doctrine – with an eye toward preserving cooperative law enforcement relationships with foreign national counterparts, but likely lacking comprehensive awareness of and sensitivity to diplomatic considerations. The State Department, likewise, will have its own incentives for cultivating diplomatic relations, sometimes at the expense of criminal accountability in specific cases.

[90] 18 US Code §3231 provides that 'The district courts of the United States shall have original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States.'

[91] See discussion in Section 2.3.

[92] Ibid.

[93] Under the interpretation adopted by the Second Circuit and advocated by the two dissenting Justices, the FSIA would apply to a State court prosecution – thus protecting a defendant if it qualified as a 'sovereign' and if its activities were not 'commercial,' and potentially allowing ultimate review of a final State court judgment by the

In its majority opinion, the Supreme Court made light of this risk, calling it a 'consequentialist argument.'[94] At oral argument, however, several Justices explored the issue in detail and took the risk of a State or local prosecution quite seriously.[95] The majority opinion addressed the issue briefly, and its analysis deserves quoting in its entirety. After noting that the argument was in essence irrelevant because even if correct, 'we must interpret the FSIA as written,'[96] the Court went on to say:

> In addition, it is not evident that the premise of Halkbank's consequentialist argument is correct. To begin with, Halkbank offers no history of state prosecutors subjecting foreign states or their instrumentalities to criminal jurisdiction. And if such a state prosecution were brought, the United States could file a suggestion of immunity. A decision by a state court to deny foreign sovereign immunity might be reviewable by this Court (a question we do not here address). Moreover, state criminal proceedings involving foreign states or their instrumentalities might be preempted under principles of foreign affairs preemption (another question we do not here address). [Citation omitted] And if those principles do not apply or do not suffice to protect U. S. national security and foreign policy interests, Congress and the President may always respond by enacting additional legislation.[97]

The Court's retort that Halkbank had offered 'no history of state prosecutors subjecting foreign states or their instrumentalities to criminal jurisdiction,' suggesting that the issue was either non-existent or negligible, took advantage of Halkbank's strategy of emphasizing the unprecedented, path-breaking nature of the DOJ's pursuit of the bank.[98] Continuing globalization and increased use of SOEs, however, convince the authors of this article that State prosecutions of SOEs will certainly occur, and – as several Justices noted – one cannot exclude the possibility of an ambitious prosecutor deciding to pursue a true sovereign nation.[99]

The majority opinion briefly identified two possible and conceptually overlapping legal constraints on State or local prosecution, namely the potential 'federalization' of sovereign immunity independent of the FSIA thus permitting Supreme Court review, and the possible

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Supreme Court – but the determinations necessary to apply these principles would be made by the State court in the first instance. See discussion below, Section 5.2.

94 *Halkbank* Supreme Court Opinion (n 21) 11.

95 For example, Justice Gorsuch noted the following in a colloquy with the Solicitor General: '[I]f we hold that [section] 1604 doesn't apply to criminal cases, then states would be free to try to bring lawsuits against Mexico for this or that, or perhaps China because of COVID, or who knows what a creative state prosecutor might come up with…. And I just wonder, have you given careful thought to those consequences?' Gorsuch J, Transcript of Oral Argument, *Turkiye Halk Bankasi AS v United States*, 143 S Ct 940 (2023) (No 21-145). See also Sotomayor J, 59–60: 'I don't know how I would want to leave to the vagrancies [sic] of individual prosecutors, whether it's federal or state, the right to insult another nation by giving them this unbridled power to initiate [criminal] suits'; Alito J, 74–5 (referring to the possibility of 'an elected district attorney [who] brings a criminal case against a foreign state….'); 75–86 (dialogue with several Justices).

96 *Halkbank* Supreme Court Opinion (n 21) 11–2.

97 Ibid 14.

98 The first sentences of its brief argued: 'Since the Founding [of the United States], the United States has resolved its differences with other sovereigns through war and diplomacy, not by prosecuting offending governments in federal court …. Until the decision below, no court had authorized the criminal trial of a foreign sovereign or its instrumentalities.' *Halkbank v United States*, 143 S Ct 940 (2023) (No 21-1450) Brief of Petitioner (November 14 2022) 2.

99 See n 95.

'preemption' of State law.[100] It noted, however, that each raised a legal question that 'we do not here address,'[101] and emphasized the uncertain status of these constraints by adding 'if those principles do not apply or do not suffice to protect US national security and foreign policy interests, Congress and the President may always respond by enacting additional legislation.'[102] The rest of this article will explore these issues further.

