CRIMINAL LAW — FOREIGN SOVEREIGN IMMUNITIES ACT — NINTH CIRCUIT HOLDS THAT CERTAIN CHINESE STATE–OWNED COMPANIES ARE NOT FOREIGN "INSTRUMENTALITIES" AND THUS LACK IMMUNITY UNDER THE FSIA FROM CRIMINAL PROSECUTION. — *United States v. Pangang Group Co.*, 6 F.4th 946 (9th Cir. 2021), *reh'g and reh'g en banc denied*, No. 19-10306, 2021 BL 332267 (9th Cir. Sept. 1, 2021).

The United States increasingly advances important foreign policy goals by prosecuting legal entities controlled by foreign governments.[1] But these defendants have begun to delay proceedings for years by arguing that they are immune from criminal prosecution based on the Foreign Sovereign Immunities Act of 1976[2] (FSIA). The FSIA primarily aims to shield the executive branch from unwanted foreign-state pressures by providing foreign states and their instrumentalities jurisdictional immunity from civil litigation in U.S. courts.[3] Since 2002, the circuits have split over whether the FSIA applies to criminal cases.[4] Most federal courts of appeals observe that the FSIA was likely not intended to apply but avoid reaching the question by holding that defendants' conduct would fall within the FSIA's exceptions regardless.[5] Recently, in *United States v. Pangang Group Co.*,[6] the Ninth Circuit took a novel approach to this issue by denying immunity to corporate defendants charged with economic espionage on the grounds that they had failed to show direct majority ownership by the Chinese government so as to qualify as foreign instrumentalities under the FSIA.[7] *Pangang* exemplifies how courts' refusals to hold that the FSIA does not apply to criminal cases undermine the statute's core purpose by impeding convictions that support U.S. foreign policy. The courts or Congress should clarify that the FSIA does not apply. Until then, however, *Pangang* offers a second-best approach in economic espionage prosecutions by effectively requiring defendants to produce inculpatory evidence, thus disincentivizing claims of FSIA immunity.

---

[1] *See* Steven Arrigg Koh, *Foreign Affairs Prosecutions*, 94 N.Y.U. L. REV. 340, 370 (2019); Michael Farbiarz, *Extraterritorial Criminal Jurisdiction*, 114 MICH. L. REV. 507, 512–13 (2016). The increase is especially pronounced with respect to economic espionage, cyber espionage, and sanctions evasion prosecutions. *See* Chimène I. Keitner, *Prosecuting Foreign States*, 61 VA. J. INT'L L. 221, 239 (2021).

[2] Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended in scattered sections of 28 U.S.C.).

[3] *See* Keitner, *supra* note 1, at 233.

[4] *See* John Balzano, *Crimes and the Foreign Sovereign Immunities Act: New Perspectives on an Old Debate*, 38 N.C. J. INT'L L. & COM. REGUL. 43, 46, 52 (2012). *Compare* Southway v. Cent. Bank of Nigeria, 198 F.3d 1210, 1214–15 (10th Cir. 1999), *with* Keller v. Cent. Bank of Nigeria, 277 F.3d 811, 819–20 (6th Cir. 2002), *abrogated on other grounds by* Samantar v. Yousuf, 560 U.S. 305 (2010).

[5] *See* Balzano, *supra* note 4, at 52; *see, e.g.*, United States v. Turkiye Halk Bankasi A.S., 16 F.4th 336, 350 (2d Cir. 2021).

[6] 6 F.4th 946 (9th Cir. 2021).

[7] *See id.* at 960.

According to the *Pangang* indictment, the Chinese government had for decades sought to learn a closely guarded manufacturing process for titanium dioxide, the source of the brilliant shade of white found in myriad items from Oreo cookies to smoke grenades.[8] DuPont, a U.S. company, had dominated the industry since the 1940s by developing a cheaper, more efficient manufacturing process.[9] In the early 1990s, the Chinese government directed an electrical engineer, Walter Liew, to obtain the superior technology.[10] Liew did so and sold the trade secrets to a leading manufacturer wholly owned by the Chinese government: Pangang Group Company.[11]

