ALERT MEMORANDUM

Supreme Court Requires Foreign State-Owned Corporation to Comply with Contempt Order in Special Counsel Mueller Investigation and D.C. Circuit Expands Upon its Prior Ruling That State-Owned Corporations Are Subject to U.S. Criminal Jurisdiction

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As discussed in Cleary Gottlieb's December 21, 2018 Alert Memorandum, on December 18, 2018, the U.S. Court of Appeals for the D.C. Circuit issued an important ruling in *In re Grand Jury Subpoena,* holding, *inter alia*, that foreign state-owned corporations are subject to criminal jurisdiction in the United States and upholding the Justice Department's authority to serve and enforce a grand jury subpoena on a sovereign entity.[1] The decision affirmed the district court's order holding the unidentified foreign state-owned corporation in contempt for failing to comply with the grand jury subpoena, which was reportedly issued by Special Counsel Mueller as part of his probe into Russian interference in the 2016 U.S. presidential election. The Court's original order was supported by a brief judgment with the promise of a published opinion to follow. The foreign state-owned corporation subsequently sought a stay of enforcement of the contempt order from the Supreme Court, which Chief Justice Roberts granted.

This Alert Memorandum focuses on two key developments that took place on January 8, 2019. *First*, the Supreme Court, voting as a whole, lifted the administrative stay previously entered by Chief Justice Roberts. *Second*, the D.C. Circuit Court issued its full, albeit partially redacted, opinion, which provides additional reasoning for the panel's decision, seeks to reconcile any purported conflict with rulings issued by other Circuit Courts on the legal question at hand, and focuses on the state owned nature of the entity involved. These developments are discussed in further detail below.

[1] *In re Grand Jury Subpoena*, No. 18 Civ. 3071 (D.C. Cir. Dec. 18, 2018), ECF No. 1764819 (hereinafter *In re Grand Jury Subpoena I*).

Background

Cleary Gottlieb's December 21, 2018 Alert Memorandum provides background on this case. The most pertinent details are as follows.

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") with an office in the United States. The Corporation apparently satisfies the FSIA's definition of an "agency or instrumentality" of a foreign state. The Corporation moved 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 ("Country A").[2]

The Foreign Sovereign Immunities Act (the "FSIA" or the "Act") provides that a "foreign state shall be immune from the jurisdiction of the courts of the United States" except where certain exceptions provided for in the Act apply. The Act treats a state-owned entity the same as the foreign state itself for relevant immunity purposes. The FSIA's only provision conferring subject matter jurisdiction, 28 U.S.C. § 1330(a), provides that a federal district court may exercise jurisdiction over a foreign state in "any nonjury *civil* action" provided an FSIA exception to immunity applies.[3] The FSIA does not contain any provision giving the federal courts criminal jurisdiction over a foreign sovereign.

In *Amerada Hess* and several subsequent decisions, the Supreme Court has stated that the FSIA is the "the sole basis for obtaining jurisdiction over a foreign state."[4] These cases all arose in a civil context and many have assumed that the U.S. cannot exercise criminal jurisdiction over a foreign state. But the Supreme Court has never addressed whether there is an independent basis for criminal jurisdiction against a foreign state or whether the FSIA controls the jurisdictional analysis in *criminal proceedings* against a foreign sovereign entity. Reported cases involving criminal proceedings against state-owned entities are somewhat sparse. The Sixth Circuit considered whether a civil RICO case could go forward against a state-owned entity and, in concluding in the affirmative, stated that the FSIA's immunity grant extends to both criminal and civil cases, relying on the blanket immunity contained in Section 1604 of the FSIA, which states that a "foreign state shall be immune from the jurisdiction of the courts of the United States."[5] The Court did not find criminal jurisdiction could be exercised over a foreign state. The Tenth and Eleventh Circuits have stated that the FSIA's silence on criminal jurisdiction reflected Congress' intent to limit the grant of sovereign immunity to civil cases.[6] But the first of these cases again arose in the civil RICO context, while the second involved a claim of a head-of-state immunity where the decision could be supported on other grounds. None of the circuit cases squarely confronted a criminal proceeding against a foreign state. Thus, until *In re Grand Jury Subpoena I*, no circuit court had held that a foreign state or state-owned entity could be

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2 *Id*.

