ASIL Insight

Foreign Officials and Sovereign Immunity in U.S. Courts

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The Foreign Sovereign Immunities Act (FSIA) provides that foreign states shall be immune from the jurisdiction of U.S. courts unless the suit falls within a specified statutory exception to immunity. There is currently a conflict among the federal circuit courts over whether suits against individual foreign officials are covered by the FSIA. If such suits are not covered by the FSIA, additional questions are raised concerning a possible common law immunity for foreign officials. This Insight describes both the conflict and the additional questions.

Background

The FSIA does not define "foreign state" directly, but rather provides that for the purposes of the Act a "foreign state" "includes a political subdivision" as well as an "agency or instrumentality."[1] The phrase agency or instrumentality is in turn defined to include "any entity" that "is a separate legal person, corporate or otherwise" and that is either an organ of a foreign state or has a majority of its shares or other ownership interests owned by a foreign state.[2]

The FSIA does not specifically include individual foreign officials in its definition of a foreign state. Nor is there any indication in the legislative history of the Act that it was intended to confer immunity on individuals. Nevertheless, in a 1990 decision, *Chuidian v. Philippine National Bank*, the U.S. Court of Appeals for the Ninth Circuit held that suits against foreign officials for actions taken in their official capacity are covered by the FSIA.[3] In that case, a Philippine citizen sued a member of a Philippine governmental commission after the official instructed a bank not to honor a letter of credit that had been issued by issued by the former Marcos government. In holding that the defendant was entitled to sovereign immunity from the suit, the court reasoned that the terms "agency," "instrumentality," "organ," "entity," and "legal person," "while perhaps more readily connoting an organization or collective, do not in their typical legal usage necessarily exclude individuals."[4] The court also reasoned that, if individual foreign officials lacked immunity, litigants could "accomplish indirectly what the [FSIA] barred them from doing directly" by simply naming the responsible official rather than the foreign state as the defendant.[5]

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DOCUMENTS OF NOTE

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- Yousuf v. Samantar
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- U.S. Court of Appeals for the 4th Circuit
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In *Chuidian*, the Executive Branch filed an amicus curiae brief arguing that individual foreign officials were not covered by the FSIA, but that the FSIA should be interpreted as leaving intact the common law immunity that such officials would have possessed prior to the FSIA's enactment.[6] While the Ninth Circuit recognized that the Executive Branch's proposed approach might reduce the danger that the FSIA's conferral of immunity would be circumvented through pleading against responsible officials rather than the state, the court nevertheless rejected it as inconsistent with what it understood to be the purposes of the FSIA. One such purpose, the court explained, was to shift immunity determinations away from the Executive Branch to the courts, whereas the court assumed that, if the pre-FSIA immunity regime were to be applied to suits against individual foreign officials, "presumably we would once again be required to give conclusive weight to the State Department's determination of whether an individual's activities fall within the traditional exceptions to sovereign immunity."[7] The court also thought that allowing a common law immunity regime to exist alongside the FSIA's immunity regime would be inconsistent with Congress's effort in the FSIA to regulate sovereign immunity comprehensively. [8]

Until recently, all the circuit courts to have addressed the issue had agreed with the Ninth Circuit that suits against individual foreign officials for actions taken in their official capacity are covered by the FSIA, although many of these courts did so without much independent analysis.[9] The first circuit court to suggest a contrary view was the Seventh Circuit in a 2005 decision, *Enahoro v. Abubakar*.[10] In that case, a group of Nigerian citizens was suing a former member of a military junta that had ruled Nigeria, alleging that he was responsible for acts of torture and murder in Nigeria. In concluding that the defendant was not covered by the FSIA, the court stated that it was "troubled" by the reasoning in *Chuidian*, and it expressed the view that "[i]f Congress meant to include individuals acting in the official capacity in the scope of the FSIA, it would have done so in clear and unmistakable terms."[11]

