APPENDIX

APPENDIX A

In the
United States Court of Appeals
for the Second Circuit

AUGUST TERM 2020

NO. 20-3499-cr

UNITED STATES OF AMERICA,
Appellee,

v.

TURKIYE HALK BANKASI A.S., AKA HALKBANK,
Defendant-Appellant,

REZA ZARRAB, AKA RIZA SARRAF, CAMELIA JAMSHIDY, AKA KAMELIA JAMSHIDY, HOSSEIN NAJAFZADEH, MOHAMMAD ZARRAB, AKA CAN SARRAF, AKA KARTALMSD, MEHMET HAKAN ATILLA, MEHMET ZAFER CAGLAYAN, ABI, SULEYMAN ASLAN, LEVENT BALKAN, ABDULLAH HAPPANI,
Defendants.

Appeal from the United States District Court
for the Southern District of New York

ARGUED: APRIL 12, 2021

DECIDED: OCTOBER 22, 2021

Before: KEARSE, CABRANES, and BIANCO, *Circuit Judges*.

This case presents two questions. First, whether a denial of a motion to dismiss a criminal indictment based on the Foreign Sovereign Immunities Act ("FSIA") is immediately appealable under the collateral order doctrine. Second, whether FSIA confers immunity on foreign sovereigns from criminal prosecutions. We answer the first question in the affirmative. As to the second, we hold that even if we were to assume that FSIA confers immunity in the criminal context, the offense conduct with which Defendant-Appellant Turkiye Halk Bankasi A.S. is charged would fall under the commercial activity exception to FSIA. Accordingly, we **DENY** the Government's motion to dismiss this appeal, and we **AFFIRM** the Decision and Order of the United States District Court for the Southern District of New York (Richard M. Berman, *Judge*).

SIDHARDHA KAMARAJU (Michael D. Lockard, David W. Denton, Jr., Jonathan E. Rebold, Thomas McKay, *on the brief*), Assistant United States Attorneys, *for* Damian Williams, United States Attorney for the Southern District of New York, New York, NY, *for Appellee.*

SIMON A. LATCOVICH (Robert M. Cary, Eden Schiffmann, James W. Kirkpatrick, *on the brief*), Williams & Connolly, LLP, Washington, D.C., *for Defendant-Appellant*.

JOSÉ A. CABRANES, *Circuit Judge*:

This case presents two questions. First, whether a denial of a motion to dismiss a criminal indictment based on the Foreign Sovereign Immunities Act ("FSIA") is immediately appealable under the collateral order doctrine. Second, whether FSIA confers immunity on foreign sovereigns from criminal prosecutions. We answer the first question in the affirmative. As to the second, we hold that even if we were to assume that FSIA confers immunity in the criminal context, the offense conduct with which Defendant-Appellant Turkiye Halk Bankasi A.S. ("Halkbank") is charged would fall under the commercial activity exception to FSIA. Accordingly, we **DENY** the Government's motion to dismiss this appeal, and we **AFFIRM** the Decision and Order of the United States District Court for the Southern District of New York (Richard M. Berman, *Judge*).

I. BACKGROUND

Halkbank is a commercial bank that is majority-owned by the Government of Turkey.

In 2019 a grand jury returned a Superseding Indictment (the "Indictment") charging Halkbank with participating in a multi-year scheme to launder billions of dollars' worth of Iranian oil and natural gas proceeds in

violation of U.S. sanctions against the Government of Iran and Iranian entities and persons. The oil and natural gas proceeds were held in Halkbank accounts on behalf of the Central Bank of Iran ("CBI"), the National Iranian Oil Company ("NIOC"), and the National Iranian Gas Company ("NIGC").[1]

The Indictment alleged that Halkbank knowingly facilitated certain types of illegal transactions, including: (1) "allowing the proceeds of sales of Iranian oil and gas deposited at Halkbank to be used to buy gold for the benefit of the Government of Iran"; (2) "allowing the proceeds of sales of Iranian oil and gas deposited at Halkbank to be used to buy gold that was not exported to Iran";[2] and (3) "facilitating transactions fraudulently

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[1] It is not disputed that the CBI, NIOC, and NIGC were all subject to U.S. sanctions during the charged offense conduct or indictment period.

[2] The National Defense Authorization Act for Fiscal Year 2012 (the "2012 NDAA"), Pub. L. No. 112-81, requires the imposition of sanctions on foreign financial institutions following a determination by the President that the institution has violated certain prohibitions on activities with respect to the Central Bank of Iran or another Iranian financial institution designated under the International Emergency Economic Powers Act ("IEEPA"). *See generally* U.S. Dep't of the Treasury, *Frequently Asked Questions: Iran Sanctions*, available at https://home.treasury.gov/policy-issues/financial-sanctions/faqs/topic/1551 (last accessed August 17, 2021) (FAQs 169-70). Government-owned foreign financial institutions, like Halkbank, are prohibited from engaging in transactions for the sale or purchase of petroleum or petroleum products to or from Iran. *See id* (FAQ 170). Under the terms of the 2012 NDAA, foreign countries could be exempted from sanctions for purchasing Iranian oil so long as they significantly reduced their purchases of such products from Iran, the so-called "significant reduction exception." *See id.* (FAQ 235).

Section 504 of the Iran Threat Reduction and Syria Human Rights Act of 2012, 22 U.S.C. §§ 8711, *et seq.*, ("ITRA") narrowed the

designed to appear to be purchases of food and medicine by Iranian customers, in order to appear to fall within the so-called 'humanitarian exception'[3] to certain sanctions against the Government of Iran, when in fact no purchases of food or medicine actually occurred."[4]

Through the charged scheme, Halkbank allegedly transferred approximately $20 billion of otherwise restricted Iranian funds in order to create a "pool of

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significant reduction exception "to (a) exempt from sanctions only transactions that conduct or facilitate bilateral trade in goods or services between the country granted the exception and Iran, and (b) require that funds owed to Iran as a result of the bilateral trade be credited to an account located in the country granted the exception and not be repatriated to Iran," or the "bilateral trade restriction." *See* U.S. Dep't of the Treasury, *Frequently Asked Questions: Iran Sanctions* (FAQs 254-55). Under this provision, as is relevant here, the proceeds of oil sales by Iran to another country, like Turkey, are to be deposited in an escrow account in the purchasing country and may only be used by Iran for further trade with that country (*i.e.*, for trade between Turkey and Iran). *See* 22 U.S.C. § 8513a(d)(4)(D). Subsequently, under the Iran Freedom and Counter-Proliferation Act ("IFCA"), passed as part of the National Defense Authorization Act for Fiscal Year 2013, Pub. L. No. 112-239, sanctions may apply to foreign financial institutions that conduct or facilitate a transaction for the sale, supply, or transfer of natural gas to or from Iran unless, as with proceeds from Iran's oil sales, any funds owed to Iran as a result of the trade are credited to an account located in the purchasing country. *See* U.S. Dep't of the Treasury, *Frequently Asked Questions: Iran Sanctions* (FAQs 297, 313).

[3] The 2012 NDAA included an exception for transactions for the sale of food, medicine, or medical devices to Iran. *See id.* (FAQ 641) ("Transactions for the sale of agricultural commodities, food, medicine, or medical devices to Iran involving the [CBI] are excepted from the relevant sanctions under section 1245(d)(2) of the NDAA 2012 and sections 561.203 and 561.204 of the Iranian Financial Sanctions Regulations. . . . ").

[4] Indictment ¶ 4.

Iranian oil funds . . . held in the names of front companies, which concealed the funds' Iranian nexus."[5] These funds were then used to make international payments on behalf of the Government of Iran and Iranian banks, including at least $1 billion in dollar-denominated transfers that passed through the U.S. financial system in violation of U.S. law.

Further, Halkbank executives, acting within the scope of their employment and for the benefit of Halkbank, are alleged to have concealed the true nature of the transactions Halkbank made on behalf of the Government of Iran from officials at the U.S. Department of the Treasury (the "Treasury").[6] To conceal these transactions, Halkbank officers allegedly conspired with Reza Zarrab, an Iranian-Turkish businessman, and other Turkish and Iranian government officials, some of whom are alleged to have received millions of dollars from the proceeds of the scheme in exchange.[7]

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[5] *Id.* ¶¶ 4, 6.

[6] These executives included: (1) Halkbank's former General Manager, Suleyman Aslan; (2) Halkbank's former Deputy General Manager for International Banking, Mehmet Hakan Atilla, who was responsible for maintaining Halkbank's correspondent banking relationships, including with U.S. correspondent banks, and for maintaining Halkbank's relationships with Iranian banks, including the Central Bank of Iran; and (3) the former head of Halkbank's Foreign Operations Department, Levent Balkan. These individual defendants are not parties to the present appeal; the Government informs us that Aslan and Balkan were charged separately and remain at large, while Atilla was convicted, following a jury trial, of offenses charged separately. *See United States v. Atilla*, 966 F.3d 118 (2d Cir. 2020); Gov't Br. at 4-5 n.2.

[7] Zarrab pleaded guilty to the charges against him in relation to this scheme on October 26, 2017.

Halkbank was charged in the six-count Indictment with: conspiring to defraud the United States by obstructing the lawful functions of the Treasury, in violation of 18 U.S.C. § 371 (Count One); conspiring to violate or cause violations of licenses, orders, regulations, and prohibitions issued under the International Emergency Economic Powers Act ("IEEPA"), codified at 50 U.S.C. §§ 1701-06 (Count Two); bank fraud, in violation of 18 U.S.C. § 1344 (Count Three); conspiring to commit bank fraud, in violation of 18 U.S.C. § 1349 (Count Four); money laundering, in violation of 18 U.S.C. § 1956(a)(2)(A) (Count Five); and conspiring to commit money laundering, in violation of 18 U.S.C. § 1956(h) (Count Six).

On August 10, 2020, Halkbank moved to dismiss the Indictment, arguing that FSIA renders it immune from criminal prosecution because it is majority-owned by the Turkish Government.[8] Halkbank further argued that FSIA's exceptions to immunity are applicable only in civil cases—not in criminal cases—and that, in any event, even if FSIA's exceptions did apply in the criminal context, the conduct with which Halkbank is charged does not fall within the ambit of FSIA's so-called "commercial activity" exception. Finally, even if FSIA did not bar its prosecution, Halkbank argued that it was nevertheless entitled to immunity from prosecution under the common law.

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[8] The parties do not dispute that Halkbank is an "instrumentality of a foreign state" for purposes of FSIA. *See* Halkbank Br. at 8. Under FSIA, an "instrumentality of a foreign state" includes "any entity" for which "a majority of [its] shares or other ownership interest is owned by a foreign state." 28 U.S.C. § 1603(b)(2). For purposes of this opinion, we use foreign sovereign and foreign state interchangeably.

Following briefing and oral argument, the District Court denied Halkbank's motion in a Decision and Order dated October 1, 2020. The District Court principally concluded that Halkbank was not immune from prosecution because FSIA confers immunity on foreign sovereigns only in civil proceedings. The District Court went on to conclude that, even assuming *arguendo* that FSIA did confer immunity to foreign sovereigns in criminal proceedings, Halkbank's conduct would fall within FSIA's commercial activity exception. The District Court also rejected Halkbank's contention that it was entitled to immunity from prosecution under the common law, noting that Halkbank failed to cite any support for its claim on this basis. Halkbank timely appealed.

On appeal, Halkbank moved to stay the District Court proceedings pending resolution of this appeal, which the Government opposed. The Government then moved to dismiss Halkbank's appeal, taking the position that the District Court's denial of Halkbank's motion to dismiss the Indictment on the basis of foreign sovereign immunity is not subject to interlocutory review by our Court.

A motions panel of our Court granted Halkbank's motion for a stay and referred the decision on the Government's motion to dismiss to the merits panel.

