OSAKA UNIVERSITY LAW REVIEW No. 72 (February 2025) 79-90

A Landmark Change from Absolute to Restrictive Immunity: A Commentary on Foreign Sovereign Immunity Law of the People's Republic of China*

Zhengxin HUO**

Abstract

On 1 September 2023, the Chinese national legislature adopted the 'Law of the People's Republic of China on Foreign State Immunity'. Comprising 23 articles, the Law represents a landmark change in China's foreign state immunity doctrine from absolute to restrictive immunity. The Law deals with a foreign state's immunity and property from civil lawsuits in Chinese courts and judicial enforcement in the People's Republic of China, representing a new chapter for foreign states in Chinese courts. The adoption of the restrictive immunity doctrine significantly increases the scope of proceedings to be pursued against foreign states with respect to their commercial transactions and enforcement actions to be implemented against foreign states' commercial assets within China. Parties entering commercial transactions with foreign states will benefit from this law in the event that a dispute arises, and thus, enforcing their rights against a state in Chinese courts becomes necessary.

1. Position of the People's Republic of China on Immunity before 2023

The doctrine of immunities of states and their property straddles the boundaries between public and private international laws. In accordance with this principle, with some exceptions, a foreign State enjoys immunity from the jurisdiction of the

---

* This paper includes insights from a lecture titled 'New Developments in Foreign Relations Law in China', held at the Osaka University Graduate School of Law and Politics on 29 March 2024. This lecture was part of the research outcomes supported by the Japan Society for the Promotion of Science (JSPS) Grant-in-Aid for Scientific Research, specifically within the project titled 'Multilateral Studies on the Fourth Restatement of Foreign Relations Law of the United States.'

** Professor of Law, Faculty of International Law, China University of Political Science and Law. He can be reached at zhengxinh@cupl.edu.cn.

courts of another State. That is, a forum State's courts are precluded from either subjecting a foreign State to its jurisdiction or implementing pre-judgment or post-judgment measures of constraint such as attachment, arrest, or execution against the property of the foreign State.[1)]

In the 19th century and for most of the 20th century, the 'absolute' rule of immunity prevailed, whereby foreign sovereign states were accorded immunity for all activities, whether governmental or commercial. However, the increase in state trading in the 20th century resulted in several states developing a distinction, generally known as the 'restrictive' theory, between acts of government, *acta jure imperii*, and the acts of a commercial nature, *acta jure gestionis*. Under the restrictive theory, states are immune with respect to the government but not commercial acts. In 2004, the United Nations adopted the Convention on Jurisdictional Immunities of States and Their Property (hereinafter referred to as the UN Convention on Immunities), which also endorses the restrictive theory of sovereign immunity.[2)]

Despite the lack of legislation on immunity before 2023, the People's Republic of China (hereinafter referred to as PRC) had met more than once with lawsuits against itself or its property in the courts of foreign jurisdictions. On those occasions, the PRC government had clearly stated its position and attitude regarding the issue of the immunities of states and their property.

In the well-known case of Russell Jackson *et al. v.* The People's Republic of China,[3)] the plaintiffs instituted an action in November 1979, the year when the Sino-US diplomatic relationship had just normalised, seeking payment for certain bearer bonds, allegedly in default, which were issued by the government of the Qing Dynasty in 1911 for the express purpose of financing the construction of the Huguang Railroad. The jurisdiction of the U.S. District Court for the Northern District of Alabama was invoked under the Foreign Sovereign Immunities Act of 1976 (hereinafter referred to as FSIA).[23] In October 1981, a default judgment was entered against the defendant, the PRC, owing to China's failure to appear. Damages were subsequently awarded in 1982.[24]

---

1) Dahai Qi, "State Immunity, China and Its Shifting Position," Chinese Journal of International Law 7, no. 2 (July 2008): 307–338.

2) Eileen Denza, "The 2005 UN Convention on State Immunity in Perspective," International and Comparative Law Quarterly 55, no. 2 (April 2006): 395–398; Richard Gardiner, "UN Convention on State Immunity: Form and Function," International and Comparative Law Quarterly 55, no. 2 (April 2006): 407–410.

3) 550 F.Supp.869(1982).