3 *See* 28 U.S.C. § 1330(a) (conferring jurisdiction to U.S. courts over foreign sovereign entities in "any nonjury civil action . . . with respect to which the foreign state is not entitled to immunity").

4 *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). *See e.g., Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993); *Schermerhorn v. State of Israel*, 876 F.3d 351,353 (D.C. Cir. 2017).

5 *Keller v. Cent. Bank of Nigeria*, 277 F.3d 811, 820 (6th Cir. 2002) (*abrogated on other grounds by Samantar v. Yousuf*, 560 U.S. 305, 311 n.4 (2010)) ("The FSIA states that a 'foreign state shall be immune from the jurisdiction of the courts of the United States,' and does not limit this grant of immunity to civil cases." (citing 28 U.S.C. § 1604)).

6 *Southway v. Cent. Bank of Nigeria*, 198 F 3d 1210, 1214 (10th Cir. 1999) (indicating that "[w]e are unwilling to presume that Congress intended the FSIA to govern district court jurisdiction in criminal matters" given that the "FSIA makes no mention of foreign sovereign immunity in the criminal context"); *id.* at 1215 ("If Congress intended defendants . . . to be immune from criminal indictment under the FSIA, Congress should amend the FSIA to expressly so state."); *U.S. v. Noriega*, 117 F.3d 1206, 1212 (11th Cir. 1997) (noting that the FSIA does not address "foreign sovereign immunity in the criminal context").

criminally prosecuted in the United States. However, a different federal statute, Title 18, United States Code, Section 3231—which is not addressed in *Amerada Hess* or the prior circuit court cases on this subject—gives the federal district courts "original jurisdiction, exclusive of the courts of the States, of all offenses against the laws of the United States," without any explicit exception for or mention of foreign states.

Here, the U.S. District Court for the District of Columbia rejected the Corporation's sovereign immunity argument. The district court held that it could exercise jurisdiction under Section 3231 of Title 18, assumed that the FSIA framework applied in criminal proceedings, and held that the FSIA's commercial activity exception deprived the Corporation of immunity from the obligations of the subpoena.[7] It also rejected the argument that the subpoena was unenforceable on the grounds that the laws of Country A barred compliance with the subpoena.[8]

Following the district court's decision, the Corporation failed to comply with the subpoena. The district court then held the Corporation in contempt and imposed a monetary fine, which increased with each day of non-compliance.[9] The Corporation appealed to the D.C. Circuit, and following secret appellate proceedings for which the court took the extraordinary step of shutting down an entire floor of the courthouse during oral argument, the D.C. Circuit affirmed the district court in its Judgment issued on December 18, 2018.

In that Judgment, the Court held that: (1) 18 U.S.C. § 3231 provided the District Court with subject matter jurisdiction even if no provision of the FSIA itself did; (2) assuming that the FSIA's grant of immunity extends to criminal proceedings, the government had made a sufficient showing that the FSIA's commercial activity exception applied; and (3) the contempt sanctions issued by the district court were a permissible remedy for the Corporation's non-compliance with the grand jury subpoena.

The Full Opinion Issued By the D.C. Circuit's on January 8, 2019

On January 8, 2019, the D.C. Circuit issued a partially redacted opinion (with the unredacted opinion filed under seal) that provided additional insight into the Court's reasoning, particularly with respect to the questions of criminal jurisdiction and immunity.[10] The *per curiam* opinion was joined by Circuit Judges Tatel and Griffith, with Senior Judge Williams concurring in part in the opinion and concurring in the judgment.

Criminal Jurisdiction

First, the D.C. Circuit held that the district court had jurisdiction over the action, pursuant to 18 U.S.C. § 3231, which provides that district courts have jurisdiction over "all offenses against the laws of the United States." The Court indicated that such language is broad enough to cover criminal proceedings, including against foreign sovereign defendants or respondents.[13] It also noted that, although Section 1330(a) of the FSIA—which is the Act's sole jurisdiction-conferring provision—confers such jurisdiction only for "*civil* actions" where an FSIA immunity exception applies,[11] that provision does not expressly or impliedly repeal the jurisdictional grant conferred in Section 3231 of Title 18.[12] Thus, rather than viewing Section 1330(a) as an implied repeal of the jurisdictional grant in Section 3231, the two statutes "'readily could been seen as supplementing one another' . . . because criminal jurisdiction can be confined to those cases where the Act's exceptions to immunity apply."[13]

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7 *In re Grand Jury Subpoena I* at 1.