II. DISCUSSION

A. Appellate Jurisdiction

As a threshold matter, we must consider whether we have jurisdiction over this appeal, which is taken from the District Court's denial of Halkbank's motion to dismiss the Indictment on the basis of foreign sovereign immunity.

The Government challenges our jurisdiction, asserting that the District Court's sovereign immunity determination is neither a final judgment nor an order that qualifies for interlocutory appeal. We do not agree.

While Congress has limited our jurisdiction to "final decisions of the district courts,"[9] we have recognized a narrow exception to the final judgment rule that permits interlocutory appeals from certain "collateral orders." It is well established that, to qualify for interlocutory appeal under the collateral order doctrine, a decision must: (1) "conclusively determine the disputed question"; (2) "resolve an important issue completely separate from the merits of the action"; and (3) "be effectively unreviewable on appeal from a final judgment."[10]

We have "consistently held that [a] threshold [foreign] sovereign-immunity determination is immediately reviewable under the collateral-order doctrine."[11] But, as the Government points out, our holding on this point concerned a sovereign immunity determination in the civil, not criminal, context. Because the Supreme Court has made clear that the collateral order doctrine is to be applied in criminal cases with the "utmost strictness,"[12]

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[9] 28 U.S.C. § 1291.

[10] *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978), *superseded on other grounds by* Fed. R. Civ. P. 23(f).

[11] *Funk v. Belneftekhim*, 861 F.3d 354, 363 (2d Cir. 2017) (first alteration in original) (internal quotation marks omitted).

[12] *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 799 (1989) (internal quotation mars omitted). Indeed, the Supreme Court has recognized just four categories of orders that are immediately appealable in criminal cases: (1) denials of motions to reduce bail; (2) denials of motions to dismiss on double-jeopardy grounds; (3) denials of motions to dismiss under the Speech or Debate Clause, and (4) orders for the forced medication of criminal defendants. *See id.*; *Sell*

the Government argues that a threshold sovereign immunity determination in a criminal case cannot qualify for the collateral order exception to the final judgment rule.

It is true that the Supreme Court has "emphasized that one of the principal reasons for . . . strict adherence to the doctrine of finality in criminal cases is that the Sixth Amendment guarantees a speedy trial."[13] Still, that the Supreme Court has not *yet* held that a sovereign immunity determination in a criminal case falls within the collateral order doctrine does not necessarily foreclose that outcome.[14]

Indeed, where, as here, a sovereign immunity determination in the criminal context plainly satisfies the criteria set forth by the Supreme Court in *Coopers & Lybrand*, applied with the "utmost strictness," it qualifies for interlocutory review. First, the District Court's sovereign immunity determination conclusively determined the issue against Halkbank.[15] Second, Halkbank's professed entitlement to immunity is an issue distinct from the merits of the charges at issue.[16] Third, an "appeal from [a] final judgment cannot repair the damage caused to a sovereign that is improperly required

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v. United States, 539 U.S. 166, 176-77 (2003).

[13] *United States v. MacDonald*, 435 U.S. 850, 861 (1978) (internal quotation marks and alteration omitted).

[14] Our Circuit has also held that commitment orders, *United States v. Magassouba*, 544 F.3d 387, 400 (2d Cir. 2008), and orders allowing the government to try a juvenile as an adult, *United States v. Doe*, 49 F.3d 859, 865 (2d Cir. 1995), are immediately appealable in criminal cases

[15] *See Funk*, 861 F.3d at 362-63.

[16] *See id.* at 363.

to litigate a case."[17] Put another way, "the denial of immunity is effectively unreviewable after final judgment because defendants must litigate the case to reach judgment and, thus, lose the very immunity from suit to which they claim to be entitled."[18]

In sum, we hold that a threshold sovereign immunity determination is immediately appealable pursuant to the collateral order doctrine—even in a criminal case. Accordingly, we have jurisdiction to review the District Court's sovereign immunity determination.

B. Subject Matter Jurisdiction

On appeal, Halkbank principally contends that the District Court lacks subject matter jurisdiction because it has sovereign immunity from criminal prosecution under § 1604 of FSIA, which grants immunity to foreign sovereigns "from the jurisdiction of the courts of the United States," unless a statutory exception applies.[19]

i. Standard of Review

On appeal, "[w]e review *de novo* a district court's legal determinations regarding its subject matter jurisdiction, such as whether sovereign immunity exists, and its factual determinations for clear error."[20]

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[17] *EM Ltd. v. Banco Central de la Republica Argentina*, 800 F.3d 78, 87 (2d Cir. 2015); *see also Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1317 (2017) (observing that the "basic objective" of foreign sovereign immunity is "to free a foreign sovereign from *suit*" so that it should be decided "as near to the outset of the case as is reasonably possible" (emphasis in original)).

[18] *Funk*, 861 F.3d at 363.

[19] 28 U.S.C. § 1604.

[20] *Petersen Energía Inversora S.A.U. v. Argentine Republic &*

ii. The Foreign Sovereign Immunities Act

It is well established that Article III of the United States Constitution grants federal courts jurisdiction to hear claims involving "foreign States."[21] Still, for most of our history, foreign sovereigns enjoyed absolute immunity in U.S. courts as "a matter of grace and comity"[22] in light of the "perfect equality and absolute independence of sovereigns."[23] Accordingly, federal courts "consistently . . . deferred to the decisions of the political branches—in particular, those of the Executive Branch—on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities."[24] In practice, the U.S. Department of State would routinely make requests for immunity in all actions against "friendly sovereigns."[25]

Then, in 1952, the Acting Legal Adviser to the State Department, Jack B. Tate, issued a letter announcing the State Department's adoption of a so-called "restrictive" theory of foreign sovereign immunity.[26] Under this

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YPF S.A., 895 F.3d 194, 203 (2d Cir. 2018) (internal quotation marks omitted).

[21] U.S. CONST. art III, § 2, cl. 1.

[22] *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983).

[23] *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 137 (1812).

[24] *Verlinden*, 461 U.S. at 486.

[25] *Samantar v. Yousef*, 560 U.S. 305, 312 (2010).

[26] Letter from Jack B. Tate, Acting Legal Adviser, Dep't of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), *reprinted in* 26 Dep't of State Bull. 984–85 (1952) *and in Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 711-15 (1976) (App'x 2 to opinion of White, *J.*).

theory, the State Department would take the position that foreign sovereigns were not immune from liability in U.S. courts for acts that are "private or commercial in character (*jure gestionis*)"; rather, foreign sovereigns would only enjoy immunity for their "sovereign or public acts (*jure imperii*)."[27] The State Department's new position threw immunity determinations for foreign sovereigns into "disarray."[28] Indeed, foreign nations lobbied the State Department for immunity, with the result that "political considerations sometimes led the Department to file suggestions of immunity in cases where immunity would not have been available under the restrictive theory."[29] And, when foreign nations did not request immunity from the State Department, the federal courts were left to "determine whether sovereign immunity existed, generally by reference to prior State Department decisions."[30] As a result, "sovereign immunity determinations were made in two different branches, subject to a variety of factors [that] sometimes include[d] diplomatic considerations" and "the governing standards were neither clear nor uniformly applied."[31]

As discussed in a recent case, the consequent

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[27] *Saudi Arabia v. Nelson*, 507 U.S. 349, 359-60 (1993).

[28] *Republic of Austria v. Altmann*, 541 U.S. 677, 690 (2004).

[29] *Id.* (internal quotation marks omitted); *see also* Curtis A. Bradley & Jack L. Goldsmith, *Foreign Sovereign Immunity, Individual Officials, and Human Rights Litigation*, 13 GREEN BAG 2D 9, 19 (2009) ("[T]he pre-FSIA common law regime of executive discretion in determining foreign sovereign immunity" was "characterized by unprincipled conferrals of immunity based on the political preferences of the presidential administration and case-by-case diplomatic pressures.")

[30] *Altmann*, 541 U.S. at 690 (internal quotation marks omitted).

[31] *Id.* at 691 (internal quotation marks omitted).

"inconsistent application of sovereign immunity" attracted Congressional notice.[32] In 1976 Congress enacted FSIA to "endorse and codify the [State Department's] restrictive theory of sovereign immunity" and to "transfer primary responsibility for deciding claims of foreign states to immunity from the State Department to the courts."[33] Under § 1604 of FSIA, foreign sovereigns are "immune from the jurisdiction of the courts of the United States,"[34] with certain exceptions, including an exception for the "commercial activity" of a foreign sovereign.[35] FSIA also 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."[36]

iii. FSIA in the Criminal Context

By enacting FSIA, Congress established a comprehensive framework "governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities."[37] By its terms, FSIA plainly confers immunity on foreign sovereigns from civil actions—albeit with certain

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[32] *Samantar*, 560 U.S. at 313.

[33] *Id.* (internal quotation marks omitted); *see also* 28 U.S.C. § 1602 (setting forth Congressional findings and the purposes of FSIA).

[34] 28 U.S.C. § 1604 ("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 the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.").

[35] *Id.* § 1605(a)(2).

[36] *Id.* § 1330(a).

[37] *Verlinden*, 461 U.S. at 488.

exceptions.[38] What is less clear, however, is whether Congress also intended for FSIA to confer immunity on instrumentalities of foreign sovereigns in criminal cases.[39]

Halkbank takes the position that § 1604 of FSIA confers immunity on foreign sovereigns and their instrumentalities from criminal prosecution. In particular, Halkbank argues that § 1604, which confers immunity (with enumerated exceptions) on foreign sovereigns "from the jurisdiction of the courts of the United States," must be read "in tandem"[40] with a separate provision of FSIA, § 1330(a), which grants district courts jurisdiction over "any nonjury *civil* action against a foreign state."[41] Thus, Halkbank urges that, the *absence* of any express grant of criminal jurisdiction over foreign sovereigns in § 1330(a), combined with § 1604's general grant of immunity to foreign sovereigns from the jurisdiction of U.S. courts, necessarily leads to the conclusion that foreign sovereigns and their

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[38] *See* 28 U.S.C. § 1330(a).

[39] Other circuits to consider FSIA's availability in criminal cases have split. *Compare Southway v. Cent. Bank of Nigeria*, 198 F.3d 1210, 1215 (10th Cir. 1999) (concluding in the context of a civil Racketeer Influenced and Corrupt Organizations Act ("RICO") claim that if Congress intended defendants such as the Republic of Nigeria "to be immune from criminal indictment under the FSIA, Congress should amend the FSIA to expressly so state"), *and United States v. Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997) (same, in a case involving head-of-state immunity*), with Keller v. Cent. Bank of Nigeria*, 277 F.3d 811, 820 (6th Cir. 2002) (considering FSIA in the context of civil RICO, but holding that FSIA does apply to criminal cases).

[40] *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989).

[41] 28 U.S.C. § 1330(a) (emphasis added).

instrumentalities are immune from criminal prosecution.

As an initial matter, to the extent Halkbank's challenge rests on the idea that FSIA is the sole basis for the District Court's subject matter jurisdiction over this criminal prosecution, that premise is incorrect.[42] It is true that we have held, in the civil context, that "FSIA provides the sole basis for obtaining jurisdiction over a foreign state in the courts of this country."[43] But federal district courts have "original jurisdiction, exclusive of the courts of the States, of *all* offenses against the laws of the United States" pursuant to § 3231 of Title 18 of the U.S. Code.[44] As one of our sister circuits recently observed, "[i]t is hard to imagine a clearer textual grant of subject-matter jurisdiction"—"'[a]ll' means 'all.'"[45] Indeed, § 3231 "contains no carve-out" that supports an exemption for federal offenses committed by foreign sovereigns, and "nothing in the [FSIA's] text expressly displaces [§] 3231's jurisdictional grant."[46]

Although Halkbank argues that § 1604's broad grant of sovereign immunity cuts back on § 3231's grant of

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[42] In support of this proposition Halkbank relies on *Amerada Hess*, in which the Supreme Court wrote that "the text and structure of FSIA demonstrate Congress' intention that the FSIA be the sole basis for obtaining jurisdiction over a foreign state in our courts." 488 U.S. at 434. But *Amerada Hess* was a civil case and neither our Court nor the Supreme Court has ever extended this holding to a criminal case.