The Chinese government reacted strongly to the judgment. On 9 November 1982, the Chinese Embassy in the United States delivered the following statement to the U.S. District Court for the Northern District of Alabama transmitted by the U.S. State Department:

'*... In accordance with the principle of equality of all countries as stipulated in international law, the People's Republic of China, as a sovereign state, is entitled to enjoy judicial immunity. It will accept no suit against it by any person at a foreign court, nor will it accept judgment against it by any foreign court... The Chinese government requests the U.S. government to take effective measures immediately to prevent the development of the situation and revoke the above unreasonable judgment. Should the U.S. court execute the judgment forcibly and attach China's properties in the United States, the Chinese government will reserve its right to take corresponding measures. The U.S. side must be held for all the consequences arising therefrom.*'[4)]

In fact, the Jackson case was a legal event of political significance during the normalisation period of the Sino-American relationship in the 1980s. Considering the strong reactions from the Chinese government and extreme importance of Sino-American relations against the background of the Cold War, the U.S. State Department submitted amicus briefs to the U.S. District Court for the Northern District of Alabama, which suggested that the interest of the United States was at stake in the judgment.

In August 1983, the Chinese government appointed a private American counsel to make a special appearance at the U.S. Court to move for relief of the default judgment and oppose the Court's jurisdiction over China. On 27 February 1984, the U.S. District Court for the Northern District of Alabama ultimately revoked its default judgment. Thereafter, the plaintiffs appealed to the U.S. Court of Appeals for the Eleventh Judicial Circuit for 'a writ of certiorari' but failed. On 9 March 1987, the Supreme Court of the United States also dismissed the appeal, thus finally ending the case.

This case has been proven to be extremely influential in China, not only providing an opportunity to see how the Chinese government comprehensively elaborated its official position on the principle of state immunity but also propelling a wave of studies on state immunity by Chinese international law scholars in the 1980s.

---

4) Huang Jin; Ma Jingsheng, "Immunities of States and Their Property: The Practice of the People's Republic of China," Hague Yearbook of International Law 1 (1988): 163–181.

The landmark case of Democratic Republic of the Congo and Others *v* FG Hemisphere Associates LLC (hereinafter referred to as 'Congo Case') is also worthy of particular notice.[5] The core question of the law in this case concerns the extent of the state immunity from suit and execution available in the courts of Hong Kong. The majority was of the view that state immunity, a principle based on the mutual acknowledgement of equality among sovereign states; hence, the Court of Final Appeal of Hong Kong (hereinafter referred to as 'CFA') decided that before deciding on the issue of state immunity, a reference had to be made to the Standing Committee of the National People's Congress of the PRC (hereinafter referred to as NPCSC) pursuant to Article 158 of the Basic Law. The NPCSC published its interpretation on 26 August 2011. It reasoned that 'state immunity concerns whether the courts of a state have jurisdiction over foreign states and their properties', and 'directly relates to the state's foreign relations and international rights and obligations'. Thus, because the issue of sovereign immunity falls within the realm of foreign affairs, the Chinese government has the power to decide on this issue, and Hong Kong courts are bound to follow the PRC's practice in adopting the absolute approach.[6] On 8 September 2011, the CFA issued its final judgment, dismissing the entire case based on DRC's state immunity.[28]

The above and other important cases compelled the conclusion that the PRC—for a long period—insisted on the absolute doctrine of the immunities of states and their property.[7]

2. Background of the Change from Absolute to Restrictive Immunity

Recent practice has suggested that the insistence on absolute immunity no longer satisfies the interests of the PRC. First, Chinese citizens and enterprises were not entitled to defend their rights and interests before Chinese courts when commercial disputes arose between them and foreign states. Second, in recent years, some foreign courts, U.S. courts in particular, have frequently accepted and exercised jurisdiction over baseless and frivolous lawsuits against the PRC,

---

5) "FG Hemisphere Associates LLC v. Democratic Republic of the Congo and Others," International Law Reports 142 (2011): 216–307.

6) Available at http://www.npc.gov.cn/zgrdw/huiyi/cwh/1122/2011-08/27/content_1670088_2.htm as last accessed on 5 November 2024.

7) For instance, *Scott v. The People's Republic of China* (No. CA3-79-0836 D., N.D. Tex. Filed. 29 June 1979), *Yang Rong v. Liaoning Province Government* (371 U.S. App. D.C. 507; 452 F.3d 883, 2006 U.S.).

creating an imbalanced situation insofar as Chinese courts cannot exercise jurisdiction over foreign states based on absolute immunity.

In March 2020, 35 deputies of the NPC raised a special motion during the two sessions, urging the legislature to accelerate formulating a foreign state immunity law that grants Chinese citizens and companies the right to sue other countries in domestic Chinese courts in an attempt to retaliate against the US's abuse of litigation against China over the COVID-19 pandemic.[8] Noteworthily, after the COVID-19 pandemic outbreak in 2020, some Americans and even individual states within the US sued China in American courts, demanding that China assume substantial compensation liability for the pandemic, and these cases were accepted by US courts. Meanwhile, some Chinese citizens wanted to sue the US government in Chinese courts, accusing it of smearing and stigmatising China, thereby infringing upon the Chinese nation's legitimate interests and citizens. However, owing to China's stance on absolute immunity, its courts could not accept these cases.

