New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 266—NO. 101
WEDNESDAY, NOVEMBER 24, 2021

SECOND CIRCUIT REVIEW

Expert Analysis

Broad View of Jurisdiction Over Foreign Instrumentalities in Criminal Matters

By **Martin Flumenbaum** And **Brad S. Karp**

Last month, the U.S. Court of Appeals for the Second Circuit held that a district court had subject-matter jurisdiction over the criminal prosecution of a bank that was majority-owned by the Turkish government notwithstanding the Foreign Sovereign Immunities Act (FSIA).

In a complex ruling in *United States v. Turkiye Halk Bankasi A.S.*, Circuit Judges Jose A. Cabranes, Amalya Lyle Kearse, and Joseph F. Blanco unanimously concluded that the FSIA's enactment did not curtail the broad jurisdictional grant of 18 U.S.C. §3231, which confers district courts jurisdiction over "*all* offenses against the laws of the United States," whether or not committed by foreign sovereigns. 2021 WL 4929002, at *5. In so holding, the Second Circuit followed precedent from the D.C. Circuit and departed from the principle, often repeated by a majority of the other Circuits, that the FSIA is the exclusive basis of subject-matter jurisdiction in actions against foreign states. Compare *In re Grand Jury Subpoena*, 912 F.3d 623, 628 (D.C. Cir. 2019), with *Goar v. Compania Peruana de Vapores*, 688 F.2d 417, 421 (5th Cir. 1982) (collecting cases for the majority view).

Although the Second Circuit left the question of FSIA immunity's application in the criminal context for another day, the court further opined that, even if it did, the bank's alleged sanctions-evading conduct fell within the FSIA's commercial-activity exception. *Bankasi*, 2021 WL 4929002, at *8. That ruling conflicts with the Sixth Circuit's decision that the commercial-activity FSIA exception, which does not expressly refer to criminal proceedings, does not defeat immunity in the criminal context. See *Keller v. Cent. Bank of Nigeria*, 277 F.3d 811, 820 (6th Cir. 2002), abrogated on other grounds by *Samantar v. Yousuf*, 560 U.S. 305 (2010). Finally, the unanimous panel concluded that the bank did not have common-law immunity from criminal prosecution. *Bankasi*, 2021 WL 4929002, at *8, *9. Thus, although the court declined to determine whether the FSIA applies in the criminal context, the Second Circuit provided a clear roadmap for future prosecutions of foreign instrumentalities.

Background and District Court Proceedings

The appellant, Turkiye Halk Bankasi A.S. (Halkbank), is a commercial bank that is majority-owned by the Turkish government. In 2019, Halkbank was indicted on charges that it participated in a multi-year scheme to launder Iranian oil and natural gas proceeds in contravention of U.S. sanctions and to conceal those transactions from U.S.

MARTIN FLUMENBAUM *and* BRAD S. KARP *are litigation partners at Paul, Weiss, Rifkind, Wharton & Garrison, specializing in complex commercial and white-collar defense litigation. Brad is the Chairman of Paul, Weiss.* MELINA M. MENEGUIN LAYERENZA, *a litigation associate at the firm, assisted in the preparation of this column.*

government officials. Id. at *1, *2. Halkbank faced multiple charges of bank fraud, money laundering, and conspiracy, including to violate U.S. sanctions and defraud the United States. Id. at *2.

Moving to dismiss the indictment, Halkbank argued that it was immune from criminal prosecution because it was an instrumentality of a foreign sovereign under the FSIA. The bank contended that the FSIA's exceptions to sovereign immunity were themselves only applicable in civil cases, that those exceptions did not apply to its conduct on the merits, and that, in the alternative, it was entitled to common-law immunity. Id. The district court denied the motion, holding that the FSIA only conferred sovereign immunity in civil cases and that, even assuming that the statute applied in the criminal context, its commercial-activity exception permitted the prosecution. Halkbank appealed.

The Foreign Sovereign Immunities Act

The FSIA codifies the principle that foreign sovereigns are immune from suit in U.S. courts with certain exceptions, including one for "commercial activity." 28 U.S.C. §§1604-1605. That exception applies in "any case" based upon (1) "a commercial activity carried on in the United States by the foreign state"; (2) "upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere"; or (3) "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." 28 U.S.C. §1605(a)(2). The FSIA defines "commercial activity" as "either a regular course of commercial conduct or a particular commercial transaction or act."