The Department of Justice (DOJ) obtained an indictment against Liew on eleven charges related to economic espionage and, in 2012, added Pangang Group Company and three of its wholly owned subsidiaries (collectively, the "Pangang Companies") as codefendants.[12] The Pangang Companies resisted service of summonses, while Liew was convicted at trial on all counts and sentenced to 144 months in prison.[13] In 2016, DOJ obtained a superseding indictment against the Pangang Companies, charging them with one count of conspiracy to violate and one count of attempted violation of the Economic Espionage Act of 1996[14] (EEA).[15] After the companies were adequately served summonses,[16] they moved to dismiss the indictment on the grounds that they were entitled to sovereign immunity under the FSIA.[17]

The district court denied the motion to dismiss.[18] The court reasoned that the indictment's allegations that the defendants were "foreign instrumentalities" under the EEA allowed it to assume they qualified as the same under the FSIA.[19] Despite finding the view that the FSIA does not apply in criminal cases "more persuasive,"[20] the court assumed the

---

[8] *See* United States v. Liew, 856 F.3d 585, 590 (9th Cir. 2017); BRENDAN G. DELACY ET AL., U.S. ARMY RSCH., DEV. & ENG'G COMMAND, OPTICAL, PHYSICAL, AND CHEMICAL PROPERTIES OF SURFACE MODIFIED TITANIUM DIOXIDE POWDERS 9 (2011).

[9] *Liew*, 856 F.3d at 590.

[10] *See id.*

[11] *See id.* at 591.

[12] *Id.* at 593 & n.2; *Pangang*, 6 F.4th at 950.

[13] United States v. Liew, 466 F. Supp. 3d 1062, 1063 (N.D. Cal. 2020).

[14] Pub. L. No. 104-294, 110 Stat. 3488 (codified at 18 U.S.C. §§ 1831–1839).

[15] *Pangang*, 6 F.4th at 950.

[16] *Id.* at 951 (noting that Rule 4 of the Federal Rules of Criminal Procedure was amended to clarify requirements for serving foreign organizational defendants "[p]artly in response to the district court's rulings in this case").

[17] *Id.* at 949.

[18] Order Denying Motion to Dismiss Indictment at 1, United States v. Pangang Grp. Co., No. 11-cr-00573, 2022 WL 580790 (N.D. Cal. Aug. 26, 2019), ECF No. 1223.

[19] *Id.* at 5. The court noted "some differences" between the two statutes' definitions but concluded they were "not material" to the motion to dismiss. *Id.*

[20] *Id.* at 10.

FSIA applied but denied defendants' motion to dismiss because their conduct fell within the FSIA's commercial-activity and waiver exceptions.[21]

The Ninth Circuit affirmed.[22] As a preliminary matter, the court held that the defendants could immediately appeal the denial of FSIA immunity under the collateral order doctrine.[23] Then, "[a]ssuming *arguendo*" that the FSIA applies in criminal cases, the court began — and ended — with the statute's "threshold predicate": "that the party seeking to invoke [FSIA] immunity is a 'foreign state' within the meaning of the FSIA."[24] A "foreign state" includes its "instrumentalit[ies]."[25]

The court applied *Dole Food Co. v. Patrickson*,[26] a civil FSIA case in which the Supreme Court held that "only direct ownership of a majority of shares by the foreign state satisfies" the FSIA's instrumentality requirements.[27] The *Pangang* court explained that *Dole Food* implicitly rejected a "recursive reading" of the FSIA that would permit a determination that a defendant was entitled to foreign sovereign immunity based on indirect majority ownership by a foreign state — that is, by allowing one "instrumentality of a foreign state" to serve as a "foreign state" for purposes of determining whether *another* entity would also be entitled to immunity as an "instrumentality" of the first.[28] And, because the FSIA defined foreign instrumentality in the "present tense, . . . instrumentality status [must] be determined at the time suit is filed."[29] Thus, whether the defendants were "foreign instrumentalities" under the FSIA turned solely on whether they were directly majority owned by the Chinese government when originally indicted.

The *Pangang* court also applied the burden-shifting framework from the civil FSIA context.[30] Defendants could establish prima facie cases that they were foreign instrumentalities by making either "facial or factual challenge[s]."[31] Because the Pangang Companies had made only a facial challenge by presenting no evidence in support of their motion to dismiss, the court determined instrumentality status based "entirely on the allegations of the indictment" taken as true.[32]

---

[21] *Id.* at 14–15, 17.