8 *Id.*

9 *Id.*

10 *In re Grand Jury Subpoena*, No. 18 Civ. 3071 (D.C. Cir Jan. 8, 2019), ECF No. 1767507 (Williams, J. concurring in part and concurring in the judgment) (hereinafter *In re Grand Jury Subpoena II*).

11 28 U.S.C. § 1303(a) (emphasis added).

12 *In re Grand Jury Subpoena II* at 7 (stating that Section 1303(a) cannot be read to "silently and simultaneously *revoke* jurisdiction over any case not falling within its terms, including any criminal proceeding").

13 *In re Grand Jury I* at 3 (citing *Amerada Hess*, 488 U.S. at 438).

Second, the Court assumed without holding that the exceptions to immunity set forth in the FSIA applied to criminal cases and indicated that the Act provided the sole source of immunity. In effect, if the sovereign's conduct fell within an FSIA exception it would be subject to both civil and criminal actions. The Court did not recognize any independent claims of sovereign immunity in criminal cases. In its analysis, the D.C. Circuit more fully addressed the prior case law discussing criminal jurisdiction and sought to reconcile any conflict between its ruling and the decisions of other courts. Specifically, in response to the Corporation's assertion that the D.C. Circuit's affirmance would create or deepen a split from the Sixth Circuit's opinion in *Keller*, the D.C. Circuit noted that, unlike in the instant case, in *Keller* "no party drew the Court's attention to the separate grant of subject-matter jurisdiction in section 3231."[14] As such, "the Sixth Circuit has yet to squarely address" the question the D.C. Circuit has now passed upon.[15]

Furthermore, the Court's Opinion included a more thorough refutation of the Corporation's reliance on *Amerada Hess*, in which the Supreme Court stated that the FSIA is "the sole basis for obtaining jurisdiction over a foreign state in our courts."[16] The Court noted, that *Amerada Hess* was a civil action where the FSIA "pretty plainly granted Argentina immunity" from jurisdiction of the United States courts, which led plaintiffs to rely on alternative statutes to establish jurisdiction.[17] The Court explained that, while the Supreme Court in *Amerada Hess* was "chiefly concerned that exercising jurisdiction under other [civil] provisions in title 28 [such as the Alien Tort Statute] would provide an end run around the Act's immunity provision," "[t]here is no danger of such evasion here: [the FSIA] tells us that, where the Act applies, an action must fall within one of the listed exceptions and says nothing about excluding criminal actions" from the exceptions to FSIA immunity.[18] As further support, the Court indicated that, as a practical matter, it was difficult to reconcile the Act's context and purpose—to hold foreign sovereigns accountable for their actions in certain circumstances, including with respect to commercial activity—with conferring absolute immunity on foreign states and their instrumentalities in criminal cases.

Third, the Court elaborated on its discussion of Congressional intent in adopting the FSIA and in so doing, focused on the fact that the recipient of the grand jury subpoena was a state-owned entity and not a foreign state. The D.C. Circuit pointed to the Act's legislative history, which "suggest[s] Congress was focused, laser-like, on the headaches born of private plaintiffs' civil actions against foreign states," rather than on limiting or foreclosing criminal jurisdiction. Indeed, it wrote that if Congress really intended to "so dramatically gut[ ] the government's crime-fighting toolkit" by providing for jurisdiction over foreign states and their instrumentalities only for certain "nonjury civil actions" and immunizing them from criminal prosecution, it likely would have done so more explicitly in the FSIA.[19] The Court, however, cited sources suggesting there was "uncertainty" in the law, before and after the Act, with respect to the scope of criminal immunity for "a commercial venture, entirely divorced from any governmental function" or "state-owned enterprises."[20]

FSIA Immunity and Exceptions

After establishing that criminal jurisdiction existed, the D.C. Circuit next considered whether an exception to the Corporation's assumed immunity applied. Based on its (largely redacted) analysis of *ex parte* evidence, the Court held that the government had demonstrated a "reasonable probability"[21] that the action was based upon an act outside the United States "in connection with a commercial activity" and that