[43] *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) (internal quotation marks omitted).

[44] 18 U.S.C. § 3231 (emphasis added).

[45] *In re Grand Jury Subpoena*, 912 F.3d 623, 628 (D.C. Cir. 2019).

[46] *Id.*

criminal jurisdiction, that logic is unavailing. Indeed, we agree with our sister circuit that (in an analogy we now understand all too well in this time of global pandemic) "granting a particular class of defendants 'immunity' from jurisdiction has no effect on the scope of the underlying jurisdiction, any more than a vaccine conferring immunity from a virus affects the biological properties of the virus itself."[47]

We think that the District Court plainly has subject matter jurisdiction over the federal criminal prosecution of Halkbank pursuant to § 3231. However, we need not—and do not—decide whether § 1604 of FSIA confers immunity on foreign sovereigns in the criminal context. As we explain below, even assuming *arguendo* that FSIA confers sovereign immunity in criminal cases, the offense conduct with which Halkbank is charged falls within FSIA's commercial activities exception to sovereign immunity.[48]

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[47] *Id.*

[48] We also note that, although Halkbank takes the position that FSIA's § 1604 confers sovereign immunity in criminal cases, it also takes the position that FSIA's exceptions to sovereign immunity, which are set forth in § 1605, are *not* available in criminal proceedings. Under this reasoning, a foreign sovereign could be liable under FSIA's commercial activity exception in the civil context, but immune from criminal liability for the same commercial conduct. We are skeptical that Congress intended for § 1604's grant of immunity to sweep far more broadly in criminal cases than in civil cases. Further, the text of § 1605 plainly states that FSIA's exceptions to foreign sovereign immunity apply "in *any* case." 28 U.S.C. § 1605(a) (emphasis added). Just as "all" means "all," so must "any" mean "any."

iv. FSIA's Commercial Activity Exception to Sovereign Immunity

The Government submits that, even assuming that FSIA confers immunity to foreign sovereigns in criminal cases, Halkbank's charged offense conduct would fall within FSIA's exception to sovereign immunity for commercial activity. We agree.

Section 1605(a)(2) of FSIA, the statute's commercial activity exception, provides that "[a] foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case" in which the action is 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."[49]

To fall within the commercial activity exception, Halkbank's activities need to qualify for at least one of the categories specified in the three clauses of § 1605(a)(2).

We begin this inquiry by identifying an "act of the foreign sovereign [s]tate" that is "'based upon' the 'particular conduct' that constitutes the 'gravamen' of the suit."[50] Here, the Indictment alleges that Halkbank "participated in the design of fraudulent transactions

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[49] 28 U.S.C. § 1605(a)(2).

[50] *Petersen Energía*, 895 F.3d at 204 (quoting *OBB Personenverkehr AG v. Sachs*, 577 U.S. 27, 35 (2015)); *see also Barnet*, 961 F.3d at 200 ("We first must identify [the] predicate act that serves as the basis for plaintiff's claims.") (internal quotation marks omitted).

intended to deceive U.S. regulators and foreign banks" in order to launder approximately $1 billion in Iranian oil and gas proceeds through the U.S. financial system.[51] The Indictment further alleges that Halkbank lied to Treasury officials regarding the nature of these transactions in an effort to hide the scheme and avoid U.S. sanctions. This conduct plainly constitutes the "gravamen" of the charges against Halkbank.

We next consider whether the identified act took place inside or outside the United States, and whether the act constitutes commercial activity within the meaning of FSIA.

FSIA defines "commercial activity" in a circular manner, as meaning "either a regular course of commercial conduct or a particular commercial transaction or act."[52] But FSIA does go on to provide that "[t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose."[53] In applying this provision of FSIA, we have held that "*purpose* is the reason why the foreign state engages in the activity and *nature* is the outward form of the conduct that the foreign state performs or agrees to perform."[54] Put another way, "the issue is whether the particular actions that the foreign state performs . . . are the *type* of actions by which a

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[51] Indictment ¶¶ 1, 64.

[52] 28 U.S.C. § 1603(d).

[53] *Id.*

[54] *Pablo Star Ltd. v. Welsh Government*, 961 F.3d 555, 561 (2d Cir. 2020) (emphasis added) (other emphases and internal quotation marks omitted).

private party engages in trade and traffic or commerce."[55] Whether a foreign state acts in the manner of a private party to engage in commercial activity is thus "a question of behavior, not motivation."[56]

Here, Halkbank's alleged offense conduct qualifies as commercial activity under all three categories set forth in § 1605(a)(2).

As to the first two clauses of § 1605(a)(2), Halkbank's activities in the United States—that is, Halkbank's communications with Treasury officials, including communications made in meetings and in conference calls, in furtherance of its efforts to evade U.S. sanctions—qualify under both. Although Halkbank is majority-owned by the Government of Turkey, such communications are plainly the *type* of activity in which banks, including privately owned correspondent banks, routinely engage.[57] Just as in *Pablo Star*, where we observed that "[l]iterally anyone can do"[58] copyright infringement, so, too, can literally any bank violate sanctions. Halkbank's interactions with the Treasury were therefore "commercial activity carried on in the United States" or, in the alternative, "act[s] performed in

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[55] *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992) (emphasis in original) (internal quotation marks omitted). We note that such commercial activity has "been held to include criminal acts if those actions are ones in which private parties could engage and if they are committed in the course of business or trade, including illegal contracts to steal money, bribery, forgery, and mail, wire, and securities fraud." Restatement (Fourth), The Foreign Relations Law of the United States § 454 rn. 3.

[56] *Nelson*, 507 U.S. at 360.

[57] *Cf. Weltover*, 504 U.S. at 614.

[58] *Pablo Star*, 961 F.3d at 562.

the United States in connection with a commercial activity . . . elsewhere"—specifically, its banking activities in Turkey on behalf of the Government of Iran.[59]

As to the third clause of § 1605(a)(2), Halkbank's activities outside the United States—Halkbank's participation in schemes to launder Iranian oil and gas proceeds through non-U.S. transactions[60]—also qualify as commercial activities for the same reasons. In addition, such activities were Halkbank's "commercial activit[ies] … elsewhere" that nevertheless caused a "direct effect" in the United States by causing victim-U.S. financial institutions to take part in laundering over $1 billion through the U.S. financial system in violation of U.S. law.[61]

With respect to the third clause, Halkbank argues that its activities outside the United States were "sovereign, not commercial" because the Government of Turkey has designated Halkbank as its "sole repository of proceeds from the sale of Iranian oil to Turkey's national oil company and gas company," consistent with applicable U.S. laws.[62] But we rejected a similar argument in *Pablo*

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[59] 28 U.S.C. § 1605(a)(2).

[60] These transactions included purchases of gold using Iranian oil and gas proceeds as well as transactions fraudulently disguised as purchases of food and medicine, which would have fallen under a "humanitarian exception" to the U.S. sanctions regime. Indictment ¶ 4.

[61] 28 U.S.C. § 1605(a)(2).

[62] Halkbank Br. at 40-41 (internal quotation marks omitted); *see also supra* note 2, at 5 (explaining that the ITRA amended the 2012 NDAA to require the proceeds of Iranian oil sales between Iran and another country, like Turkey, to be deposited in a specified account in that country to only be used for trade with that country).

Star. In that case, we were faced with a copyright dispute over the Welsh Government's use of the likeness of the poet Dylan Thomas in its promotional materials. The Welsh Government urged us to characterize its activities as promoting Welsh culture and tourism pursuant to a statutory mandate—activity that it asserted was distinctly "sovereign" in nature that would qualify for immunity under FSIA.[63] We declined to do so, observing that the Welsh government's broad characterization of its activities "conflate[s] the act with its purpose."[64]

Here, Halkbank's broad characterization of its activities as sovereign in nature also "conflates the act with its purpose." The gravamen of the Indictment is not that Halkbank is the Turkish Government's repository for Iranian oil and natural gas proceeds in Turkey, *i.e.*, the *purpose* for which it held these funds. Rather, it is Halkbank's participation in money laundering and other fraudulent schemes designed to evade U.S. sanctions that is the "core action taken by [Halkbank] outside the United States."[65] And because those core acts constitute "an activity that could be, and in fact regularly is, performed by private-sector businesses," those acts are commercial, not sovereign, in nature.[66]

Halkbank also argues that its activities elsewhere did not have a "direct effect" in the United States. That is plainly not the case. We find a direct effect if "an effect

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[63] *Pablo Star*, 961 F.3d at 562.

[64] *Id.* This reflects a fundamental issue with the *nature-purpose* distinction, which is that its "application may sometimes depend on the level of generality at which the conduct is viewed." *Id.* at 561.

[65] *Barnet*, 961 F.3d at 200 (internal quotation marks omitted).

[66] *Pablo Star*, 961 F.3d at 562.

simply followed as an immediate consequence of the defendant's activity."[67] That effect "need not be substantial or foreseeable."[68] Again, Halkbank's activities outside the United States led to approximately $1 billion being laundered through the U.S. financial system.

In sum, even assuming *arguendo* that FSIA confers immunity on the instrumentalities of foreign sovereigns in the criminal context, Halkbank's charged offense conduct would fall within FSIA's commercial activity exception to sovereign immunity.

C. Common Law Immunity

Halkbank argues that even if FSIA does not confer foreign sovereign immunity in criminal cases, it is nevertheless immune from criminal prosecution under common law. We do not agree.

Assuming *arguendo* that FSIA does confer sovereign immunity in criminal cases—a holding we do not reach today—its enactment displaced any pre-existing common-law practice.[69] Further, even assuming that FSIA did not supersede the pertinent common law, any foreign sovereign immunity at common law also had an exception for a foreign state's commercial activity,[70] just

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[67] *Barnet*, 961 F.3d at 199 (internal quotation marks and alteration omitted).

[68] *Peterson Energía*, 895 F.3d at 205.

[69] *See, e.g., Samantar*, 560 U.S. at 312-13; *Amerada Hess*, 488 U.S. at 435 (recognizing the "general rule that the [FSIA] governs the immunity of foreign states in federal court" (internal quotation marks omitted)).

[70] *See, e.g., Verlinden*, 461 U.S. at 487-88. Under the restrictive view of immunity under customary international law, "states are generally required to afford immunity from jurisdiction to adjudicate to foreign states in respect to claims arising out of government

like FSIA's commercial activity exception.

Finally, in any event, at common law, sovereign immunity determinations were the prerogative of the Executive Branch; thus, the decision to bring criminal charges would have necessarily manifested the Executive Branch's view that no sovereign immunity existed.[71]

III. CONCLUSION

To summarize, we hold as follows:

(1) We have jurisdiction over the instant appeal pursuant to the collateral order doctrine;

(2) Even assuming FSIA applies in criminal cases—an issue that we need not, and do not, decide today—the commercial activity exception to FSIA would nevertheless apply to Halkbank's charged offense conduct; thus, the District Court did not err in denying Halkbank's motion to dismiss the Indictment; and

(3) Halkbank, an instrumentality of a foreign sovereign, is not entitled to immunity from criminal prosecution at common law.

For the foregoing reasons, we **DENY** the Government's motion to dismiss this appeal, and we **AFFIRM** the District Court's Decision and Order dated October 1, 2020.

