Watch out, Ministers! You are not Immune Under the U.S. Foreign Sovereign Immunities Act*

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Abstract

Recently the United State Supreme Court made a decision on whether the U.S. Foreign Sovereign Immunities Act (FSIA) should apply to a foreign official. In a U.S court, a civil action was brought by some victims of human rights violations, such as torture and extrajudicial killings in Somalia, commanded by a former Somalian government official who was Defense Minister at the time of such violations. The foreign official claimed immunity from the jurisdiction of the U.S. courts under the FSIA which grants immunity, with exceptions, to a foreign state including “agency or instrumentality of a foreign state.” He contended that since he was a high-ranking government official, he could be categorized as an “agency or instrumentality of a foreign state,” and subsequently, he is immune as a foreign state.

The Supreme Court rejected his claim, denying the application of the FSIA to the immunity of foreign officials. The Court's main argument is that an “agency or instrumentality” under the FSIA means an “entity” which includes a legal person, not a natural person. Thus, the immunity issue of a foreign official cannot be analyzed by the FSIA, but by the common law such as case laws.

This decision is quite meaningful since it clearly sets up the scope of the FSIA by distinguishing immunity for a foreign state from that for foreign officials. With this new decision, the Court abrogated precedents of lower courts which have allowed or discussed immunity of foreign officials under the FSIA. Although this decision left open some important questions, such as whether a former foreign official can be immune if he acted within his official capacity, whether human right violations can be regarded as acts committed within or outside the scope of official capacity, whether such human right violations may be subject to exceptions to immunity, etc., the decision at least primarily may prevent a foreign official from simply raising his immunity defense under the FSIA. Consequently, it is expected that immunity of foreign officials will be scrutinized, by applying the well-recognized common law including international law.

This paper takes a glance at the FSIA from its legislative history to rules on immunity for a foreign state to find out whether the FSIA may apply to foreign officials, and then reviews backgrounds and discussions of this case from lower courts to the Supreme Court.

Key words: Foreign Sovereign Immunities Act, foreign official, immunity, exception to immunity, jurisdiction

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I. Introduction

Personally, I have been troubled in understanding the Foreign Sovereign Immunities Act of 1976 (FSIA) of the United States since it encompasses the overpowering and extraterritorial authority to sue other foreign governments, agencies, or instrumentalities in the U.S. courts. Sovereignty of an individual state has been understood as a sovereign power that a state should not be sued by another state under the doctrine of sovereign immunity. However, its sovereign power has been downsized by such a codified foreign law like the FSIA under the theory of restrictive immunity.

The FSIA allows personal and subject matter jurisdiction to the U.S. courts if a foreign state committed certain activities which are not classified as public or sovereign activities although such activities were committed outside the U.S. Therefore, when a court decides on whether the FSIA applies or excludes the immunity from a foreign state, the court must first determine who or what can be qualified as a foreign state under the FSIA, and what kinds of activities the foreign state is engaged.

In June, 2010, the United States Supreme Court decided on whether foreign officials are qualified as a foreign state under the FSIA. It concluded that a former Somalian defense minister was not immune under the FSIA from a suit for his violations of human rights committed in Somalia. The Court reasoned that the FSIA generally protects foreign states from being sued in American courts, but it does not protect public officers of a foreign state since the FSIA does not intend to include ‘individual’ foreign officials in the categories of a foreign state. Basically, while this decision recognized the immunity of a foreign state, it applied the scope of a foreign state in narrower and stricter ways, by excluding public officials from the categories of ‘an agency or instrumentality’ of a foreign state under the FSIA.

Thus, this paper revisits the FSIA, by looking over its mandate to exercise its power over foreign states. The paper mainly focuses on the recent Supreme Court discussion and interpretation of the scope of a foreign state on whether a foreign official is included in a foreign state under the FSIA, while it overviews other relevant issues of the FSIA including jurisdictional issues.