

D.C. Circuit Finds Criminal Jurisdiction over Foreign State Where an Exception to Immunity Applies under the FSIA

On December 18, 2018, the United States Court of Appeals for the District of Columbia Circuit ruled that the Foreign Sovereign Immunities Act (FSIA) did not protect a foreign state-owned corporation from complying with a grand jury subpoena in a highly secretive criminal case in which all the parties' filings have been sealed.¹

Under the FSIA, foreign states and their agencies and instrumentalities are generally “immune from the jurisdiction of the courts of the United States” unless one of the statute’s enumerated exceptions to sovereign immunity applies.² The FSIA also limits that jurisdiction to “any nonjury *civil* action” under 28 U.S.C. § 1330.³ The United States Supreme Court has repeatedly held that the FSIA, section 1330, is the sole basis of jurisdiction in any action involving foreign sovereign defendants, and the Court has yet to recognize any exception to that comprehensive statutory scheme.⁴ Thus, the D.C. Circuit’s decision is significant because it departs from this long line of cases by holding that jurisdiction over a foreign sovereign in a criminal proceeding may be premised on a different provision, 18 U.S.C. § 3231, which grants federal courts “original” and “exclusive” jurisdiction over “all offenses against the laws of the United States.”⁵

I. The Trial Court Orders a Foreign State-Owned Corporation to Comply with a Grand Jury Subpoena

In the course of a criminal investigation, a grand jury issued a subpoena seeking information from an unnamed corporation owned by a foreign state identified only as “Country A.” It has been widely reported in the press that the subpoena was issued in connection with Special Counsel Robert S. Mueller III’s investigation into Russian interference in the 2016 U.S. presidential election. The corporation moved to quash (or suppress) the subpoena on the grounds that (1) the court lacked jurisdiction over a foreign sovereign entity in a criminal proceeding, (2) the corporation was protected by sovereign immunity under the FSIA, and (3) compliance with the subpoena would require the corporation to violate the laws of Country A.

¹ *In re Grand Jury Subpoena*, No. 18-3071, 2018 U.S. App. LEXIS 35441, at *6 (D.C. Cir. Dec. 18, 2018).

² 28 U.S.C. § 1604.

³ 28 U.S.C. § 1330(a) (emphasis added).

⁴ *See, e.g., Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993) (citing *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 444 (1989)).

⁵ *In re Grand Jury Subpoena*, 2018 U.S. App. LEXIS 35441, at *2 (quoting 18 U.S.C. § 3231).

The United States District Court for the District of Columbia denied the motion, finding that jurisdiction was proper under 18 U.S.C. § 3231, that an exception to sovereign immunity applied, and that Country A's laws were not an impediment to producing the requested information. When the corporation refused to obey the order, the district court imposed monetary sanctions for every day the corporation failed to comply.

II. The D.C. Circuit Affirms the District Court's Exercise of Criminal Jurisdiction over a Foreign Sovereign Entity

On appeal, the D.C. Circuit affirmed the district court's decision. The court of appeals recognized binding precedents establishing that the FSIA is the exclusive source of jurisdiction over foreign sovereigns, but reasoned that that body of law applied only in civil actions and did not extend to the criminal context. It further explained that, unlike other grants of *civil* jurisdiction, 18 U.S.C. § 3231 "readily could be seen as supplementing" the FSIA because *criminal* jurisdiction could be limited to those cases in which the FSIA's exceptions to immunity applied.⁶ In effect, the court grafted the text of 18 U.S.C. § 3231 onto the FSIA's jurisdictional provisions under 28 U.S.C. § 1330 to authorize criminal jurisdiction over a foreign sovereign entity.

Assuming that the FSIA's grant of sovereign immunity covered criminal actions, the court agreed that such immunity had been defeated in this case because the United States established a "reasonable probability" that the FSIA's commercial activity exception had been satisfied.⁷ And that showing could be made through *ex parte* submissions when "necessary to ensure the secrecy of ongoing grand jury proceedings."⁸ Thus, the court concluded that the FSIA did not immunize the corporation from complying with the grand jury subpoena.

The court of appeals also rejected the argument that complying with the subpoena would violate Country A's laws. The court found that the text of the foreign statute did not support the corporation's position and that the textual interpretation offered by the corporation's counsel and a regulator from Country A "lack[ed] critical indicia of reliability."⁹ Finally, the D.C. Circuit affirmed the lower court's order imposing monetary sanctions for non-compliance, although the court of appeals acknowledged that "[w]hether and how that sanction" can be enforced was a "separate question for a later day."¹⁰

⁶ *Id.* at *3 (quoting *Amerada Hess*, 488 U.S. at 438).

⁷ *Id.* at *5 (quoting *In re Sealed Case*, 832 F.2d 1268, 1274 (D.C. Cir. 1987)).

⁸ *Id.* (quoting *In re Sealed Case*, 151 F.3d 1059, 1075 (D.C. Cir. 1998)).

⁹ *Id.* at *6 (citing *Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co. Ltd.*, 138 S. Ct. 1865, 1873-74 (2018)).

¹⁰ *Id.*

On December 22, the corporation filed an application in the Supreme Court to stay the district court's order. The following day, Chief Justice John G. Roberts stayed the order, including the accrual of monetary penalties, pending a response by the United States, which was due on December 31, 2018.¹¹

About Curtis

Curtis, Mallet-Prevost, Colt & Mosle LLP is a leading international law firm. Headquartered in New York, Curtis has 17 offices in the United States, Latin America, Europe, the Middle East and Asia. Curtis represents a wide range of clients, including governments and state-owned companies, multinational corporations and financial institutions, money managers, sovereign wealth funds, privately held businesses, individuals and entrepreneurs.

For more information about Curtis, please visit www.curtis.com.

Attorney advertising. The material contained in this Client Alert is only a general review of the subjects covered and does not constitute legal advice. No legal or business decision should be based on its contents.

Please feel free to contact any of the persons listed below if you have any questions on this important development:



Joseph D. Pizzurro

Partner
jpizzurro@curtis.com
New York: +1 212 696 6196



Robert B. Garcia

Partner
robert.garcia@curtis.com
New York: +1 212 696 6052



Kevin A. Meehan

Partner
kmeehan@curtis.com
New York: +1 212 696 6197



Juan O. Perla

Associate
jperla@curtis.com
New York: +1 212 696 6084

¹¹ *In re Grand Jury Subpoena*, No. 18A669, 2018 U.S. LEXIS 7305, at *1 (Dec. 23, 2018).