Conflict in the Circuits

In a decision issued in January 2009, *Yousuf v. Samantar*, the Fourth Circuit squarely disagreed with *Chuidian*.[12] In *Yousuf*, a group of Somali citizens brought suit under the Alien Tort Statute and the Torture Victim Protection Act against a former high-ranking Somali official, alleging that he was responsible for acts of torture and other human rights violations committed against them in Somalia. The district court concluded that the defendant was entitled to immunity under the FSIA and proceeded to dismiss the action because none of the FSIA's exceptions to immunity was satisfied. In reversing this decision, the Fourth Circuit reasoned that the phrase "separate legal person" in the FSIA's definition of agency or instrumentality "suggests that corporations or other business entities, but not natural persons, may qualify as agencies or instrumentalities."[13] The court also pointed out that the definition of agency or instrumentality goes on to require that the entity be neither a citizen for purposes of certain diversity of citizenship provisions that are inapplicable to individuals, nor "created under the laws of any third country," a phrase that would not make sense as applied to individuals.[14] In addition, the court observed that the service of process provisions of the FSIA do not appear to contemplate service on individual defendants.[15] Finally, the court noted that the FSIA's legislative history gives no indication that the phrase "separate legal person" applies to natural persons.[16] The court did not address whether the defendant in that case was entitled to common law immunity and instead remanded to the district court on that and other issues.

As it argued in *Chuidian*, the Executive Branch has continued to maintain that suits against individual foreign officials do not fall within the

FSIA, but that such officials should receive the benefit of common law immunity.[17] Such common law immunity, the Executive Branch has argued, extends to all acts "performed on the state's behalf, such that they are attributable to the state itself," and it has further argued that this immunity is not subject to the exceptions set forth in the FSIA.[18] In addition, the Executive Branch has contended that, although it "need not appear in each case in order to assert the immunity of a foreign official, . . . where it does so appear, its determination is conclusive."[19] Like the Fourth Circuit in *Yousuf*, the Executive Branch has also criticized the textual analysis by the Ninth Circuit in *Chuidian*.

An Alternate Approach: Treating the State as the Real Party in Interest

It may turn out that there is a better textual basis for applying the FSIA to suits against individual officials than the "agency or instrumentality" language relied upon by the Ninth Circuit in *Chuidian*. As noted above, the term "foreign state" is not directly defined in the FSIA. It could be argued that, when an individual foreign official is sued for conduct carried out in an official capacity, the suit is actually one against the state rather than against the individual, given that states can only act through individuals. Indeed, as the Supreme Court has noted in the context of suits against officials of U.S. states, "official-capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent."[20] Under this approach, a foreign official might not need to fall within the definition of "agency or instrumentality." Rather, an official-capacity suit could simply be characterized as one against the foreign state itself, notwithstanding the plaintiff's effort to plead against the individual. Somewhat analogously, under a statute known as the Westfall Act, suits against federal employees are treated as suits against the United States if the Attorney General certifies that "the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose."[21]

In addition to avoiding some of the textual problems associated with *Chuidian*'s "agency or instrumentality" approach, this "foreign state" approach might also address some of the policy concerns that have been raised by the Executive Branch. The Executive Branch has been concerned that, under the *Chuidian* approach, individual officials will be denied immunity whenever the case falls within one of the FSIA's statutory exceptions to immunity, potentially exposing individual officials to broad personal liability for a foreign state's commercial activities.[22] Under the "foreign state" approach, however, the foreign officials would not be subjected to any personal liability for acts carried out in an official capacity, since the suit would be treated as one against the state, not against the officials. The Executive Branch also has expressed concern that, under the *Chuidian* approach, suits against foreign officials will be subject to the FSIA's more lenient rules concerning attachment of assets and punitive damages that apply when a suit is brought against an agency or instrumentality rather than the foreign state itself.[23] Under the "foreign state" approach, however, foreign officials acting in an official capacity would not themselves be considered agencies or instrumentalities, so the more lenient rules would apply to their acts only if the entity they worked for otherwise fell within the definition of "agency or instrumentality."