[22] Judge Collins wrote for the unanimous panel, which included Judges Wardlaw and Eaton (the latter sitting by designation).

[23] *Pangang*, 6 F.4th at 952 (quoting Gupta v. Thai Airways Int'l, 487 F.3d 759, 763 (9th Cir. 2007)).

[24] *Id.* at 953–54.

[25] *Id.* at 955 (quoting 28 U.S.C. § 1603(a)). An "instrumentality of a foreign state" includes "any entity . . . which is a separate legal person . . . [and] a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof." 28 U.S.C. § 1603(b).

[26] 538 U.S. 468 (2003).

[27] *Pangang*, 6 F.4th at 957 (quoting *Dole Food*, 538 U.S. at 474).

[28] *Id.* at 955–56.

[29] *Id.* at 957 (emphasis omitted) (quoting *Dole Food*, 538 U.S. at 478).

[30] *Id.* at 954.

[31] *Id.* (quoting Terenkian v. Republic of Iraq, 694 F.3d 1122, 1131 (9th Cir. 2012)).

[32] *Id.*

The court then "readily dispose[d] of three of the four" defendants as non-instrumentalities because the indictment alleged that they were "subsidiaries" of Pangang Group Company, the fourth defendant, and thus not *directly* owned by the Chinese government.[33] Pangang Group Company, however, was allegedly a "state-owned enterprise controlled by . . . a special government agency" of the People's Republic of China.[34] Still, the court held, such control did not satisfy *Dole Food*'s requirement of direct majority ownership.[35] The indictment's "unadorned allegation" that Pangang Group Company was "state-owned" did not indicate whether that term was used in the "colloquial sense" — which would include indirect ownership — or to refer to "direct ownership of a majority of shares."[36]

The court identified two contextual reasons why the "state-owned" allegation should not be read to mean the latter.[37] First, the indictment alleged elsewhere that other defendants were each "owned" by two entities, which could not both have direct majority stakes.[38] Second, the court took judicial notice of the fact that, in earlier litigation, the government had submitted evidence asserting that the Chinese government owned Pangang Group Company indirectly.[39] Thus, none of the defendants had established a prima facie case of instrumentality status under the FSIA.

Finally, the court refused to conflate different definitions of "foreign instrumentality," holding that the EEA's is "much broader than the FSIA's."[40] The EEA definition "expressly" covers entities "substantially owned, controlled, sponsored, commanded, managed, or dominated by a foreign government"[41] — in contrast to the FSIA's requirement of direct majority ownership under *Dole Food*. Accordingly, the indictment's allegation that the Pangang Companies were "foreign instrumentalities" under the EEA did not establish a prima facie case that they were so under the FSIA. The court of appeals therefore affirmed the district court's denial of the defendants' motion to dismiss.

Despite ultimately denying FSIA immunity, *Pangang* exemplifies how courts' unwillingness to hold that the FSIA does not apply to criminal cases undercuts the FSIA's core purpose.[42] Congress enacted the

---

[33] *Id.* at 957–58.
[34] *Id.* at 957.
[35] *See id.* at 958.
[36] *Id.* (quoting Dole Food Co. v. Patrickson, 538 U.S. 468, 474 (2003)).
[37] *Id.*
[38] *Id.* at 958–59.
[39] *Id.* at 959.
[40] *Id.* at 960.
[41] *Id.* (quoting 18 U.S.C. § 1839(1)).
[42] Courts and academics have already explained persuasively that both the text and context of the FSIA demonstrate that Congress intended the statute to apply only to civil cases. *See, e.g.*, *In*

FSIA primarily to prevent private lawsuits against foreign sovereigns from impinging on the executive branch's conduct of foreign relations. But when the Executive itself chooses to prosecute foreign-sovereign entities — in support of or despite adverse effects on its foreign policy objectives — delays in convictions due to FSIA-based litigation negatively impact U.S. foreign relations. Courts should interpret the FSIA as inapplicable to criminal cases or Congress should amend the FSIA to clarify the same. Until then, however, *Pangang*'s application of the *Dole Food* test offers a second-best approach to economic espionage cases that disincentivizes defendants from claiming FSIA immunity by effectively requiring them to produce inculpatory evidence.