5.1 Is Sovereign Immunity a Question of 'Federal Common Law?'

The Court first suggested that 'if such a state prosecution were brought, the United States could file a suggestion of immunity,' after which '[a] decision by a state court to deny foreign sovereign immunity might be reviewable by this Court.'[103] This offhand comment refers to the much-discussed question of whether issues such as sovereign immunity are exclusively governed by federal law rather than the law of the various States. This issue is crucial since the competence of the Supreme Court to review decisions of State courts is limited to whether the decision implicates federal laws or the Constitution; in theory, a decision concerning immunity made exclusively under State law could not be reviewed by the Court. While the majority of scholars agree that CIL enjoys the status of federal common law,[104] some began to challenge this position at the turn of the century.[105] These scholars argue that the majority position is inconsistent with the holding of *Erie R Co v Tompkins,* constitutional text, federalism, and basic democratic values.[106] As such, these 'revisionist' scholars argue that CIL does not 'bind' State courts. Some maintain that States should not only be free to interpret CIL for themselves, but to refuse to incorporate CIL into State law altogether.[107]

5.1.1 The traditional view and *Erie R Co v Tompkins*

Traditionally, the Supreme Court and other federal courts uniformly treated CIL as part of 'international law' that would be applied as part of 'common law' where appropriate. The Court

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[100] 'Preemption' refers to a situation where under the Supremacy Clause of the US Constitution, federal law has either expressly or impliedly superseded conflicting State laws. See Congressional Research Service, *Federal Preemption: A Legal Primer* (18 May 2023) <https://sgp.fas.org/crs/misc/R45825.pdf> accessed 16 August 2024.

[101] *Halkbank* Supreme Court opinion (n 21) 14.

[102] Ibid.

[103] Ibid 14.

[104] See, for example, *Restatement (Third)* (n 34), 'Federal common law refers to the federal law interpreted and applied by federal courts that is not specifically authorized by a congressional enactment'; Harold H Koh, 'Is International Law Really State Law?' (1998) 111 Harv L Rev 1824, challenging arguments that CIL is not federal common law; Henkin (n 80) 1556, explaining that CIL, referred to as 'the law of nations' at the Founding, became a part of domestic common law when the United States gained independence from Great Britain in 1776. CIL was both inherited from English common law, which incorporated the law of nations, and accepted 'by implication of our independence, by virtue of international statehood.' Customary international law is formed by uniform state practice and *opinio juris* – the 'belief of states engaged in the relevant practice that their action is required by international law,' Ernest A Young, 'Sorting Out the Debate over Customary International Law' (2002) 42 Va J Intl L 365.

[105] Julian G Ku, 'Customary International Law in State Courts' (2001) 42 Va J Intl L 265: 'While a majority of scholars support treating CIL … as federal common law, an emerging group of revisionist scholars has sharply challenged this view.'

[106] 304 US 64, 78 (1938). See, for example, Curtis A Bradley and Jack L Goldsmith III, 'The Current Illegitimacy of International Human Rights Litigation' (1997) 66 Fordham L Rev 319 (1997); Ku (n 107)*;* Arthur M Weisburd, 'State Courts, Federal Courts, and International Cases' (1995) 20 Yale J Intl L 1.

[107] See, for example, Bradley and Goldsmith (n 108) 320–5.

noted in 1900, for example, that: 'International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction.'[108] At that time, federal courts developed 'common law' independently of the States, and applied that law in federal court cases not governed by legislation.[109] In 1938, however, the Supreme Court in *Erie R Co v Tompkins* declared an end to 'federal general common law.'[110] The Court concluded that this arrangement 'invaded rights which were reserved by the Constitution to the several states.'[111] In principle, this decision required federal courts to apply State common law to issues raised before them not addressed by federal legislation, and allowed the various States to develop and apply their common laws without review of those issues by the Supreme Court. Some revisionist scholars argue that when *Erie* declared an end to 'federal general common law' it also eliminated the power of federal courts to interpret and develop CIL, which many believe formed a part of general common law. [112]

5.1.2 CIL as 'specialized' federal common law

While CIL was indeed treated as general common law before *Erie,* that decision did not necessarily end the power of federal courts to develop and apply it as federal law.[113] As a number of commentators have noted, following *Erie*, the Supreme Court has developed a new species of common law: 'specialized federal common law' or simply 'federal common law,' which is federal law 'made by judges pursuant to their inherent constitutional authority or to authority delegated to them by Congress.'[114] The Court confirmed this power as recently in 2022 in *Cassirer v Thyssen-Bornemisza Collection Fund*.[115] While the Court held a district court erred when it applied a rule deriving from federal common law, as opposed to the forum state's choice-of-law rule, to determine the substantive law applicable in a case arising under the FSIA, the Court stressed that federal common law may still 'displace state-created rules,' where 'necessary to protect uniquely federal interests.'

