ALERT MEMORANDUM

D.C. Circuit Rules in Special Counsel Mueller Investigation That State-Owned Corporations Are Subject to Criminal Jurisdiction in the United States

December 21, 2018

On December 18, 2018, the District of Columbia Circuit Court of Appeals issued an important ruling in *In re Grand Jury Subpoena*, holding that foreign state-owned corporations are subject to criminal jurisdiction in the United States and that the exceptions to sovereign immunity set forth in the Foreign Sovereign Immunities Act (the "FSIA")[1] apply to criminal as well as to civil cases.[2] The court also rejected the foreign sovereign entity's argument that it should be excused from complying with a subpoena because doing so would violate the law of the respondent's country of incorporation. Although *In re Grand Jury Subpoena* arises in the context of enforcing a grand jury subpoena, its language and holding could potentially be extended to criminal prosecutions of a foreign state or state-owned entity.

If you have any questions concerning this memorandum, please reach out to your regular firm contact or the following authors:

NEW YORK

Carmine D. Boccuzzi, Jr.
cboccuzzi@cgsh.com

Joon H. Kim
jkim@cgsh.com

Jonathan S. Kolodner
jkolodner@cgsh.com

Rahul Mukhi
rmukhi@cgsh.com

Rathna J. Ramamurthi
rramamurthi@cgsh.com

[1] 28 U.S.C. §§ 1330, 1391(f), 1602-11 (2017).
[2] *In re Grand Jury Subpoena*, No. 18 Civ. 3071 (D.C. Cir. Dec. 18, 2018), ECF No. 1764819.

Background

In the course of a grand jury investigation (reportedly the investigation being led by Special Counsel Robert S. Mueller III into Russian interference in the 2016 U.S. presidential election), a subpoena was issued to an unidentified, foreign state-owned corporation (the "Corporation"). The Corporation filed a motion to quash the subpoena, claiming (1) foreign sovereign immunity and (2) that compliance with the subpoena would require the Corporation to violate the laws of its home country.[3]

The FSIA confers jurisdiction in the United States courts over foreign sovereign entities in "any nonjury civil action . . . with respect to which the foreign state is not entitled to immunity," *i.e.*, where a specified exception to immunity under the FSIA applies.[4] One such exception allows suits against a foreign sovereign entity related to commercial activity carried out within the U.S.[5]

In a civil case, the Supreme Court has stated that the FSIA is the "the sole basis for obtaining jurisdiction over a foreign state."[6] But the U.S. Supreme Court has never ruled on whether the FSIA controls the jurisdictional analysis in *criminal* proceedings against a foreign sovereign entity. Some lower courts have interpreted the fact that the FSIA only contemplates jurisdiction over civil actions to suggest that there would be no jurisdiction over criminal proceedings against a foreign sovereign entity.[7] However, a different federal statute, Title 18, United States Code, Section 3231 gives the federal district courts "original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States."[8]

Here, the District Court for the District of Columbia rejected the Corporation's sovereign immunity argument. The district court assumed that the FSIA framework applied in criminal proceedings and held that the FSIA's commercial activity exception precluded immunity from the obligations of the subpoena.[9] It also rejected the argument that the laws of the Corporation's home country barred compliance with the subpoena.[10]

Following the district court's decision, the Corporation still did not produce the information called for by the subpoena.[11] As a result, the district court held the Corporation in contempt and imposed a monetary fine, which increased with each day of non-compliance.[12] The Corporation appealed to the D.C. Circuit.

The D.C. Circuit Decision

Following secret appellate proceedings for which the court took the extraordinary step of shutting down an entire floor of the courthouse, the D.C. Circuit affirmed the district court's decision. The D.C. Circuit first found that the district court had criminal jurisdiction

[3] *In re Grand Jury Subpoena*, No. 18 Civ. 3071 at 1.
[4] 28 U.S.C. § 1330(a).
[5] 28 U.S.C. § 1605(a)(2).
[6] *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989).
[7] *See Keller v. Cent. Bank of Nigeria*, 277 F.3d 811, 818–20 (6th Cir. 2002) (*abrogated on other grounds by Samantar v. Yousuf*, 560 U.S. 305, 311 n.4 (2010)); *Dale v. Colagiovanni*, 337 F. Supp. 2d 825, 842–43 (S.D. Miss. 2004); *Gould, Inc. v. Mitsui Mining & Smelting Co.*, 750 F. Supp. 838, 843-44 (N.D. Ohio 1990).
[8] 18 U.S.C. § 3231.
[9] *In re Grand Jury Subpoena*, No. 18 Civ. 3071 at 1.
[10] *Id.*
[11] *Id.*
[12] *Id.*