Congress enacted the FSIA in 1976 at the request of the State and Justice Departments to shield the executive branch from unwanted foreign-state pressure related to private lawsuits.[43] Previously, when private parties sued foreign states in U.S. courts, the courts would generally defer to the State Department's determinations as to the states' sovereign immunity.[44] The FSIA "transfer[red that] determination . . . from the executive branch to the judicial branch" to free the former "from pressures from foreign governments to recognize their immunity . . . and from any adverse consequences resulting from an unwillingness of the [State] Department to support that immunity."[45] Thus, the FSIA sought to protect the executive branch's conduct of foreign relations from interference caused by disputes between private plaintiffs and foreign states.

But the executive branch alone decides whether to pursue *criminal* cases. Such decisions reflect the executive branch's view that the impact of prosecutions on foreign relations is either desirable or outweighed by the value of criminal law enforcement.[46] Thus, delays threaten to impair not only law enforcement but also the executive branch's conduct

---

re Grand Jury Subpoena, 912 F.3d 623, 630 (D.C. Cir. 2019) ("We doubt very much that Congress so dramatically gutted the government's crime-fighting toolkit. . . . [T]he 'Act and its legislative history do not say a single word about possible criminal proceedings under the statute.'" (quoting JOSEPH W. DELLAPENNA, SUING FOREIGN GOVERNMENTS AND THEIR CORPORATIONS 37 (2d ed. 2003))); Keitner, *supra* note 1, at 233–40; DELLAPENNA, *supra*, at 37–41.

43 *See In re Grand Jury Subpoena*, 912 F.3d at 627 (observing that Congress passed the FSIA "to extract the State Department from [a] stew" in which "many disputes that were essentially private had the potential to become spiraling diplomatic imbroglios" (citing Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 487 (1983))).

44 *See Immunities of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims & Governmental Rels. of the H. Comm. on the Judiciary*, 93d Cong. 33–34 (1973) (statement of Attorney General Richard G. Kleindienst and Secretary of State William P. Rogers).

45 H.R. REP. NO. 94-1487, at 7 (1976); *see Verlinden*, 461 U.S. at 487–88.

46 *See* Keitner, *supra* note 1, at 267. Professor Chimène Keitner's article comprehensively analyzes the interaction between the FSIA and criminal prosecutions, and concludes that Congress should clarify that the FSIA does not apply to criminal proceedings. *See id.* at 221.

of foreign affairs.[47] By claiming FSIA immunity, recipients of subpoenas and other legal process at the investigative stage can delay enforcement for months.[48] And denials of pretrial FSIA claims by defendants are immediately reviewable under the collateral order doctrine, often delaying trials for more than a year.[49] In *Pangang*, the FSIA-based appeal took nearly two years — the latest episode in the companies' decade-long strategy of delay since they were indicted.[50]

Such delays impinge on the executive branch's conduct of foreign relations in two ways that run counter to the FSIA's core purpose.[51] First, where prosecutions support U.S. foreign policy objectives,[52] investigative and pretrial delays postpone convictions that carry deterrent and expressive force. Economic espionage convictions, for example, can advance U.S. foreign policy and national security goals through substantial custodial sentences and fines that punish and deter such conduct, and restitution that helps correct for victims' market-share losses.[53] Such convictions have also allowed Secretaries of State in multiple administrations to call out Chinese economic espionage with specificity.[54]

---

[47] *See* Koh, *supra* note 1, at 370.

[48] *See In re Grand Jury Subpoena*, 912 F.3d at 625–26 (affirming district court's contempt order for failure to comply five months after issuance of subpoena); Keitner, *supra* note 1, at 247 ("[T]he FSIA's expansive definition of 'foreign state' can embolden foreign state-affiliated entities to claim immunity and create delays in unforeseen contexts, such as third-party subpoenas for financial records and other documents.").

[49] *See, e.g.*, *Pangang*, 6 F.4th at 960 (affirming district court's denial of motion to dismiss after twenty-three months). In *United States v. Turkiye Halk Bankasi A.S.*, 16 F.4th 336 (2d Cir. 2021), the Second Circuit affirmed the denial of the defendant's motion to dismiss after nearly thirteen months, *id.* at 340–41, 343, but then stayed its mandate pending disposition of the defendant's petition for writ of certiorari, Order, United States v. Turkiye Halk Bankasi A.S., No. 20-3499 (2d Cir. Jan. 14, 2022).