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activities . . . but not in respect to claims arising out of activities of a kind carried on by private persons . . . including commercial activities." Restatement (Fourth), The Foreign Relations Law of the United States § 454 cmt. h.

[71] *See Verlinden*, 461 U.S. at 486.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, –against– HALKBANK Defendants.	15 Cr. 867 (RMB) **DECISION & ORDER**

Having carefully reviewed the record herein, including without limitation: (1) the Halkbank Indictment, dated October 15, 2019; (2) Halkbank's motion to dismiss the Indictment, dated August 10, 2020; (3) the Government's opposition to the motion to dismiss, dated August 31, 2020; (4) Halkbank's reply brief, dated September 8, 2020; (5) the oral argument held on September 18, 2020, and (6) all prior related proceedings, **the Court denies Halkbank's motion to dismiss as follows**:[1]

I. Background

On October 15, 2019, Türkiye Halk Bankasi A.S. ("Halkbank") was charged in a six count Indictment with the following crimes: **Count One** – Conspiracy to Defraud the United States in violation of 18 U.S.C. § 371;

[1] **Any issues or arguments raised by the parties but not specifically addressed in this Decision and Order have been considered by the Court and rejected.**

Count Two – Conspiracy to Violate the International Emergency Economic Powers Act ("IEEPA") in violation of 50 U.S.C. § 1705, Executive Orders 12959, 13059, 13224, 13599, 13622, & 13645, and 31 C.F.R. §§ 560.203, 560.204, 560.205, 561.203, 561.204, & 561.205; **Count Three** – Bank Fraud in violation of 18 U.S.C. §§ 1344 and 2; **Count Four** – Conspiracy to Commit Bank Fraud in violation of 18 U.S.C. § 1349; **Count Five** – Money Laundering in violation of 18 U.S.C. §§ 1956(a)(2)(A) and 2; and **Count Six** – Conspiracy to Commit Money Laundering in violation of 18 U.S.C. § 1956(h). See Indictment at 35-41.[2]

According to the Government: "[t]he Indictment alleges that Halkbank participated in transactions designed to extract surreptitiously Iran's oil and gas proceeds held at the bank, so that those funds could be used to make international payments through the U.S. financial system on behalf of Iran while hiding Iran's control of those transactions, and lied to Treasury Department officials in the United States to conceal the scheme and evade applicable sanctions." See Opp. at 10; Indictment at 2-4, 21-26, 34. "The scheme involved fraudulent gold and humanitarian trade transactions run through Halkbank." Opp. at 3. "Through these methods, Halkbank illicitly transferred approximately $20 billion worth of otherwise restricted Iranian funds." Indictment at 3. "As alleged, at least approximately $1 billion was laundered through the U.S. on behalf of the Government of Iran and Iranian entities." Opp. at 3.

One of Halkbank's alleged co-conspirators, Reza Zarrab, a dual citizen of Turkey and Iran, pled guilty

[2] Halkbank is one of Turkey's largest state-owned banks. See Eric Lipton, U.S. Indicts Turkish Bank on Charges of Evading Iran Sanctions, *New York Times* (Oct. 15, 2019).

before this Court on October 26, 2017 to designing the sanctions evasion scheme. Another of Halkbank's alleged co-conspirators, Mehmet Hakan Atilla, who was the Deputy General Manager of International Banking at Halkbank, was convicted by an S.D.N.Y. jury on January 3, 2018 of conspiracy to defraud the United States; conspiracy to violate the IEEPA and the Iranian Transactions and Sanctions Regulations ("ITSR"); bank fraud; conspiracy to commit bank fraud; and conspiracy to commit money laundering. See May 16, 2018 Judgment. Atilla was sentenced to 32 months imprisonment (and he completed his sentence). Id. On July 20, 2020, the Second Circuit affirmed Atilla's conviction and sentence. See discussion of Second Circuit ruling at pp.5-6 infra.

Prior Related Motions to Dismiss

On July 18, 2016, Zarrab moved to dismiss the March 30, 2016 Indictment against him which charged Zarrab with conspiracy to defraud the United States; conspiracy to violate the IEEPA; conspiracy to commit bank fraud; and conspiracy to commit money laundering. In his motion, Zarrab raised some of the same issues which are raised here. Among other things, Zarrab contended that: the alleged conspiracy to defraud the U.S. Office of Foreign Assets Control ("OFAC") "occurred entirely abroad;" the IEEPA and bank fraud statutes "do[] not apply extraterritorially;" "the indictment fails to allege a conspiracy to commit bank fraud;" and "conspiracy to commit money laundering is an improper duplicative charge [of the IEEPA charge]." See July 18, 2016 Mot. at 4, 25, 33, 35; Aug. 22, 2016 Reply at 11-12, 17. Following briefing, by Decision & Order, dated October 17, 2016, the Court denied Zarrab's motion to dismiss. *See United*

States v. Zarrab, 2016 WL 6820737, at *4, 8, 12, 15-16 (S.D.N.Y. Oct. 17, 2016) ("The Indictment alleges a violation of § 371 against Zarrab and his co-conspirators;" "the Indictment alleges a domestic nexus between Zarrab and his co-conspirators' conduct and the United States, i.e. the exportation of services from the United States;" "the Indictment clearly states the elements of a conspiracy to commit bank fraud;" and "Zarrab's argument that the conspiracy to commit money laundering charge 'merges' with the IEEPA [count] . . . is unpersuasive").

On October 9, 2017, Atilla moved to dismiss the September 6, 2017 Indictment against him. Atilla's motion raised some of the same issues which are raised here. In his motion, Atilla contended, among other things, that he "cannot be charged with activity that is exclusively foreign based with no direct U.S. effect;" "there is no allegation linking Atilla with the U.S;" and the IEEPA and ITSR cannot be applied extraterritorially to a foreign national. See Oct. 9, 2017 Mot. at 4, 13, 16. On November 16, 2017, after briefing, the Court denied Atilla's motion to dismiss. See Nov. 16, 2017 Tr. at 12:5-22:7 ("The Second Circuit Court of Appeals has made it abundantly clear that the execution of money transfers from the United States to Iran on behalf of another . . . constitutes the exportation of a service and may be in violation of IEEPA and ITSR." Id. at 19:22-20:1; "the indictment . . . reflects the elements of each count in the indictment and establishes a sufficient nexus between Mr. Atilla and his co-conspirators' conduct and the United States . . . Mr. Atilla is charged with participating in the same conspiracies as eight other defendants, i.e., at its core, circumventing U.S. sanctions against Iran via Halkbank."

Id. at 20:24-22:13; "Mr. Atilla is [also] alleged to have . . . lied to U.S. regulators." Id. at 15:18-20).

II. Legal Standard

"[T]he indictment has a strong presumption of validity . . . [and is] only rarely dismissed." *United States v. Cornielle*, 171 F.3d 748, 752 (2d Cir. 1999). "An indictment . . . if valid on its face . . . is enough to call for trial of the charge[s] on the merits." *Costello v. U.S.*, 350 U.S. 359, 409 (1956). "The dismissal of an indictment is an 'extraordinary remedy' reserved only for extremely limited circumstances implicating fundamental rights." *See United States v. De La Pava*, 268 F.3d 157, 165 (2d Cir. 2001). "An indictment need only provide sufficient detail to assure against double jeopardy and state the elements of the offense charged, thereby apprising the defendant of what he must be prepared to meet." *United States v. Tramunti*, 513 F.2d 1087, 1113 (2d Cir. 1975).

There is "a substantial public interest in ensuring that the Government may pursue prosecutions based upon indictments that are legally sufficient." *United States v. Samia*, 2017 WL 980333, at *3 (S.D.N.Y. Mar. 13, 2017); *United States v. Fields*, 592 F.2d 638, 648 (2d Cir. 1978). "In reviewing a motion to dismiss an indictment, the Court must take the allegations of the indictment as true." *See United States v. Avenatti*, 432 F.Supp.3d 354, 360-61 (S.D.N.Y. 2020) (citing *Boyce Motor Lines v. United States*, 342 U.S. 337, 343 n. 16 (1952)); *New York v. Tanella*, 374 F.3d 141, 148 (2d Cir. 2004).

"The standard for the sufficiency of an indictment is not demanding and requires little more than that the indictment track the language of the statute charged and state the time and place (in approximate terms) of the

alleged crime." *United States v. Hayes*, 811 Fed. App'x 30, 37 (2d Cir. 2020) (citing *United States v. Balde*, 943 F.3d 73, 89 (2d Cir. 2019)) (internal citations omitted).

"The law of the case [doctrine] . . . expresses the practice of courts generally to refuse to reopen what has been decided." *See Colvin v. Keen*, 900 F.3d 63, 68 (2d Cir. 2018) (internal citations and quotations omitted). "When a court has ruled on an issue, that decision should generally be adhered to by that court in subsequent stages in the same case." *United States v. Uccio*, 950 F.2d 753, 758 (2d Cir. 1991). "The court has discretion to apply the law of the case doctrine, notwithstanding a 'difference in parties,' provided that doing so would be consistent with the court's 'good sense.'" *See S.E.C. v. Penn*, 2020 WL 1272285, at *3 (S.D.N.Y. Mar. 17, 2020). "A late-added party, or a co-party who did not participate in the proceedings that led to the first ruling, might be required to show reasons to doubt the adequacy of the underlying argument or of the ruling itself." See 18B Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 4478.5 (2d ed.).

III. Second Circuit Court of Appeals July 20, 2020 Decision in the Atilla Case

On September 18, 2020, at the oral argument of Halkbank's motion to dismiss, both Halkbank and the Government sought to rely upon the Second Circuit's decision in *United States v. Atilla*, 966 F.3d 118 (2d Cir. 2020). According to the defense, "the Second Circuit's opinion in *Atilla* stands for one thing and one thing only . . . evasion of secondary sanctions is not a crime." See Sept. 18, 2020 Tr. at 34:14-16. "Halkbank was indicted on the assumption that the entire $20 billion . . . was unlawful because it violated secondary sanctions, and the Second

Circuit said, no, that's not the law." Id. at 35:13-17.

The Government counters that "the *Atilla* decision is a ruling of the Second Circuit with respect to the very scheme alleged in this [Halkbank's] indictment and is controlling. The Second Circuit [] viewed the . . . allegations underlying the scheme and concluded that [the allegations] support IEEPA conspiracy involving primary sanctions, bank fraud conspiracy, money laundering conspiracy and . . . bank fraud." Id. at 33:14-21. "In affirming Atilla's convictions . . . the Second Circuit . . . necessarily found that the scheme contemplated laundering the money through the U.S. financial system." Id. at 20:23-25; see also Reenat Sinay, "Feds Say 2nd Circ. Ruling Bolsters Halkbank Sanctions Case," *Law360.com* (Sept. 18, 2020).