14 *In re Grand Jury II* at 12.
15 *Id.*
16 *Id.* at 7 (quoting *Amerada Hess*, 488 U.S. at 434).
17 *Id.* at 8.
18 *Id.* at 9.
19 *Id.* at 10-11.
20 *Id.* at 10.
21 *Id.* at 15.

the "act caus[ed] a direct effect in the United States."[22] Thus, the Court found that the third clause of the FSIA's commercial activity exception had been satisfied and the Corporation lost any immunity with respect to compliance with the subpoena. The Court further held that the Corporation had failed to satisfy its burden of showing that Country A's law would prohibit complying with the subpoena, and thus enforcement of the subpoena would neither be unreasonable nor oppressive.

Concurring Opinion

Judge Williams concurred in the judgment and the majority opinion, but disagreed with the majority's analysis regarding which prong of the FSIA's commercial activity exception most aptly applied.[23] As noted, the majority relied on the third clause of the exception, which requires a showing that the action was based upon an act of the Corporation outside the United States "in connection with a commercial activity" and that such "act caus[ed] a direct effect in the United States."[24] However, Judge Williams asserted that, to the contrary, the first clause of the FSIA commercial activity exception—which requires establishing that the action was based upon the commercial activity "carried on in the United States by an American office of the Corporation"—"most compellingly establishes" that the Corporation is not immune from the grand jury subpoena.[25] The government argued that the "general U.S. commercial activity" of the Corporation formed "minimum contacts" sufficient to establish general jurisdiction over the Corporation, which brought "any of the Corporation's documents within the jurisdiction of the district court"—even if located abroad.[26] Judge Williams characterized the government's general jurisdiction theory as "a bit outdated" after Supreme Court decisions such as *BNSF Ry. Co. v. Tyrrell*,[27] under which a subpoena does not necessarily cover the Corporation's documents abroad based on "general U.S. commercial activity" of its American office. However, because the Corporation "raised no objection to the government's outdated understanding of what U.S. contacts were necessary to bring a foreign entity (and the documents it possesses) within the general jurisdiction of our courts," the government's "unrebutted" theory "is sufficient to compel compliance with the subpoena."[28] With all that said, the portions of the judgment relating to the actual commercial conduct of the Corporation are redacted, making it difficult to evaluate the strength of Judge Williams' analysis.

The Supreme Court's January 8, 2019 Denial of a Stay of Enforcement of the District Court's Contempt Order

Following the D.C. Circuit's affirmance of the District Court's contempt order against the Corporation, the Corporation sought an administrative stay of enforcement of that order from the Supreme Court, which was granted by Chief Justice Roberts on December 23, 2018. Thereafter, on January 8, 2019, the full Supreme Court issued an order vacating the temporary stay without any explanation. Separately, on the same day, the Corporation filed a motion seeking permission to file a petition for review under seal, which will go to the full court for consideration. On January 9, 2019, the Reporters Committee for

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22 *Id.* at 14 (quoting 28 U.S.C. § 1605(a)(2)). The FSIA's commercial activity exception has three prongs: A foreign state (including its agency or instrumentality) "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 [i] a commercial activity carried on in the United States by the foreign state; or [ii] upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or [iii] upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States." 28 U.S.C. § 1605(a)(2).

23 *In re Grand Jury II* at Concurring Op. 3.

24 *In re Grand Jury II* at 14.

25 *Id.* at 24.

26 *Id.* at 24, 25.

27 *BNSF Ry. Co. v. Tyrrell*, 137 S. Ct. 1549, 1559 (2017) (reiterating the rule that general jurisdiction may be exercised only where the defendant entity is "at home" and not based on the magnitude of its contacts with the United States).

28 *In re Grand Jury Subpoena II* at 24, 25, 26.

Freedom of the Press moved in the D.C. Circuit for an order unsealing the briefs, record, and oral argument transcript.