over the foreign state-owned entity. It found jurisdiction based in the language of 18 U.S.C. § 3231 that district courts have jurisdiction over "all offenses against the laws of the United States," ruling that such language is broad enough to cover foreign sovereign defendants.[13] The court also ruled that the language of the FSIA, which confers civil jurisdiction over actions against foreign sovereigns, supplemented the language of Section 3231, which confers criminal jurisdiction and does not "strip the district courts of criminal jurisdiction" they otherwise possess.[14] In other words, while the FSIA is the sole source of jurisdiction against a foreign sovereign in the civil context, other statutes could still confer jurisdiction over sovereigns in criminal proceedings. The court found that there was "no conflict between the two heads of jurisdiction" and that the FSIA left "intact Congress's grant of subject-matter jurisdiction over criminal offenses."[15] Indeed, the court noted that a contrary reading of the FSIA would "completely insulate corporations majority-owned by foreign governments from all criminal liability" and would be inconsistent with "Congress's choice to codify a theory of foreign sovereign immunity designed to allow regulation of foreign nations acting as ordinary market participants."[16]

The D.C. Circuit next moved to the question of whether the state-owned entity was entitled to immunity. The court noted that as "a creature of the common law," "foreign sovereigns might have been able to raise an immunity defense in a criminal case" and assumed that the immunities conferred by the FSIA were also available to foreign sovereigns in a criminal context.[17] However, the court also appeared to rule that, in a criminal context, the immunity available to at least a state-owned entity is limited by the language of the FSIA and that if the FSIA does not confer immunity, no common law immunity remains. Specifically, the court noted that the FSIA's language creating exceptions to sovereign immunity is not limited by its terms to civil actions but applies to "any case."[18] Accordingly, the court held that the Corporation could be required to answer the grand jury subpoena on a showing of a "reasonable probability" that the action was based upon an act outside the United States "in connection with a commercial activity" and that the "act caus[ed] a direct effect in the United States."[19] The court found that the commercial activity exception had been met and the FSIA did not immunize the Corporation from the subpoena.

Regarding the Corporation's argument that the subpoena was unenforceable because compliance would violate the laws of the Corporation's home country, the D.C. Circuit found that the Corporation had "fallen well short" of establishing that domestic law "truly prevent[ed]" compliance with the subpoena.[20]

Conclusion

It is difficult to know how much to read into the D.C. Circuit's decision. As the briefs before the D.C. Circuit remain under seal, the

[13] *Id.* at 2.
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.* (citing 28 U.S.C. § 1605(a)).
[19] *Id.* at 3 (citing 28 U.S.C. § 1605(a)(2)).
[20] *Id.*

specific arguments considered by the court remain unclear, and the court indicated that a fuller opinion will follow. Moreover, it is quite possible that a petition for certiorari will be filed.

But on its face, the court's opinion resolves two important issues that—if applied more broadly—could be quite significant. First, by ruling that the FSIA's grant of jurisdiction to the district courts is not exclusive and that the federal courts have criminal jurisdiction over foreign states and state-owned entities, the court appears to have significantly expanded the types of cases to which foreign states can be subject in the United States. In doing so, the court departed from the Supreme Court's language that the FSIA is "the sole basis for obtaining jurisdiction over a foreign state in our courts."[21]

Perhaps more significantly, the court also appeared to hold that at least state-owned entities and perhaps foreign states are not immune from criminal jurisdiction and criminal prosecution in circumstances where, under the FSIA, they would be subject to civil suit. Such a ruling departs from what was recognized as a common law defense of sovereign immunity. Moreover, while it did not explicitly discuss or analyze relevant case law and while the case did not concern a criminal prosecution against a foreign sovereign, its reasoning does not appear to be so limited. If extended to a prosecution against a foreign sovereign, the ruling would depart from other federal court precedents that have "conclude[d] that the FSIA grants immunity to foreign sovereigns from criminal prosecution, absent an international agreement stating otherwise."[22]

The U.S. government has only rarely sought to pursue criminal charges against state-owned instrumentalities and those cases have to date been resolved without expressly reaching the question of the sovereign entity's potential immunity from criminal liability. The decision in *In re Grand Jury* now adds to a prosecutor's arsenal in arguing that foreign states and state-owned entities can be subject to criminal prosecution in the United States so long as an FSIA exception applies.

…

CLEARY GOTTLIEB

[21] *Argentine Republic*, 488 U.S. at 434.

[22] *Keller*, 277 F.3d at 820; *Dale*, 337 F. Supp. 2d at 842-43. *But see Southway v. Cent. Bank of Nigeria*, 198 F.3d 1210, 1215 (10th Cir. 1999) ("If Congress intended defendants . . . to be immune from criminal indictment under the FSIA, Congress should amend the FSIA to expressly so state.").