[50] *See Pangang*, 6 F.4th at 950–51, 960.

[51] Absent the FSIA, courts would apply the common law of foreign sovereign immunity. *See* Keitner, *supra* note 1, at 265. Although its precise contours are beyond the scope of this comment, the dominant approaches would preclude or streamline claims of criminal sovereign immunity. The Second Circuit recently observed, for example, that "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." *Turkiye Halk Bankasi A.S.*, 16 F.4th at 351 (citing Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 486 (1983)). The D.C. Circuit, moreover, has held that 18 U.S.C. § 3231's grant of federal court subject matter jurisdiction over "all offenses against the laws of the United States" did not exclude foreign sovereigns. *In re Grand Jury Subpoena*, 912 F.3d at 631 (quoting 18 U.S.C. § 3231).

[52] *See* Farbiarz, *supra* note 1, at 512–13 (surveying prosecutions that support U.S. foreign policy goals: for example, to strengthen certain African governments, curb Iranian weapons procurement, and combat Colombian narcotics trafficking).

[53] The sentences in *Liew*, for example, included twelve years' imprisonment for the main defendant and more than $45 million in forfeiture and fines; DuPont requested an additional $28 million in restitution. *Pangang*, 6 F.4th at 950; Transcript of Sentencing Hearing at 14, 76, 80–82, United States v. Liew, No. 11-cr-00573 (N.D. Cal. July 10, 2014), ECF No. 929.

[54] *See, e.g.*, Jonathan Kaiman, *Kerry Hits Out at Chinese Cyber-Spying*, THE GUARDIAN (July 10, 2014, 8:18 AM), https://www.theguardian.com/world/2014/jul/10/john-kerry-hits-out-at-chinese-cyber-spying [https://perma.cc/867L-7SS8]; Atlantic Council, *A Conversation with*

The 2015 U.S.-China Cyber Agreement — which promised that "neither country's government [would] conduct or knowingly support cyber-enabled theft of intellectual property, including trade secrets"[55] — was negotiated against the backdrop of high-profile prosecutions such as *Liew* and *Pangang*. Finally, economic espionage investigations and prosecutions are particularly "time sensitive": "[a] trade secret once lost is, of course, lost forever."[56] Delaying these convictions and sentences thus undermines the FSIA's core objective of protecting the executive branch's conduct of foreign affairs.

Second, where the executive branch prosecutes foreign-sovereign entities *despite* negative ramifications on U.S. foreign relations, pretrial delays lengthen the window of opportunity for foreign sovereigns to apply diplomatic pressure to resolve cases favorably. Turkish President Recep Tayyip Erdoğan, for example, has reportedly exerted immense pressure on the U.S. government to drop or settle the prosecution of a Turkish government–owned bank that has delayed trial by claiming FSIA immunity.[57] The Supreme Court has recognized that courts should avoid "triggering . . . serious foreign policy consequences" and "instead defer[] such decisions, quite appropriately, to the political branches."[58] By dodging the question of whether the FSIA applies in criminal cases, courts allow pressure campaigns that exacerbate adverse foreign policy consequences.

Although *Pangang* failed to hold that the FSIA is inapplicable to criminal cases, the court's application of the *Dole Food* test with a burden-shifting procedural framework could disincentivize other defendants from claiming FSIA immunity in economic espionage cases. In *Pangang*, the defendants chose to make a facial (versus factual) jurisdictional challenge based on the FSIA. Accordingly, the court relied solely on the indictment, which alleged that the defendants were "state-owned

---

U.S. Secretary of State Michael R. Pompeo (Sept. 15, 2020, 9:15 AM), https://www.atlanticcouncil.org/event/a-conversation-with-us-secretary-of-state-michael-r-pompeo [https://perma.cc/UTH3-ZKLL].

55 Press Release, Office of the Press Sec'y, White House, President Xi Jinping's State Visit to the United States (Sept. 25, 2015), https://obamawhitehouse.archives.gov/the-press-office/2015/09/25/fact-sheet-president-xi-jinpings-state-visit-united-states [https://perma.cc/6D7V-AMTY].