The FSIA separately grants subject-matter jurisdiction to federal district courts over "any nonjury civil action against a foreign state … to which the foreign state is not entitled to immunity." 28 U.S.C. §1330(a). Before *Bankasi* was decided, only one Court of Appeals—the D.C. Circuit—had found a source of subject-matter jurisdiction over foreign states outside of the FSIA: in the general criminal jurisdiction provision of 18 U.S.C. §3231. *Compare In re Grand Jury Subpoena*, 912 F.3d at 628 (recognizing criminal jurisdiction against foreign state under §3231), with *Rex v. Cia. Pervana de Vapores, S.A.*, 660 F.2d 61, 65 (3d Cir. 1981) (the FSIA is the only source of jurisdiction against foreign states); *Williams v. Shipping Corp. of India*, 653 F.2d 875, 881 (4th Cir. 1981) (similar); *Janvey v. Libyan Inv. Auth.*, 840 F.3d 248, 257 (5th Cir. 2016) (similar); *Keller*, 277 F.3d at 820 (similar); *Wolf v. Federal Republic of Germany*, 95 F.3d 536, 541 (7th Cir. 1996) (similar); *Cmty. Fin. Grp. v. Republic of Kenya*, 663 F.3d 977, 980 (8th Cir. 2011) (similar); *McKeel v. Islamic Republic of Iran*, 722 F.2d 582, 585-86 (9th Cir. 1983) (similar). Moreover, a subset of the courts of appeals were also divided on the related question whether Congress even intended the FSIA to confer immunity in criminal cases and, if so, whether the FSIA exceptions could overcome that immunity. Compare *Southway* v. *Cent. Bank of Nigeria*, 198 F.3d 1210, 1215 (10th Cir. 1999) (no immunity against civil claims under the Racketeer Influenced and Corrupt Organizations Act (RICO) if a FSIA exception applies), and *United States* v. *Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997) (FSIA addresses neither head-of-state immunity nor foreign sovereign immunity in the criminal context), with *Keller*, 277 F.3d at 820 (FSIA immunity in the context of civil RICO, which requires an "indictable" act).

> Even though the Second Circuit passed on the opportunity to directly weigh in on an unsettled question about the applicability of FSIA immunity in the criminal context, the court still charted a path for prosecutors to invoke the commercial-activity exception in order to prosecute foreign government instrumentalities.

The Second Circuit Opinion In 'Bankasi'

In an opinion authored by Circuit Judge Cabranes—joined in full by Circuit Judges Kearse and Bianco—the Second Circuit rejected the premise that the

district court's jurisdiction over the criminal proceedings against Halkbank depended on the FSIA. Instead, the court pointed to the general criminal jurisdiction provision in §3231, which provides that federal district courts have "original jurisdiction, exclusive of the courts of the States, of *all* offenses against the laws of the United States." *Bankasi*, 2021 WL 4929002, at *5. The court agreed with the D.C. Circuit that "[i]t is hard to imagine a clearer grant of subject-matter jurisdiction" than §3231 insofar as "'[a]ll' means 'all'" without any carve-out. Id. (quoting *In re Grand Jury Subpoena*, 912 F.3d at 628). Moreover, in the court's view, nothing in the FSIA's text purported to displace the jurisdictional grant in §3231. Id. To bolster its conclusion, the court distinguished Supreme Court and Second Circuit precedent suggesting the FSIA is the "sole basis" of jurisdiction over foreign sovereigns in U.S. courts, on the ground that those authorities were limited to the civil context and never extended to the criminal realm. See id. at *5 & n.42 (distinguishing *Argentine Republic* v. *Amerada Hess Shipping*, 488 U.S. 428, 434 (1989), and *Barnet as Tr. of 2012 Saretta Barnet Revocable Tr. v. Ministry of Culture & Sports of the Hellenic Republic*, 961 F.3d 193, 199 (2d Cir. 2020)).

The court was then able to resolve the appeal without deciding whether §1604 of the FSIA confers immunity in the criminal context. Id. at *6. Even assuming that it did, the court explained, Halkbank's conduct fell within the commercial-activity exception. Id. In its analysis, the court identified the "gravamen" of the indictment as the bank's participation in fraudulent structuring of transactions to launder Iranian oil and gas proceeds and its misrepresentations to U.S. Treasury officials. Id. These acts were commercial in nature because they were "plainly the *type* of activity in which banks, including privately owned correspondent banks, routinely engage." Id. at *7. The court also rejected Halkbank's assertion that its activities were sovereign because the Turkish government had designated it as the "sole repository" of Iranian proceeds: serving as a repository was merely the *purpose* for which Halkbank held the funds; the charged *conduct* was Halkbank's participation in illicit schemes. Id. at *8. And because the bank's commercial conduct had a statutorily adequate nexus to the United States, the court held that the commercial-activity exception applied. Id.

Finally, the Second Circuit held that Halkbank was not immune under the common law. The court reasoned that the FSIA's enactment had displaced any common-law practice. Id. at *8 & n.69 (citing *Amerada*, 488 U.S. at 435). Even looking to customary international law, foreign States were traditionally not immune against claims arising out of commercial activities. Id. at *8 & n.70 (quoting *Restatement (Fourth), The Foreign Relations Law of the United States* §454 cmt. h). And in any event, even at common law, the power to make immunity determinations rested with the Executive Branch, and that Branch's decision to bring charges against Halkbank "necessarily manifested" a view that there was no immunity. Id. at *9.

Conclusion

The Second Circuit's decision in *United States v. Turkiye Halk Bankasi S.A.* adopted a broad view of federal court jurisdiction over criminal proceedings against foreign sovereigns and their instrumentalities. Even though the Second Circuit passed on the opportunity to directly weigh in on an unsettled question about the applicability of FSIA immunity in the criminal context, the court still charted a path for prosecutors to invoke the commercial-activity exception in order to prosecute foreign government instrumentalities.