Harold Koh argues that CIL, as developed by the federal courts, survives *Erie*, for two reasons: first, he argues that CIL differs from the state tort at issue in *Erie* because, while Congress has no power to 'declare the substantive rules of common law applicable in a state,' Congress does have the power to define and punish offenses against the law of nations.[116] As such, when federal courts make federal common law rules with respect to international law they are not acting outside the federal government's enumerated powers.[117] Second, he argues that the problems *Erie* sought to address do not apply in the context of CIL. The Court in *Erie* reasoned that general common law allowed federal courts to bypass the constitutional 'allocation of law-making functions

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[108] *The Paquete Habana*, 175 US 677, 700 (1900).
[109] *Erie* (n 108).
[110] Ibid.
[111] Ibid.
[112] Both the *Restatement (Third)* and Louis Henkin acknowledge that CIL was part of 'general common law' before *Erie*. *Restatement (Third)* (n 34) ch 2, introductory note 41; Henkin (n 80) 1556–8.
[113] Beth Stephens, 'The Law of Our Land: Customary International Law as Federal Law after *Erie'* (1997) 66 Fordham L Rev 393, 411. Stephens argues that while CIL was sometimes treated as 'general common law,' it did not share many of common law's central attributes. She argues that unlike rules of general common law, which could be adopted or not by a particular judication or changed by statute without repercussions on the nation as a whole, 'the law of nations…reflected the practice and consensus of the various nations of the world. Neither the United States nor any individual government could alter or amend its rules.'
[114] See Henry J Friendly, 'In Praise of *Erie* – And of the New Federal Common Law' 39 NYUL Rev 383 (1964).
[115] 212 L Ed 2d 451, 142 S Ct 1502 (2022).
[116] Koh (n 106).
[117] Ibid.

between the state and federal legislative.'[118] Because the Constitution does not envision state participation in the making or application of CIL, this rationale loses its force in the context of international customary law.

Louis Henkin maintained that, following *Erie,* the Supreme Court has made it clear that CIL falls within the powers of the Supreme Court to develop 'specialized common law' to protect federal interests.[119] Three years after the Court decided *Erie,* Phillip C Jessup*,* then a Judge of the International Court of Justice, stressed the practical implications of applying *Erie* broadly, including the possibility that State courts' determinations of CIL rules would be unreviewable by the Supreme Court.'[120] In *Banco Nacional de Cuba v Sabbatino,* the Court declared that the Act of State Doctrine is a principle of federal law binding on states.[121] While the Act of State Doctrine is a principle of domestic foreign affairs law as opposed to international law, the Court relied in part on Jessup's views regarding the applicability of *Erie* to CIL. Reasoning that 'rules of international law should not be left to divergent and perhaps parochial state interpretations,' the Court stressed that 'issue[s] concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law.'[122]

Thus, while scholars disagree as to whether *Erie* itself excluded CIL from its holding, or whether later cases accomplished this task, a majority of commentators agree that the end of 'general common law' announced in *Erie* did not portend the end of CIL's status as federal law.

5.1.3 Revisionist views

Revisionists argue that CIL's status as federal law violates the basic principles of federalism. Specifically, they claim CIL's status is at odds with the Supreme Court's 'modern federalism jurisprudence,' which has revived federalism's capacity to act as a 'substantive limit on federal power.'[123] Revisionists contend that allowing 'judge-made law' to supersede state law violates constitutional restraints on federal power designed to protect state rights.[124] Federal common law, they argue, by-passes the usual requirements of formal legislation, and thus escapes procedures put in place to protect states against improper federal intrusion.[125] As such, they warn, 'the doctrine that [CIL] is the supreme law of the land portends a dramatic transfer of constitutional authority from the states to the world community.'[126]

In addition to their constitutional arguments, revisionists also contend that the modern position is inconsistent with democratic values.[127] They stress that CIL is formed without the direct participation of the citizens whom it binds. Unlike a treaty, which requires the Executive's