56 R. Mark Halligan, *Protection of U.S. Trade Secret Assets: Critical Amendments to the Economic Espionage Act of 1996*, 7 J. MARSHALL REV. INTELL. PROP. L. 656, 668 (2008) (alteration in original) (quoting FMC Corp. v. Taiwan Tainan Giant Indus. Co., 730 F.2d 61, 63 (2d Cir. 1984)).

57 *See, e.g.*, Eric Lipton & Benjamin Weiser, *Turkish Bank Case Showed Erdogan's Influence with Trump*, N.Y. TIMES (Oct. 29, 2020), https://www.nytimes.com/2020/10/29/us/politics/trump-erdogan-halkbank.html [https://perma.cc/DN2B-5VQ8]; United States v. Turkiye Halk Bankasi A.S., 16 F.4th 336, 340–43 (2d Cir. 2021). Moreover, a conviction would directly support U.S. foreign policy: DOJ is prosecuting the bank for a multibillion-dollar sanctions evasion scheme that undercut the United States' economic pressure campaign to bring Iran to the diplomatic negotiating table. *See* United States v. Türkiye Halk Bankasi A.S., 426 F. Supp. 3d 23, 26–27 (S.D.N.Y. 2019).

58 Kiobel v. Royal Dutch Petroleum Co., 569 U.S. 108, 124 (2013).

enterprise[s] controlled by the [Chinese government]" and managed by "officials of the Communist Party of China."[59] Nonetheless, the court determined that the allegations referred to ownership merely in the "colloquial sense" and did not establish direct majority ownership (that is, in the "formal corporate" sense) as required for FSIA immunity.[60] *Pangang* demonstrates how the U.S. government can explicitly attribute criminal conduct to foreign sovereigns — in support of foreign policy goals — without helping defendants make facial FSIA challenges.

Criminal defendants that must therefore make *factual* jurisdictional challenges based on the FSIA will face a Hobson's choice if they have been charged under the EEA. The EEA imposes liability for theft of trade secrets to benefit a "foreign instrumentality" and, as the *Pangang* court noted, "the EEA's definition of 'foreign instrumentality' is much broader than the FSIA's . . . as construed in *Dole Food*."[61] Thus, evidence of direct majority ownership offered by defendants to assert sovereign immunity under the FSIA will be highly inculpatory under the EEA. In the *Liew* trial, for example, testimony that Pangang Group Company was wholly owned by the Chinese government gave the prosecution its most straightforward path to proving the EEA's foreign-instrumentality element.[62] And even if a defendant clears the *Dole Food* hurdle for instrumentality status, the court may still deny immunity on the well-worn ground that the defendant's conduct falls within an FSIA exception. Although the *Pangang* defendants' ownership structure had already been exposed in the *Liew* trial, other defendants charged under the EEA could be disincentivized from claiming FSIA immunity.

Pangang exemplifies how refusals to hold that the FSIA only applies to civil cases undercut the statute's core purpose of protecting the executive branch's conduct of foreign affairs. The courts should interpret the FSIA as inapplicable to criminal cases or Congress should amend it to clarify the same. Until then, however, *Pangang*'s application of *Dole Food* forces defendants charged under the EEA to "own up" to their conduct — thus blunting the weapon of delay that the FSIA unintentionally handed to foreign corporate defendants.

---

[59] Third Superseding Indictment ¶¶ 3–5, United States v. Pangang Grp. Co., 2017 WL 3034063 (N.D. Cal. July 18, 2017) (No. 11-cr-00573).

[60] *Pangang*, 6 F.4th at 959–60 (quoting Dole Food Co. v. Patrickson, 538 U.S. 468, 474 (2003)).

[61] *Id.* at 960. The EEA defines "foreign instrumentality" as any entity "substantially owned, controlled, sponsored, commanded, managed, or dominated by a foreign government." 18 U.S.C. § 1839(1).

[62] In closing argument, Liew unsuccessfully argued that the Pangang Companies were not "foreign instrumentalities" under the EEA because Chinese corporate mores suggested that the Chinese government had not functionally "dominated" them. Transcript of Trial at 4516–19, United States v. Liew, 466 F. Supp. 3d 1062 (N.D. Cal. 2020) (No. 11-cr-00573). In rebuttal, the prosecution reiterated its simpler theory: "Here, the foreign instrumentality is the Pangang Group, . . . which it is undisputed is a . . . 100 percent [Chinese] state–owned company. That's ownership. Again, enough." *Id.* at 4651.