Common Law Immunity

Despite these considerations, even the "foreign state" approach might need to leave some room for common law immunity for officials who are no longer in office. The Supreme Court has held that the determination of whether an entity qualifies as an "instrumentality" of a foreign state should be based on the facts that exist at the time the lawsuit is brought

rather than at the time of the conduct in question.[24] If that temporal standard were applied to suits against individual officials (despite the potentially greater foreign relations sensitivities in such suits), it might mean that only officials in office at the time the suit is filed would be able to invoke the protections of the FSIA. Indeed, in *Yousuf*, the Fourth Circuit invoked this proposition as an alternative justification for its reversal of the district court, since the defendant in that case was no longer in office.[25] According to the Executive Branch, however, even former officials should be protected by common law immunity for their official acts taken while in office.[26]

Finally, it should be noted that some courts have already concluded that one aspect of immunity relating to foreign officials is governed by a common law approach rather than the FSIA – the immunity of foreign heads of state (such as presidents, prime ministers, monarchs, and ministers for foreign affairs).[27] Unlike other government officials, heads of state may be entitled under international law to absolute immunity from the jurisdiction of foreign courts, without regard to the distinction between official and personal capacity, at least while they are in office.[28] In applying head of state immunity, U.S. courts tend to give substantial deference to the views of the Executive Branch, just as courts did with respect to foreign sovereign immunity more generally prior to the enactment of the FSIA.[29]

About the Author

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Endnotes

[1] 28 U.S.C. § 1603(a).

[2] 28 U.S.C. § 1603(b).

[3] 912 F.2d 1095 (9th Cir. 1990).

[4] Id. at 1101.

[5] Id. at 1102.

[6] See id. at 1101.

[7] Id. at 1102.

[8] Id. at 1102-03.

[9] See, e.g., Keller v. Central Bank of Nigeria, 277 F.3d 811, 815 (6th Cir. 2002); Byrd v. Corporacion Forestal y Industrial de Olancho S.A., 182 F.3d 380, 388 (5th Cir. 1999); El-Fadl v. Central Bank of Jordan, 75 F.3d 668, 671 (D.C. Cir. 1996).

[10] See 408 F.3d 877 (7th Cir. 2005).

[11] Id. at 881-82.

[12] 552 F.3d 371 (4th Cir. 2009).

[13] Id. at 380.

[14] Id.

[15] Id. at 380-81.

[16] Id. at 381.

[17] See, e.g., Brief for the United States as *Amicus Curiae* in Support of Affirmance, Matar v. Dichter, No. 07-2579-cv (Dec. 19, 2007), at http://ccrjustice.org/files/Matar%20v%20%20Dichter,%20US%20for%20Defendants%20Amicus%20Brief%2012.19.07.pdf .

[18] Id. at 21.

[19] Id. at 3.

[20] Monell v. Dep't of Social Services, 436 U.S. 658, 690 n.55 (1978).

[21] 28 U.S.C. § 2679(d). For a recent decision with reasoning along these lines, albeit one that ultimately follows the *Chuidian* approach, see In re Terrorist Attacks on September 11, 2001, 538 F.3d 71, 84 (2d Cir. 2008).

[22] See Brief for the United States (cited in note 17), at 15.

[23] See id. at 16-17.

[24] See Dole Food Co. v. Patrickson, 538 U.S. 468, 480 (2003).

[25] 552 F.3d at 381-83.

[26] See Brief for the United States (cited in note 17), at 17-18.

[27] See, e.g., Ye v. Zemin, 383 F.3d 620, 625 (7th Cir. 2004); United States v. Noriega, 117 F.3d 1206, 1212 (11th Cir. 1997); Lafontant v. Aristide, 844 F. Supp. 128, 131-37 (E.D.N.Y. 1994).

[28] See, e.g., Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium), 2002 ICJ Rep. 3 (Feb. 14) (holding that a minister for foreign affairs was entitled to absolute immunity from foreign criminal jurisdiction).

[29] See, e.g., *Zemin*, 383 F.3d at 625-27.