In the Court's view, the Second Circuit ruling stands for several relevant propositions. First and foremost, the Second Circuit affirmed Atilla's convictions and sentence for conspiracy to defraud the U.S., conspiracy to violate the IEEPA, bank fraud, conspiracy to commit bank fraud, and conspiracy to commit money laundering. *See United States v. Atilla*, 966 F.3d 118 (2d Cir. 2020). Second, the Second Circuit rejected "secondary sanctions liability" under the IEEPA but affirmed Atilla's conviction under the Government's alternate primary sanctions theory that "Atilla conspired to violate the IEEPA by exporting services (including the execution of U.S. dollar transfers) from the United States to Iran in violation of the ITSR [Iranian Transactions and Sanctions Regulations]." *Atilla*, 966 F.3d at 127. Third, the evidence of Atilla's convictions was "overwhelming" and "demonstrated that the purpose of the scheme was to convert Iranian oil proceeds held at Halkbank into a form that could be used

to fund international payments on behalf of the Government of Iran." *Id.* at 128-29. "These international payments were likely to pass through the U.S. financial system" and "senior-level executives at Halkbank knew the particulars of the scheme, including the importance of the international payments and of U.S. dollar transactions." *Id.* at 121-22, 128-29. "Atilla wanted the Iranian transactions to remain obscured by Zarrab because Atilla knew that they violated U.S. sanctions on Iran." *Id.* at 129. Fourth, that "Atilla repeatedly lied to Treasury officials to conceal the sanctions avoidance scheme . . . [and] he was aware that the scheme involved international payments through U.S. banks that were violations of U.S. sanctions." *Id.*[3]

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[3] Among the evidence adduced at Atilla's trial were meetings between and among Atilla and U.S. Treasury officials Adam Szubin, former Director of OFAC, and David Cohen, former U.S. Undersecretary of the Treasury for Terrorism and Financial Intelligence. These meetings took place both in the U.S. and in Turkey. Indeed, some of these meetings took place at the U.S. Department of Treasury in Washington D.C. See Dec. 7, 2017 Tr. at 1082, 1083:17-19; see also Dec. 12, 2017 Tr. at 1413:6-10; 1474:16-17.

A meeting at the U.S. Department of Treasury in Washington D.C. in March 2012 is reflected in the following trial testimony: AUSA Lockard: "On March 14, 2012, where was the meeting held?" Cohen: "In my office at the Treasury Department." AUSA Lockard: "Who were the participants in that meeting?" Cohen: "Mr. Atilla and Mr. Aslan [the former General Manager of Halkbank] . . . the Halkbank executives were in Washington for a meeting." AUSA Lockard: "What were the topics that you discussed with Mr. Atilla and Mr. Aslan at this meeting in March?" Cohen: "[I]ssues relating to Iran sanctions . . . They told us that they . . . were not allowing Iran to acquire gold . . . using the proceeds that Halkbank was holding for Iran from the sale of oil . . . [W]e were assured that . . . they understood that Iran would look to use deceptive practices to evade sanctions and [] that they had mechanisms in place at the bank to ensure that they

IV. Halkbank's Motion to Dismiss

Halkbank's motion seeks to dismiss all six counts in the Indictment. Halkbank contends that it is immune from prosecution under the Foreign Sovereign Immunities Act ("FSIA"). See Mot. at 1. Halkbank also contends that the Indictment is barred by the "presumption against extraterritoriality." Id. at 12. Halkbank asserts that the Court lacks personal jurisdiction over Halkbank because of the absence of "minimum contacts" with the United States. Id. at 8. Halkbank also seeks to dismiss Counts One, Three, Four, and Six on particularized individual grounds, including

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would detect and prevent Iranian efforts to evade the sanctions." See Dec. 8, 2017 Tr. at 1112:22-1118:7.

At the so-called "pull-aside" meeting in Turkey in February 2013, according to Szubin, Szubin warned Atilla "one-on-one" that: "to the extent he [Atilla] was viewing this as a kind of routine discussion or . . . visit . . . that wasn't the case. This was a very conscious visit to Halkbank, by me, because of concerns that were pretty serious about what was going on at Halkbank. And that we viewed them in sort of a category unto themselves, that I wasn't having this same level of conversation with any other bank." See Dec. 12, 2017 Szubin Testimony Tr. at 1436.

At another meeting at the U.S. Department of Treasury in Washington D.C. in October 2014, Atilla gave assurances to Cohen about Halkbank's relationship with Reza Zarrab: AUSA Lockard: "Directing your attention to early October of 2014, did you meet with anyone from Halkbank at that time?" Cohen: "Mr. Atilla and the new CEO of Halkbank . . . in my office in Washington . . . I wanted to know what Halkbank's involvement with Mr. Zarrab was." AUSA Lockard: "Did Mr. Atilla provide any additional details about Mr. Zarrab's then-current business with the bank?" Cohen: "He [Atilla] mentioned that they had a loan for some properties that Mr. Zarrab owned. My recollection is it was a relatively small relationship . . . I was being assured that everything was okay." See Dec. 8, 2017 Tr. at 1149:19-1152:8.

respectively failure to allege a conspiracy to defraud the U.S; failure to allege bank fraud; and failure to allege conspiracy to commit bank fraud. Halkbank claims that Count Six is multiplicitous of Count Two.[4]

Halkbank is Not Immune from Prosecution under the FSIA

Halkbank argues that the Foreign Sovereign Immunities Act (FSIA) "extends [] immunity to any 'instrumentality of a foreign state.'" See Mot. at 1. Immunity presumably extends to Halkbank because it is majority-owned by the Turkish government. Id. The Government counters persuasively that FSIA does not apply in criminal cases and that, even if FSIA did apply, "the statute's 'commercial activities' exception would strip away any immunity." See Opp. at 6-7, 9-14.

The Court concludes that Halkbank is not immune from prosecution. For one thing, FSIA does not appear to grant immunity in criminal proceedings. *See United States v. Hendron*, 813 F.Supp. 973, 975 (E.D.N.Y. 1993); *United States v. Biggs*, 273 Fed. App'x 88, 89 (2d Cir. 2008); Opp. at 6-9; *see also Southway v. Central Bank of Nigeria*, 198 F.3d 1210, 1215 (10th Cir. 1999); *United States v. Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997). In *United States v. Hendron*, the district court undertook a comprehensive analysis of the text and legislative history of FSIA and concluded that FSIA "applies only to civil proceedings." *See Hendron*, 813 F.Supp. at 975. Nothing in the text of FSIA suggests that it applies to criminal

[4] Halkbank argues that "sovereign immunity," the absence of "extraterritoriality," and the absence of minimum contacts (each) void Counts One through Six. Halkbank does not appear to be seeking dismissal of Counts Two and Five on any particularized individual grounds.

proceedings; and the "legislative history . . . gives no hint that Congress was concerned [about] a foreign defendant in a criminal proceeding." *Hendron*, 813 F.Supp. at 976; *see also In re Grand Jury Proceeding*, 752 F.Supp. 2d 173, 179 (D.P.R. 2010). "The basic purpose of the [FSIA] is to give the district courts jurisdiction to hear **civil cases** involving claims against foreign states, and their instrumentalities which have waived their immunity from suit." *Corporacion Venezolana de Fomento v. Vintero Sales Corp.*, 629 F.2d 786, 790 (2d Cir. 1980) (emphasis added); *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 488 (1983); *see generally* Robert A. Katzmann, Judging Statutes (Oxford University Press, 2014) pp. 31-32 ("the fundamental task for the judge . . . is to interpret language in light of the statute's purpose(s)").[5]

Even assuming, *arguendo*, that FSIA provided immunity in this criminal case (which it does not), FSIA's commercial activity exceptions would clearly apply and support the Halkbank prosecution. The commercial activity exception provides that "a foreign state will not be immune from suit in any case: (1) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or (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." *See Hanil Bank v. PT. Bank Negara Indonesia (Persero)*, 148 F.3d 127, 130-31 (2d Cir. 1998) (citing 28

[5] It should be noted that not all Circuits agree with *Hendron*. *See e.g. Keller v. Central Bank of Nigeria*, 277 F.3d 811 (6th Cir. 2002).

U.S.C. § 1605(a)(2)).

The Government points to Halkbank's alleged misrepresentations made to U.S. Treasury officials both in and outside the United States and to Halkbank's use of U.S. banks to facilitate fraudulent transactions in excess of $1 billion as bases for denying immunity (under the commercial activity exception). See Opp. at 9-12. The Indictment alleges, among other things, that: (a) "Halkbank . . . participated in the design of fraudulent transactions intended to deceive U.S. regulators and foreign banks, and lied to U.S. regulators about Halkbank's involvement;" (b) "Senior officers of Halkbank . . . concealed the true nature of these transactions from officials with the U.S. Department of the Treasury so that Halkbank could supply billions of dollars' worth of services to the Government of Iran without risking being sanctioned by the United States and losing its ability to hold correspondent accounts with U.S. financial institutions;" and (c) "The purpose and effect of the scheme in which Halkbank [] participated was to create a pool of Iranian oil funds in Turkey . . . From there, the funds were used to make international payments on behalf of the Government of Iran and Iranian banks, including transfers in U.S. dollars that passed through the U.S. financial system in violation of U.S. sanctions laws," see Indictment at 1-4, 26, 34. According to the Government, Halkbank has forfeited any purported immunity from prosecution in the U.S. See Opp. at 9-12.

Halkbank's business meetings, conference calls, and other interactions and communications at the U.S. Department of Treasury described in the Indictment fall under the first commercial activity exception. See Opp. at 11 citing *Pablo Star Ltd. v. Welsh Gov't*, 961 F.3d 555 (2d

Cir. 2020). They amount to "commercial activity carried on in the United States." 28 U.S.C. § 1605(a)(2). Halkbank's business meetings, conference calls, and other interactions and communications at the U.S. Department of Treasury also fall under the second commercial activity exception. They amount to "act[s] performed in the United States in connection with a commercial activity elsewhere," including Halkbank's banking activity in Turkey. See Opp. at 10-11; 28 U.S.C. § 1605(a)(2); *see also Devengoechea v. Bolivarian Republic of Venezuela*, 2016 WL 3951279, at *9 (S.D.Fl. Jan. 20, 2016); *Abdulla v. Embassy of Iraq at Washington D.C.*, 2013 WL 4787225, at *7 (E.D.Pa. Sept. 9, 2013).

Halkbank's business meetings, conference calls, and other interactions and communications with the U.S. Department of Treasury (in and outside the U.S.) coupled with its alleged "laundering [of] more than $1 billion through the U.S. financial system in violation of the U.S. embargo on Iran" fall under the third commercial activity exception. They include "acts outside the territory of the United States in connection with a commercial activity elsewhere that [] cause[d] a direct effect in the United States." 28 U.S.C. § 1605(a)(2); see Opp. at 12; see also *Atlantica Holdings v. Sovereign Wealth Fund Samruk-Kazyna JSC*, 813 F.3d 98, 109 (2d Cir. 2016); *Nnaka v. Fed. Republic of Nigeria*, 238 F.Supp.3d 17, 30 (D.D.C. 2017); *Hanil Bank*, 148 F.3d at 131-33. At oral argument on September 18, 2020, the Government persuasively contended that: "[y]ou have a plan by [Halkbank] and Iran, among others, to victimize the United States and its financial institutions, which was successfully completed to the tune of a billion dollars. So, there is no dispute, frankly, that there is a direct effect [in the United

States]." See Sept. 18, 2020 Tr. at 29:19-31:9. "While it is true that the bank helped Iran secretly transfer approximately $20 billion-worth in violation of a host of international sanctions . . . the more than $1 billion . . . in other words, 100% of the U.S. criminal conduct . . . passed through domestic accounts." See Opp. at 19. "An injury knowingly caused in the United States is sufficient to satisfy the direct effect requirement and that's exactly what you have here." See Sept. 18, 2020 Tr. at 31:2-5. "The gravamen of the claim is the conspiracy and the scheme to launder money through the United States. That's what gives rise to criminal liability." Id. at 29:19-31:9; *see also Atlantica*, 813 F.3d at 107.

The Court also rejects Halkbank's claim that it is entitled to immunity under the common law. See Mot. at 1. For one thing, Halkbank cites no support for this argument. Rather, Halkbank unpersuasively relies upon *Samantar v. Yousuf*, a case in which the plaintiff sued an individual foreign official "in his personal capacity." *See Samantar v. Yousuf*, 130 S.Ct. 2278, 2281 (2010); *Tawfik v. al-Sabah*, 2012 WL 3542209, at *2 (S.D.N.Y. Aug. 16, 2012); see also Sept. 18, 2020 Tr. at 27:4-6. Second, at common law, "the granting or denial of . . . foreign sovereign immunity . . . was historically the case-by-case prerogative of the Executive Branch" and courts "deferred to the decisions of . . . the Executive Branch on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities." *See Verlinden*, 103 S.Ct. at 486; *Republic of Iraq v. Beaty*, 556 U.S. 848, 857 (2009); Opp. at 9. By pursuing Halkbank's prosecution, according to the Government, the U.S. Executive Branch "has clearly manifested its clear sentiment that Halkbank should be denied immunity."