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[118] *Erie* (n 108) 78.
[119] Henkin (n 80) 1559.
[120] Philip C Jessup, 'The Doctrine of *Erie Railroad v Tompkins* Applied to International Law' (1939) 33 Am J Intl L 740, 741–3.
[121] 376 US 398, 424, 84 S Ct 923, 938, 11 L Ed 2d 804 (1964).
[122] ibid 939.
[123] Bradley and Goldsmith (n 109) 325 and 345. Bradley and Goldsmith argue this inconsistency is especially apparent in the context of international human rights litigation in United States courts, which is outside the scope of this paper.
[124] Curtis A Bradley and Jack L Goldsmith*,* 'Customary International Law as Federal Common law: A Critique of the Modern Position' (1997) 110 Harv L Rev 815.
[125] Ibid.
[126] Ibid 846.
[127] Ibid 846–7, quoting *United States v Curtiss-Wright Export Corp*, 57 S Ct 216, 220 (1936).

agreement and the 'advice and consent' of two-thirds of the senate, CIL does not require 'formal endorsement' by domestic representatives or even, in some cases, 'any position at all.'[128]

5.2 Procedures for State Court Prosecutions

Given this controversy, it remains to be seen how federal courts will articulate the 'federal interest' in State prosecutions of sovereigns, and whether and how those interests may mandate the application of 'federal common law.' Courts could plausibly distinguish between prosecutions of actual sovereigns – that is, foreign nations – and prosecutions of corporations owned by them, namely SOEs. The diplomatic, and thus the federal impact, of indicting an actual foreign country would seem so important that it is difficult to foresee a serious position, even under the 'revisionist' line of argument summarized above, that the propriety of such prosecutions should be left to the various States to resolve without federal oversight. The same may not be true, however, with respect to corporate defendants that claim immunity based on some form of sovereign ownership or control – entities that the FSIA lumped together with true 'sovereigns' for all purposes of applying the statute, but which in fact often present very different policy issues. Among other things, the principles under which a State can prosecute a corporate entity at all – that is, principles of corporate criminal responsibility – vary widely among the States: some adopt the permissive Federal approach under which corporations are virtually automatically responsible for acts done by a wide variety of employees and other 'agents' under the principle of *respondeat superior*,[129] while others have adopted the significantly more restrictive Model Penal Code principles under which corporations are criminally responsible only for acts 'authorized, requested, commanded, performed or recklessly tolerated by the board of directors or by a high managerial agent acting in behalf of the corporation.'[130] Further, State prosecutions may well involve detailed fact-finding and analysis as to whether the corporate defendants' activities qualify as 'commercial' under commonly accepted but potentially imprecise standards, and whether its activities reflect truly 'sovereign' functions, as Halkbank maintains in the pending case against it. In any particular case, the federal government might well file a formal 'statement of interest' expressing its view whether the defendant in question is in fact a sovereign worthy of immunity as such, and thus whether a specific prosecution should be dismissed.[131] But, at least in the first instance, a State court might simply ignore such an expression and proceed in violation of it, placing into question the capacity of the federal 'statements of interest' to bind State courts.[132]

If the courts maintain that State prosecution of sovereigns does implicate federal law, this would permit a potential, and discretionary, Supreme Court review of convictions in which such law was appropriately raised as a defense, which would thereby develop the 'common law' in this

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[128] Ibid at 864–5.

[129] *NY Cent & Hudson RR v United States*, 212 US 481, 493 (1909).

[130] For a recent summary of corporate criminal liability in the United States, see Stephen F Smith, 'Corporate Criminal Liability: End It, Don't Mend It' (2021) 47 J Corp Law 1089; see generally, Jack C Coffee Jr, '"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment' (1981) 79 Mich L Rev 386.

[131] See n 5.

[132] In *Medellin v Texas*, 552 US 491 (2008), the Supreme Court emphasized that not every act of the federal government attempting to federalize an issue in State court can be considered binding on the State. In that case, Texas convicted a non-citizen without complying with an international treaty respecting consular rights and in violation of a ruling from the International Court of Justice. Even though the President had issued a 'Memorandum' exercising executive authority and directing States to comply with treaty obligations applicable to the case, the Supreme Court upheld Texas's rejection of that Memorandum and refused to vacate the conviction, ruling that the federal Executive lacked power to displace domestic criminal law.

respect. In the absence of any removal provisions, however, the prosecution would have to take place in the State court in which the relevant indictment was filed, and be pursued through State procedures including all appeals, before it would qualify as a 'final' judgment procedurally eligible for Supreme Court review.[133] Even if the State Department felt very strongly that a specific State prosecution jeopardized important federal interests, any effort to intervene in, or to stop, a State prosecution might be thwarted by the so-called 'abstention doctrine' of *Younger v Harris,*[134] which generally provides that the States are free to pursue their civil and criminal matters applying their own procedures even if the case may involve an important federal interest, and prohibits federal intervention other than Supreme Court review of a final judgment.[135] It is thus quite possible to imagine, as several Justices surmised during argument of *Halkbank*,[136] a politically motivated State prosecution creating publicity and diplomatic stress during its lifetime pending later, and only discretionary, Supreme Court review.