Conclusion

It is hard to definitively predict what further developments will materialize before the Supreme Court on this matter, but it is possible that some insight can be gleaned from the Court's January 8, 2019 order vacating the administrative stay entered by Chief Justice Roberts on December 23, 2018. Although the Supreme Court's order lacked any stated reasoning, the case law identifies general criteria for assessing whether to grant a stay, including consideration of: (1) whether there is a "reasonable probability" that at least four justices will vote to grant certiorari; (2) whether there is a "fair prospect" that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay.[29] The Supreme Court's denial of the stay, without comment or dissent, could signal that it may be disinclined to grant a petition for a writ of certiorari to review of the merits of the Court of Appeals' ruling and/or to ultimately rule in the Corporation's favor. Moreover, given the D.C. Circuit's narrowly-crafted opinion and its attempt to reconcile any perceived split with the Sixth Circuit, the Supreme Court may be further dissuaded from granting any petition at this time.

As things current stand, the D.C. Circuit's opinions resolve 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 over civil actions does not implicitly preclude jurisdiction over criminal actions and that the federal courts have criminal jurisdiction over all offenses against the laws of the United States regardless of the identity of the defendant, the Court appears to have significantly expanded the types of cases to which foreign states and their instrumentalities are subject in the United States. In doing so, the Court found a lacuna in the Supreme Court's otherwise categorical statements that the FSIA is "the sole basis for obtaining jurisdiction over a foreign state in our courts."[30] It nonetheless remains to be seen whether a foreign state—as opposed to a state-owned entity—can commit and be prosecuted for an offense against the United States. Second, the Court appears to have held that at least state-owned entities and perhaps foreign states themselves are not immune from criminal jurisdiction and criminal prosecution in circumstances where, under the FSIA, they would be subject to civil suit. It based this determination, at least in part, on "how unsettled the common law of criminal immunities for a corporation owned by a foreign state" was historically and is today (which is a statement upon which reasonable minds might differ).[31]

The Concurrence also raises a number of further issues and suggests that certain state-owned corporations may be able to invoke principles of personal jurisdiction to resist a grand jury subpoena or prosecution outright or to narrow the scope of a subpoena to U.S.-located documents, while other state-owned corporations may not. Case law in the D.C. and Second Circuits holds that neither a foreign state nor a state-owned instrumentality over which the sovereign "exerts[] sufficient control" "to make it an agent of the State," is a "person" for purposes of the due process clause, which is the source of the minimum contacts requirement necessary for the exercise of personal jurisdiction.[32] However, a state-owned corporation not so sufficiently controlled by the state to constitute an agent of the foreign state is entitled to raise constitutional due process issues in those circuits.[33] Here, the Corporation's failure to

[29] *See Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010).

[30] *Amerada Hess*, 488 U.S. at 434.

[31] *In re Grand Jury Subpoena II* at 10.

[32] *TMR Energy Ltd. v. State Prop. Fund of Ukr.*, 411 F.3d 296, 301 (D.C. Cir. 2005). *See also Frontera Res. Azer. Corp. v. State Oil Co. of Azer. Republic*, 582 F.3d 393 (2d Cir. 2009).

[33] *See GSS Grp. Ltd. v. Nat'l Port Auth.*, 680 F.3d 805, 815 (D.C. Cir. 2012).

raise a minimum contacts argument could reflect a strategic decision to head off any attempt by the U.S. government to delve into the relationship between the Corporation and Country A so as to determine whether the Corporation is a "person" for Fifth Amendment purposes. But, going forward, depending on the relationship between the subpoena recipient or criminal defendant and its home state, due process principles may provide a foreign state-owned corporation a defense that the foreign state itself is not entitled to invoke. The Court's opinion also leaves open the possibility that if an entity could sufficiently show that enforcement of a subpoena would actually violate its home country's laws—a showing that the Corporation did not make based on the evidence before the D.C. Circuit—the entity may be able to successfully resist the subpoena as unreasonable or oppressive.

At bottom, these recent case developments are likely to continue to have potential implications for a range of actors, including foreign state-owned enterprises, foreign states, and federal prosecutors. To the extent the Supreme Court does not review the issues presented in *In re Grand Jury Subpoena*, the issues it presented may be relitigated with greater frequency as prosecutors seek to rely on it, going forward, in arguing that foreign state-owned entities and possibly foreign states themselves are subject to criminal prosecution in the United States so long as an FSIA exception applies.

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