See Opp. at 9 (quoting *Noriega*, 117 F.3d at 1212).

The Presumption Against Extraterritoriality Does Not Bar the Charges in the Indictment

Halkbank argues that the Indictment should be dismissed because the applicable statutes "do not apply extraterritorially." See Mot. at 12, 14. The Government counters persuasively that "the Indictment involves a domestic, rather than an extraterritorial, application of the IEEPA, the bank fraud statute, the money laundering statute, and § 371." See Opp. at 18.

The Court finds that the presumption against extraterritoriality does not apply. Indeed, "there is a sufficient domestic nexus between the allegations in [the Indictment] to avoid the question of extraterritorial application altogether." *See United States v. Mostafa*, 965 F.Supp.2d 451, 469 (S.D.N.Y. 2013). According to the Government, "the very purpose of the scheme was to launder Iranian oil proceeds through U.S. financial institutions for use to make international payments throughout the world." See Opp. at 18. The alleged scheme involved Halkbank's "concealment of information from, and misrepresentations to, U.S. government departments and officials in this country." See Opp. at 19. And, "at least approximately $1 billion was laundered through the U.S. . . . through domestic accounts." See Opp. at 3, 19; *United States v. Prevezon Holdings, Ltd.*, 251 F.Supp.3d 684 (S.D.N.Y. 2017); *United States v. Buck*, 2017 WL 4174931, at *6-8 (S.D.N.Y. Aug. 28, 2017); *United States v. Hayes*, 99 F. Supp. 3d 409, 422 (S.D.N.Y. 2015).

The Indictment clearly alleges domestic application in that "Halkbank knowingly facilitated the scheme [and]

participated in the design of fraudulent transactions intended to deceive U.S. regulators;" "Senior officers of Halkbank . . . acting within the scope of their employment and for the benefit of Halkbank, concealed the true nature of these transactions from officials with the U.S. Department of Treasury;" "between at least approximately December 2012 and October 2013, more than $900 million in such transactions were conducted by U.S. financial institutions through correspondent accounts held in the United States;" and "Halkbank continued executing the evasion and money laundering scheme until at least in or about March 2016 . . . [and] continued to deceive Treasury officials." See Indictment at 1-3, 26, 34; see also *Force v. Facebook*, 934 F.3d 53, 73 (2d Cir. 2019) ("the case involves a domestic application of the statute . . . the conduct relevant to the statute's focus occurred in the United States, [and] the case involves a permissible domestic application even if other conduct occurred abroad").[6]

The Court has Personal Jurisdiction over Halkbank

Halkbank argues that "to meet the requirements of

[6] The Court in Zarrab's proceedings also found that "[t]he enactment and promulgation of the IEEPA and ITSR reflect the United States' interest in protecting and defending itself against, among other things, Iran's sponsorship of international terrorism, Iran's frustration of the Middle East peace process, and Iran's pursuit of weapons of mass destruction, which implicate the national security, foreign policy, and the economy of the United States." *See Zarrab*, 2016 WL 6820737, at *8; *see also United States v. Vilar*, 729 F.3d 62, 73 (2d Cir. 2013) ("the presumption against extraterritoriality does [not] apply . . . in situations where the law at issue is aimed at protecting the right of the government to defend itself"); *Facebook*, 934 F.3d at 73; *United States v. Tajideen*, 319 F.Supp.3d 445, 457 (D.D.C. 2018).

the Due Process Clause, the Government must establish either (1) that Halkbank has 'continuous and systematic' contacts with the United States . . . or (2) that the conduct giving rise to the alleged crimes 'arises out of' activities by Halkbank in the United States." See Mot. at 9. The Government counters correctly that "[n]either the Supreme Court nor the Second Circuit has ever held that the [] minimum-contacts test must be satisfied for personal jurisdiction in criminal cases." See Opp. at 16; see also *United States v. Halkbank*, 426 F.Supp.3d 23, 35 (S.D.N.Y. 2019) ("While minimum contacts challenges may be appropriate in civil cases, such challenges do not apply in criminal matters . . . Halkbank's reliance upon minimum contacts jurisprudence is simply misplaced.").

The Court clearly has personal jurisdiction over Halkbank. It is axiomatic that where, as here, a District Court has subject matter jurisdiction over the criminal offenses charged, it also has personal jurisdiction over the individuals charged in the indictment. 18 U.S.C. § 3231 ("The district courts of the United States shall have original jurisdiction . . . of all offenses against the laws of the United States"); *United States v. Maruyasu Indus. Co., Ltd.*, 229 F.Supp.3d 659, 670 (S.D. Ohio 2017); Opp. at 15. "A defendant need not acquiesce in or submit to the court's jurisdiction or actually participate in the proceedings in order for the court to have personal jurisdiction over the defendant." *United States v. McLaughlin*, 949 F.3d 780, 781 (2d Cir. 2019).

As noted, the Court has already rejected Halkbank's minimum contacts personal jurisdiction argument by Decision & Order, dated December 5, 2019. "[I]t is improper to make a personal jurisdiction motion based upon the absence of minimum U.S. contacts in a criminal

case . . . [S]uch challenges do not apply to criminal matters . . . A federal district court has personal jurisdiction to try any defendant brought before it on a federal indictment charging a violation of federal law." *See United States v. Halkbank*, 426 F.Supp.3d 23, 35 (S.D.N.Y. 2019) (collecting cases); *see also United States v. Quintieri*, 306 F.3d 1217, 1225 (2d Cir. 2002) ("the law of the case doctrine . . . holds that when a court has ruled on an issue, that decision should generally be adhered to by that court in subsequent stages in the same case").

Even assuming, *arguendo*, that "minimum contacts" were required (which they are not), the Court would likely find that Halkbank purposefully availed itself of the United States banking system as part of its alleged scheme. See Opp. at 16-17. "It should hardly be unforeseeable to a bank that selects and makes use of a particular forum's banking system that it might be subject to the burden of a lawsuit in that forum for wrongs related to, and arising from, that use." *Licci ex rel. Licci v. Lebanese Canadian Bank, SAL*, 732 F.3d 161, 171-73 (2d Cir. 2013); *Nike, Inc. v. Wu*, 349 F.Supp.3d 310, 330 (S.D.N.Y. Sept. 25, 2018) ("the Banks have sufficient minimum contacts . . . as the selection and repeated use of New York's banking system constitutes purposeful availment of the privilege of doing business in New York").

The Court also finds that Halkbank's "acts could be expected to or did produce an effect in the United States" and that the "aim of that activity [was] to cause harm inside the United States or to U.S. citizens or interests." *See United States v. Epskamp*, 832 F.3d 154, 168 (2d Cir. 2016); *Mostafa*, 965 F. Supp. 2d at 459; Opp. at 15-17.

The Indictment Alleges a Conspiracy to Defraud the United States in Count One

Halkbank argues, among other things, that "Count One should be dismissed because the Indictment does not allege a conspiracy to 'defraud' the United States" under 18 U.S.C. § 371. Mot. at 24. The Government counters persuasively that the Indictment adequately alleges a conspiracy under 18 U.S.C. § 371 because it "tracks the language of the statute and states the time and place (in approximate terms) of the alleged crime, which is all that is required to deny a motion to dismiss." Count One "is based on the bank's concealment of information from, and misrepresentations to, U.S. government departments and officials." See Opp. at 1, 17, 19.

The Court finds that the four elements of a § 371 conspiracy to defraud offense are clearly alleged, including: "(1) that the defendant entered into an agreement; (2) to obstruct a lawful function of the Government; (3) by deceitful or dishonest means; and (4) at least one overt act in furtherance of the conspiracy." *See United States v. Ballistrea*, 101 F.3d 827, 832 (2d Cir. 1996). That is, the Indictment alleges that, "[f]rom at least in or about 2012, up to and including in or about 2016, in the Southern District of New York, Turkey, the United Arab Emirates, and elsewhere . . . Halkbank . . . and others known and unknown, knowingly and willfully combined, conspired, confederated, and agreed together and with each other to defraud the United States and an agency thereof, to . . . impede and obstruct the lawful and legitimate governmental functions and operations of the U.S. Department of Treasury in the enforcement of economic sanctions laws and regulations administered by that agency." The Indictment also alleges that:

"Throughout the scheme, senior executives from Halkbank [] took steps to prevent U.S. authorities, particularly OFAC [Office of Foreign Assets Control], from detecting the illicit nature of the transfers being conducted through Zarrab's companies;" and "[a]fter continuation of the scheme following Zarrab's arrest, officials at Halkbank [] continued to deceive Treasury officials about the bank's relationship with Zarrab." See Indictment at 34-35; *United States v. Tochelmann*, 1999 WL 294992, at *2 (S.D.N.Y. May 11, 1999).

In affirming Atilla's conviction, the Court of Appeals held: "Atilla's challenge to his § 371 conviction fails because § 371's defraud clause was properly applied to his case . . . it has been well established that the term 'defraud' in § 371 . . . embraces 'any conspiracy for the purpose of impairing, obstructing, or defeating the lawful function of any department of Government.'" *United States v. Atilla*, 966 F.3d 118, 130 (2d Cir. 2020) (internal citations and quotations omitted).

The Indictment Alleges Bank Fraud in Count Three

Halkbank argues that the Indictment "fails to allege a scheme to defraud a U.S. bank." See Mot. at 18. The Government counters persuasively that the Indictment "tracks the language of the bank fraud statute and states the time and place (in approximate terms) of the alleged crime, which is all that is required to deny a motion to dismiss." See Opp. at 21 (internal citations omitted).

The Indictment clearly alleges bank fraud in violation of 18 U.S.C. § 1344 which prohibits "knowingly execut[ing], or attempt[ing] to execute a scheme or artifice (1) to defraud a financial institution; or (2) to obtain any of the money, funds, credits, assets, securities,

or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations or promises." The Indictment, as noted, states that "[f]rom at least in or about 2012, up to and including in or about 2016, in the Southern District of New York, Turkey, the United Arab Emirates, and elsewhere . . . Halkbank . . . and others . . . did knowingly execute and attempt to execute a scheme or artifice to defraud a financial institution, the deposits of which were then insured by the Federal Deposit Insurance Corporation . . . and to obtain moneys, funds . . . and other property owned by and under the custody and control of such financial institution, by means of false and fraudulent pretenses, representations, and promises . . . inducing U.S. financial institutions to conduct financial transactions on behalf of and for the benefit of the Government of Iran . . . by deceptive means." Indictment at 38.

The Indictment also provides details of the scheme to defraud U.S. banks, stating that "[t]he purpose and effect of the scheme . . . was to create a pool of Iranian oil funds . . . in the names of front companies, which concealed the funds' Iranian nexus . . . to make international payments on behalf of the Government of Iran . . . that passed through the U.S. financial system;" that "such transactions were conducted by U.S. financial institutions through correspondent accounts held in the United States;" and that "at least approximately $1 billion was laundered through unwitting U.S. financial institutions." Id. at 3-4, 26, 34.

The Indictment Alleges Conspiracy to Commit Bank Fraud in Count Four

Halkbank argues that the Indictment "fails to allege

. . . a conspiracy to commit bank fraud." See Mot. at 18. The Government counters persuasively that the Indictment tracks the language of the bank fraud conspiracy statute (18 U.S.C. § 1349) and states the time and place in approximate terms of the alleged crime. See Opp. at 21.