6. CONCLUSION

Two trends make criminal prosecution of SOEs inevitable: first, as the OECD has noted,[137] a growing number of countries seek to hold corporate entities criminally responsible for their transgressive acts; and, second, a significant and growing share of business worldwide is conducted by companies that are at least to some degree owned or controlled by sovereign states.[138] The *Halkbank* case offers an interesting, albeit United States-centric, insight into this phenomenon.

Halkbank's position before the Supreme Court took advantage of an anomaly in the FSIA, the principal American legislation regarding sovereigns: because its drafters in 1976 did not focus on the possibility of criminal prosecution of sovereigns, and because they chose to 'define' a sovereign state to include SOEs without any distinction based on its activities, Halkbank made a textually plausible argument that the FSIA barred *all* criminal prosecutions of SOEs, irrespective of the nature or severity of the charges against them.[139] This position made no sense as a policy matter – arguing before the Supreme Court, the Solicitor General described it as an:

> … extraordinary and unprecedented rule under which any foreign government-owned corporation could become a clearinghouse for any federal crime, including interfering in our elections, stealing our nuclear secrets, or something like here, evading our sanctions and funneling billions of dollars to an embargoed nation, using our banks, and lying to our regulators.[140]

By interpreting the FSIA not to apply at all to criminal prosecutions of any kind of sovereign, including SOEs, the Court avoided the policy debacle Halkbank's argument implicated, but left open at least two questions: first, does non-statutory customary international law protect

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[133] 28 USC § 1257 provides that the Supreme Court may review '[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had' for whether the judgment is 'repugnant the Constitution, treaties, or laws of the United States….'

[134] 401 US 37 (1971).

[135] A recent discussion of the *Younger* doctrine and its exceptions can be found in Anne R Traum, 'Distributed Federalism: The Transformation of Younger' (2021) 106 Cornell L Rev 1759.

[136] See n 95.

[137] OECD, *Public Consultation on liability of legal persons* (2016) <https://doi.org/10.1787/983cba50-en> accessed 16 August 2024.

[138] See World Bank (n 2) and n 52.

[139] See discussion above, Section 2.4.

[140] Transcript of oral argument, n 6 at 48.

sovereigns (including SOEs) from criminal prosecution, and if so, by which standard? And second, is there a legal framework applicable to prosecutions against sovereigns initiated by State or local prosecutors?

The authors believe that it is inevitable, and appropriate, that in the appeal now pending before the Second Circuit, the Court will answer the first question by concluding that CIL does not bar prosecution of Halkbank. As we note, CIL has recognized that when state-owned entities engage in clearly 'commercial' acts that violate national criminal laws, they can be prosecuted for such violations; as a practical matter no other outcome makes sense.[141] The Court's opinion will nonetheless offer insight into two important and unresolved issues. First, the Court will need to respond to Halkbank's –and Türkiye's – argument that the bank in fact performs critical sovereign functions and thereby identify a test for distinguishing between such functions and prosecutable commercial activities. Second, it will need to address the DOJ's argument that the Executive's position regarding immunity in effect 'binds' the judiciary – removing the need for judicial review and that federal indictment alone is enough to communicate the Executive's formal immunity position. [142] This position reflects the Department's strenuous efforts in several areas to maximize its discretion in criminal matters and shield its decisions from judicial review to a degree that is not the norm in many other countries.[143] Its adoption in the realm of sovereign immunity would add to the already powerful arsenal available to United States prosecutors in their negotiations with the corporations they pursue.

In any event, the pending case will likely leave two questions raised by the Supreme Court's decision that are not applicable to Halkbank unanswered, namely, what test should apply to a prosecution against a true sovereign acting as such? And what happens if a State or local prosecutor attempts to prosecute an SOE or a true sovereign?

[141] See discussion above, Section 4.3.

[142] See discussion above, Section 4.3.5.

[143] For example, the Justice Department makes frequent use of so-called Deferred Prosecution Agreements (DPAs) whereby companies charged with criminal offenses can avoid a criminal conviction by cooperating with the DOJ, engaging in remediation, and otherwise adhering to Department-mandated obligations to which they agree. While such outcomes are tremendously consequential in their impact on the economy, on employees, and on competitors, the DOJ has succeeded in convincing courts that the judges who must approve such agreements lack the power to determine whether they are 'in the public interest,' on the ground that such a decision is allocated to the executive branch. See Davis (n 59). As noted therein, a number of other countries have adopted procedures very similar to DPAs, but all include some form of judicial review.