The Court finds that the Indictment clearly alleges a conspiracy to commit bank fraud in violation of 18 U.S.C. § 1349 by stating that "[f]rom at least in or about 2012, up to and including in or about 2016, in the Southern District of New York, Turkey, the United Arab Emirates, and elsewhere . . . Halkbank . . . and others . . . knowingly and willfully combined, conspired, confederated, and agreed together and with each other to commit bank fraud." See Indictment at 38-39. The Indictment "tracks the statutory language and specifies the nature of the criminal activity . . . [sufficient] to withstand a motion to dismiss." *United States v. Citron*, 783 F.2d 307, 314 (2d Cir. 1986).

Halkbank's Contention that Count Six is Multiplicitous is Denied

Halkbank contends that Count Two (conspiracy to violate the IEEPA) and Count Six (conspiracy to commit money laundering) are multiplicitous because "the government details the same scheme consisting of the same transfers of funds, from the same accounts, on the same dates as the basis for the two charges." See Mot. at 22, 24. The Government counters that because Count Two and Count Six are "distinct offenses" the Court should reject the bank's multiplicity argument. The Government also argues that "a pre-trial multiplicity motion is premature." See Opp. at 23-24.

"Courts in this Circuit have routinely denied pre-trial motions to dismiss potentially multiplicitous counts as premature." *See United States v. Medina*, 2014 WL 3057917, at *3 (S.D.N.Y. July 7, 2014) (citing *United States v. Josephberg*, 459 F.3d 350, 355 (2d Cir. 2006)). If the Court were to deal with the issue on the merits at this time, it would likely reject the motion because Count Two and Count Six each "contains an element not contained in the other" and "one crime could be proven without necessarily establishing the other." *See United States v. Budovsky*, 2015 WL 5602853, at *11 (S.D.N.Y. Sept. 23, 2015); *United States v. Regensberg*, 604 F.Supp.2d 625, 633 (S.D.N.Y. 2009); Opp. at 23-24.

V. Conclusion & Order

Halkbank's motion to dismiss [Dck. # 645] is respectfully denied.

Dated: New York, New York
October 1, 2020

Richard M. Berman
RICHARD M. BERMAN, U.S.D.J.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 15th day of December, two thousand twenty-one.

United States of America,

Appellee,

v.

Reza Zarrab, AKA Riza Sarraf, Camelia Jamshidy, AKA Kamelia Jamshidy, Hossein Najafzadeh, Mohammad Zarrab, AKA Can Sarraf, AKA Kartalmsd, Mehmet Hakan Atilla, Mehmet Zafer Caglayan, Abi, Suleyman Aslan, Levent Balkan, Abdullah Happani,

Defendants,

Turkiye Halk Bankasi A.S., AKA Halkbank,

Defendant - Appellant.

ORDER

Docket No. 20-3499

Appellant, Turkiye Halk Bankasi, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

[SEAL]

APPENDIX D

18 U.S.C. § 3231. District Courts

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.

Nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof.

APPENDIX E

28 U.S.C. § 1330. Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605–1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605–1607 of this title.

APPENDIX F

28 U.S.C. § 1441(d). Removal of civil actions

* * *

(d) ACTIONS AGAINST FOREIGN STATES.—Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending. Upon removal the action shall be tried by the court without jury. Where removal is based upon this subsection, the time limitations of section 1446(b) of this chapter may be enlarged at any time for cause shown.

* * *

APPENDIX G

Foreign Sovereign Immunities Act

28 U.S.C. § 1602. Findings and declaration of purpose

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.

28 U.S.C. § 1603. Definitions

For purposes of this chapter—

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or

other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332 (c) and (e) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

28 U.S.C. § 1604. Immunity of a foreign state from jurisdiction

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 the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

28 U.S.C. § 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States

in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) 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;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign

state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

(b) A foreign state shall not be immune from the

jurisdiction of the courts of the United States in any case in which a suit in admiralty is brought to enforce a maritime lien against a vessel or cargo of the foreign state, which maritime lien is based upon a commercial activity of the foreign state: *Provided*, That—

(1) notice of the suit is given by delivery of a copy of the summons and of the complaint to the person, or his agent, having possession of the vessel or cargo against which the maritime lien is asserted; and if the vessel or cargo is arrested pursuant to process obtained on behalf of the party bringing the suit, the service of process of arrest shall be deemed to constitute valid delivery of such notice, but the party bringing the suit shall be liable for any damages sustained by the foreign state as a result of the arrest if the party bringing the suit had actual or constructive knowledge that the vessel or cargo of a foreign state was involved; and

(2) notice to the foreign state of the commencement of suit as provided in section 1608 of this title is initiated within ten days either of the delivery of notice as provided in paragraph (1) of this subsection or, in the case of a party who was unaware that the vessel or cargo of a foreign state was involved, of the date such party determined the existence of the foreign state's interest.

(c) Whenever notice is delivered under subsection (b)(1), the suit to enforce a maritime lien shall thereafter proceed and shall be heard and determined according to the principles of law and rules of practice of suits in rem whenever it appears that, had the vessel been privately owned and possessed, a suit in rem might have been maintained. A decree against the foreign state may include costs of the suit and, if the decree is for a money

judgment, interest as ordered by the court, except that the court may not award judgment against the foreign state in an amount greater than the value of the vessel or cargo upon which the maritime lien arose. Such value shall be determined as of the time notice is served under subsection (b)(1). Decrees shall be subject to appeal and revision as provided in other cases of admiralty and maritime jurisdiction. Nothing shall preclude the plaintiff in any proper case from seeking relief in personam in the same action brought to enforce a maritime lien as provided in this section.

(d) A foreign state shall not be immune from the jurisdiction of the courts of the United States in any action brought to foreclose a preferred mortgage, as defined in section 31301 of title 46. Such action shall be brought, heard, and determined in accordance with the provisions of chapter 313 of title 46 and in accordance with the principles of law and rules of practice of suits in rem, whenever it appears that had the vessel been privately owned and possessed a suit in rem might have been maintained.

[(e), (f) Repealed. Pub.L. 110–181, Div. A, Title X, § 1083(b)(l)(B), Jan. 28, 2008, 122 Stat. 341.]

(g) LIMITATION ON DISCOVERY.—

(1) IN GENERAL.—(A) Subject to paragraph (2), if an action is filed that would otherwise be barred by section 1604, but for section 1605A or section 1605B, the court, upon request of the Attorney General, shall stay any request, demand, or order for discovery on the United States that the Attorney General certifies would significantly interfere with a criminal investigation or prosecution, or a national security

operation, related to the incident that gave rise to the cause of action, until such time as the Attorney General advises the court that such request, demand, or order will no longer so interfere.

(B) A stay under this paragraph shall be in effect during the 12-month period beginning on the date on which the court issues the order to stay discovery. The court shall renew the order to stay discovery for additional 12-month periods upon motion by the United States if the Attorney General certifies that discovery would significantly interfere with a criminal investigation or prosecution, or a national security operation, related to the incident that gave rise to the cause of action.

(2) SUNSET.—(A) Subject to subparagraph (B), no stay shall be granted or continued in effect under paragraph (1) after the date that is 10 years after the date on which the incident that gave rise to the cause of action occurred.

(B) After the period referred to in subparagraph (A), the court, upon request of the Attorney General, may stay any request, demand, or order for discovery on the United States that the court finds a substantial likelihood would—

(i) create a serious threat of death or serious bodily injury to any person;

(ii) adversely affect the ability of the United States to work in cooperation with foreign and international law enforcement agencies in investigating violations of United States law; or

(iii) obstruct the criminal case related to the

incident that gave rise to the cause of action or undermine the potential for a conviction in such case.

(3) EVALUATION OF EVIDENCE.—The court's evaluation of any request for a stay under this subsection filed by the Attorney General shall be conducted ex parte and in camera.

(4) BAR ON MOTIONS TO DISMISS.—A stay of discovery under this subsection shall constitute a bar to the granting of a motion to dismiss under rules 12(b)(6) and 56 of the Federal Rules of Civil Procedure.

(5) CONSTRUCTION.—Nothing in this subsection shall prevent the United States from seeking protective orders or asserting privileges ordinarily available to the United States.

(h) JURISDICTIONAL IMMUNITY FOR CERTAIN ART EXHIBITION ACTIVITIES.—

(1) IN GENERAL.—If—

(A) a work is imported into the United States from any foreign state pursuant to an agreement that provides for the temporary exhibition or display of such work entered into between a foreign state that is the owner or custodian of such work and the United States or one or more cultural or educational institutions within the United States;

(B) the President, or the President's designee, has determined, in accordance with subsection (a) of Public Law 89–259 (22 U.S.C. 2459(a)), that such work is of cultural significance and the temporary exhibition or display of such work is in the national interest; and

(C) the notice thereof has been published in accordance with subsection (a) of Public Law 89–259 (22 U.S.C. 2459(a)),

any activity in the United States of such foreign state, or of any carrier, that is associated with the temporary exhibition or display of such work shall not be considered to be commercial activity by such foreign state for purposes of subsection (a)(3).

(2) EXCEPTIONS.—

(A) NAZI-ERA CLAIMS.—Paragraph (1) shall not apply in any case asserting jurisdiction under subsection (a)(3) in which rights in property taken in violation of international law are in issue within the meaning of that subsection and—

(i) the property at issue is the work described in paragraph (1);

(ii) the action is based upon a claim that such work was taken in connection with the acts of a covered government during the covered period;

(iii) the court determines that the activity associated with the exhibition or display is commercial activity, as that term is defined in section 1603(d); and

(iv) a determination under clause (iii) is necessary for the court to exercise jurisdiction over the foreign state under subsection (a)(3).

(B) OTHER CULTURALLY SIGNIFICANT WORKS.—In addition to cases exempted under subparagraph (A), paragraph (1) shall not apply in any case asserting jurisdiction under subsection (a)(3) in which rights in property taken in violation of

international law are in issue within the meaning of that subsection and—

(i) the property at issue is the work described in paragraph (1);

(ii) the action is based upon a claim that such work was taken in connection with the acts of a foreign government as part of a systematic campaign of coercive confiscation or misappropriation of works from members of a targeted and vulnerable group;

(iii) the taking occurred after 1900;

(iv) the court determines that the activity associated with the exhibition or display is commercial activity, as that term is defined in section 1603(d); and

(v) a determination under clause (iv) is necessary for the court to exercise jurisdiction over the foreign state under subsection (a)(3).

(3) DEFINITIONS.—For purposes of this subsection—

(A) the term "work" means a work of art or other object of cultural significance;

(B) the term "covered government" means—

(i) the Government of Germany during the covered period;

(ii) any government in any area in Europe that was occupied by the military forces of the Government of Germany during the covered period;

(iii) any government in Europe that was established with the assistance or cooperation of the Government of Germany during the covered period; and

(iv) any government in Europe that was an ally of the Government of Germany during the covered period; and

(C) the term "covered period" means the period beginning on January 30, 1933, and ending on May 8, 1945.

28 U.S.C. § 1605A. Terrorism exception to the jurisdictional immunity of a foreign state

(a) IN GENERAL.—

(1) NO IMMUNITY.—A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case not otherwise covered by this chapter in which money damages are sought against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act if such act or provision of material support or resources is engaged in by an official, employee, or agent of such foreign state while acting within the scope of his or her office, employment, or agency.

(2) CLAIM HEARD.—The court shall hear a claim under this section if—

(A)(i)(I) the foreign state was designated as a state sponsor of terrorism at the time the act described in paragraph (1) occurred, or was so designated as a result of such act, and, subject to

subclause (II), either remains so designated when the claim is filed under this section or was so designated within the 6-month period before the claim is filed under this section; or

(II) in the case of an action that is refiled under this section by reason of section 1083(c)(2)(A) of the National Defense Authorization Act for Fiscal Year 2008 or is filed under this section by reason of section 1083(c)(3) of that Act, the foreign state was designated as a state sponsor of terrorism when the original action or the related action under section 1605(a)(7) (as in effect before the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104–208) was filed;

(ii) the claimant or the victim was, at the time the act described in paragraph (1) occurred—

(I) a national of the United States;

(II) a member of the armed forces; or

(III) otherwise an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment; and

(iii) in a case in which the act occurred in the foreign state against which the claim has been brought, the claimant has afforded the foreign state a reasonable opportunity to arbitrate the

claim in accordance with the accepted international rules of arbitration; or

(B) the act described in paragraph (1) is related to Case Number 1:00CV03110 (EGS) in the United States District Court for the District of Columbia.

(b) LIMITATIONS.—An action may be brought or maintained under this section if the action is commenced, or a related action was commenced under section 1605(a)(7) (before the date of the enactment of this section) or section 589 of the Foreign Operations, Export Financing, and Related Programs Appropriations Act, 1997 (as contained in section 101(c) of division A of Public Law 104–208) not later than the latter of—

(1) 10 years after April 24, 1996; or

(2) 10 years after the date on which the cause of action arose.

(c) PRIVATE RIGHT OF ACTION.—A foreign state that is or was a state sponsor of terrorism as described in subsection (a)(2)(A)(i), and any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, shall be liable to—

(1) a national of the United States,

(2) a member of the armed forces,

(3) an employee of the Government of the United States, or of an individual performing a contract awarded by the United States Government, acting within the scope of the employee's employment, or

(4) the legal representative of a person described in paragraph (1), (2), or (3),

for personal injury or death caused by acts described in subsection (a)(1) of that foreign state, or of an official, employee, or agent of that foreign state, for which the courts of the United States may maintain jurisdiction under this section for money damages. In any such action, damages may include economic damages, solatium, pain and suffering, and punitive damages. In any such action, a foreign state shall be vicariously liable for the acts of its officials, employees, or agents.

(d) ADDITIONAL DAMAGES.—After an action has been brought under subsection (c), actions may also be brought for reasonably foreseeable property loss, whether insured or uninsured, third party liability, and loss claims under life and property insurance policies, by reason of the same acts on which the action under subsection (c) is based.

(e) SPECIAL MASTERS.—

(1) IN GENERAL.—The courts of the United States may appoint special masters to hear damage claims brought under this section.

(2) TRANSFER OF FUNDS.—The Attorney General shall transfer, from funds available for the program under section 1404C of the Victims of Crime Act of 1984 (42 U.S.C. 10603c), to the Administrator of the United States district court in which any case is pending which has been brought or maintained under this section such funds as may be required to cover the costs of special masters appointed under paragraph (1). Any amount paid in compensation to any such special master shall constitute an item of court costs.

(f) APPEAL.—In an action brought under this section, appeals from orders not conclusively ending the litigation may only be taken pursuant to section 1292(b) of this title.

(g) PROPERTY DISPOSITION.—

(1) IN GENERAL.—In every action filed in a United States district court in which jurisdiction is alleged under this section, the filing of a notice of pending action pursuant to this section, to which is attached a copy of the complaint filed in the action, shall have the effect of establishing a lien of lis pendens upon any real property or tangible personal property that is—

(A) subject to attachment in aid of execution, or execution, under section 1610;

(B) located within that judicial district; and

(C) titled in the name of any defendant, or titled in the name of any entity controlled by any defendant if such notice contains a statement listing such controlled entity.

(2) NOTICE.—A notice of pending action pursuant to this section shall be filed by the clerk of the district court in the same manner as any pending action and shall be indexed by listing as defendants all named defendants and all entities listed as controlled by any defendant.

(3) ENFORCEABILITY.—Liens established by reason of this subsection shall be enforceable as provided in chapter 111 of this title.

(h) DEFINITIONS.—For purposes of this section—

(1) the term "aircraft sabotage" has the meaning given that term in Article 1 of the Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation;

(2) the term "hostage taking" has the meaning

given that term in Article 1 of the International Convention Against the Taking of Hostages;

(3) the term "material support or resources" has the meaning given that term in section 2339A of title 18;

(4) the term "armed forces" has the meaning given that term in section 101 of title 10;

(5) the term "national of the United States" has the meaning given that term in section 101(a)(22) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(22));

(6) the term "state sponsor of terrorism" means a country the government of which the Secretary of State has determined, for purposes of section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)), section 620A of the Foreign Assistance Act of 1961 (22 U.S.C. 2371), section 40 of the Arms Export Control Act (22 U.S.C. 2780), or any other provision of law, is a government that has repeatedly provided support for acts of international terrorism; and

(7) the terms "torture" and "extrajudicial killing" have the meaning given those terms in section 3 of the Torture Victim Protection Act of 1991 (28 U.S.C. 1350 note).

28 U.S.C. § 1605B. Responsibility of foreign states for international terrorism against the United States

(a) DEFINITION.—In this section, the term "international terrorism"—

(1) has the meaning given the term in section 2331 of title 18, United States Code; and

(2) does not include any act of war (as defined in

that section).

(b) RESPONSIBILITY OF FOREIGN STATES.—A foreign state shall not be immune from the jurisdiction of the courts of the United States in any case in which money damages are sought against a foreign state for physical injury to person or property or death occurring in the United States and caused by—

(1) an act of international terrorism in the United States; and

(2) a tortious act or acts of the foreign state, or of any official, employee, or agent of that foreign state while acting within the scope of his or her office, employment, or agency, regardless where the tortious act or acts of the foreign state occurred.

(c) CLAIMS BY NATIONALS OF THE UNITED STATES.—Notwithstanding section 2337(2) of title 18, a national of the United States may bring a claim against a foreign state in accordance with section 2333 of that title if the foreign state would not be immune under subsection (b).

(d) RULE OF CONSTRUCTION.—A foreign state shall not be subject to the jurisdiction of the courts of the United States under subsection (b) on the basis of an omission or a tortious act or acts that constitute mere negligence.

28 U.S.C. § 1606. Extent of liability

As to any claim for relief with respect to which a foreign state is not entitled to immunity under section 1605 or 1607 of this chapter, the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality thereof shall

not be liable for punitive damages; if, however, in any case wherein death was caused, the law of the place where the action or omission occurred provides, or has been construed to provide, for damages only punitive in nature, the foreign state shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death which were incurred by the persons for whose benefit the action was brought.

28 U.S.C. § 1607. Counterclaims

In any action brought by a foreign state, or in which a foreign state intervenes, in a court of the United States or of a State, the foreign state shall not be accorded immunity with respect to any counterclaim—

(a) for which a foreign state would not be entitled to immunity under section 1605 or 1605A of this chapter had such claim been brought in a separate action against the foreign state; or

(b) arising out of the transaction or occurrence that is the subject matter of the claim of the foreign state; or

(c) to the extent that the counterclaim does not seek relief exceeding in amount or differing in kind from that sought by the foreign state.

28 U.S.C. § 1608. Service; time to answer; default

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services—and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and

complaint in accordance with any special arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state—

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made—

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service

applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

28 U.S.C. § 1609. Immunity from attachment and execution of property of a foreign state

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided in sections 1610 and 1611 of this chapter.

28 U.S.C. § 1610. Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the

United States or of a State after the effective date of this Act, if—

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property—

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: *Provided*, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment, or

(6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or

execution, would not be inconsistent with any provision in the arbitral agreement, or

(7) the judgment relates to a claim for which the foreign state is not immune under section 1605A or section 1605(a)(7) (as such section was in effect on January 27, 2008), regardless of whether the property is or was involved with the act upon which the claim is based.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2), (3), or (5) or 1605(b) of this chapter, regardless of whether the property is or was involved in the act upon which the claim is based, or

(3) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605A of this chapter or section 1605(a)(7) of this chapter (as such section was in effect on January 27, 2008), regardless of whether the property is or was involved in the act upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if—

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

(e) The vessels of a foreign state shall not be immune from arrest in rem, interlocutory sale, and execution in actions brought to foreclose a preferred mortgage as provided in section 1605(d).

(f)(1)(A) Notwithstanding any other provision of law, including but not limited to section 208(f) of the Foreign Missions Act (22 U.S.C. 4308(f)), and except as provided in subparagraph (B), any property with respect to which financial transactions are prohibited or regulated

pursuant to section 5(b) of the Trading with the Enemy Act (50 U.S.C. App. 5(b)), section 620(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2370(a)), sections 202 and 203 of the International Emergency Economic Powers Act (50 U.S.C. 1701–1702), or any other proclamation, order, regulation, or license issued pursuant thereto, shall be subject to execution or attachment in aid of execution of any judgment relating to a claim for which a foreign state (including any agency or instrumentality or such state) claiming such property is not immune under section 1605(a)(7) (as in effect before the enactment of section 1605A) or section 1605A.

(B) Subparagraph (A) shall not apply if, at the time the property is expropriated or seized by the foreign state, the property has been held in title by a natural person or, if held in trust, has been held for the benefit of a natural person or persons.

(2)(A) At the request of any party in whose favor a judgment has been issued with respect to a claim for which the foreign state is not immune under section 1605(a)(7) (as in effect before the enactment of section 1605A) or section 1605A, the Secretary of the Treasury and the Secretary of State should make every effort to fully, promptly, and effectively assist any judgment creditor or any court that has issued any such judgment in identifying, locating, and executing against the property of that foreign state or any agency or instrumentality of such state.

(B) In providing such assistance, the Secretaries—

(i) may provide such information to the court under seal; and

(ii) should make every effort to provide the information in a manner sufficient to allow the court to direct the United States Marshall's office to promptly and effectively execute against that property.

(3) WAIVER.—The President may waive any provision of paragraph (1) in the interest of national security.

(g) PROPERTY IN CERTAIN ACTIONS.—

(1) IN GENERAL.—Subject to paragraph (3), the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of—

(A) the level of economic control over the property by the government of the foreign state;

(B) whether the profits of the property go to that government;

(C) the degree to which officials of that government manage the property or otherwise control its daily affairs;

(D) whether that government is the sole beneficiary in interest of the property; or

(E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

(2) UNITED STATES SOVEREIGN IMMUNITY INAPPLICABLE.—Any property of a foreign state, or agency or instrumentality of a foreign state, to which paragraph (1) applies shall not be immune from attachment in aid of execution, or execution, upon a judgment entered under section 1605A because the property is regulated by the United States Government by reason of action taken against that foreign state under the Trading With the Enemy Act or the International Emergency Economic Powers Act.

(3) THIRD-PARTY JOINT PROPERTY HOLDERS.—Nothing in this subsection shall be construed to supersede the authority of a court to prevent appropriately the impairment of an interest held by a person who is not liable in the action giving rise to a judgment in property subject to attachment in aid of execution, or execution, upon such judgment.

28 U.S.C. § 1611. Certain types of property immune from execution

(a) Notwithstanding the provisions of section 1610 of this chapter, the property of those organizations designated by the President as being entitled to enjoy the privileges, exemptions, and immunities provided by the International Organizations Immunities Act shall not be subject to attachment or any other judicial process impeding the disbursement of funds to, or on the order of, a foreign state as the result of an action brought in the courts of the United States or of the States.

(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if—

(1) the property is that of a foreign central bank or

monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver; or

(2) the property is, or is intended to be, used in connection with a military activity and

(A) is of a military character, or

(B) is under the control of a military authority or defense agency.

(c) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution in an action brought under section 302 of the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996 to the extent that the property is a facility or installation used by an accredited diplomatic mission for official purposes.