The above situation illustrates that the stance of absolute immunity no longer helped safeguard the PRC's national interests. In fact, it has resulted in an unequal situation whereby foreign courts can exercise jurisdiction over the PRC, whereas Chinese courts cannot exercise jurisdiction over foreign states.

The 20th National Congress of the Communist Party of the PRC (hereinafter referred to as the CPC) held in October 2022 placed greater emphasis on the rule of law. Specifically, the report delivered by Xi Jinping—the CPC's General Secretary—to the Congress stressed that China would 'step up legislation in key, emerging, and foreign-related fields and advance the rule of law in domestic and foreign-related affairs in a coordinated manner, so that good laws are made to promote development and ensure good governance'. Consequently, since then, the Chinese legislature has noticeably progressed in foreign-related affairs.

3. The General Principle of CFSIL

On 1 September 2023, the Fifth Meeting of the NPCSC adopted the highly anticipated 'Law of the People's Republic of China on Foreign State Immunity' (hereinafter referred to as the CFSIL), which took effect on 1 January 2024.

---

8) Available at https://www.globaltimes.cn/page/202309/1297621.shtml#:~:text=Three%20days%20after%20China%27s%20top%20legislature%20adopted%20a,which%20all%20in%20turn%20boost%20China%27s%20higher-level%20opening-up as last accessed on 5 November 2024.

Comprising 23 articles,[30] the CFSIL represents a landmark change in the PRC's foreign state immunity doctrine from absolute to restrictive immunity. The FSIL commences with the basic premise that, as a general principle, foreign states enjoy immunity from suit and enforcement against their assets in Chinese courts, subject to the exceptions established in the FSIL.

The FSIL deals with the immunity of a foreign state and its property from civil lawsuits in Chinese courts and judicial enforcement in the PRC. Article 2 of the FSIL defines a 'foreign state' as (1) a foreign sovereign state, (2) a state institution or a constituent part of a foreign sovereign state, and (3) an organisation or individual authorised by a foreign sovereign state to exercise sovereign powers on its behalf.[9)]

Thus, if the foreign state, state organ, state-owned enterprises (SOE), or state-authorised organisation or individual does not execute any sovereign functions, it is not a 'foreign state' within the meaning of the FSIL and, thus, does not enjoy immunity from suit or enforcement before Chinese courts. Article 19(1) of the FSIL empowers the PRC's Ministry of Foreign Affairs (hereinafter referred to as the MFA) to determine whether an entity constitutes a 'foreign state' under the FSIL and issue a certificate to assert the MFA's position.[10)]

The definition of 'foreign state' does not seem to cover international organisations, such as the UN, World Bank, International Monetary Fund, and Asia

---

9) The FSIL does not deal with the PRC's immunity under Chinese law. Therefore, the current position that the Central People's Government enjoys 'absolute' sovereign immunity before the Chinese courts is unaffected by the FSIL. Under the PRC's Administrative Litigation Law, its administrative agencies and their employees can be subject to administrative lawsuits before Chinese courts.

10) Various Chinese laws and regulations have already drawn a distinction between states and SOEs. Even before the FSIL, foreign SOEs that did not execute sovereign functions could already be sued and their assets enforced against in Chinese courts. Under Chinese law, foreign SOEs that possess operational autonomy and do not execute sovereign functions are generally treated as separate entities from the state and do not enjoy state immunity, even where the state exercises a reasonable degree of control over them. It follows that awards issued against a foreign state cannot be enforced against SOEs operating in this manner as their assets are not treated as commercial assets of the foreign state.

The PRC's State Council has previously clarified that a Chinese SOE (i) is an independent legal entity executing activities on its own with no special status superior to other enterprises and (ii) is not considered to be part of the Central People's Government or deemed as performing functions on behalf of the Central People's Government when executing commercial activities (except for in exceptional circumstances). This position is not impacted by the FSIL.

Infrastructure Investment Bank. Therefore, the extent to which these international organisations and institutions enjoy immunity from suit and enforcement in the PRC and their immunity status continue to be determined by reference to the relevant existing Chinese law.

4. Key Exceptions to Jurisdictional Immunity

Regarding jurisdictional immunity, Article 3 of the CFSIL establishes the general rule that a foreign state and its property enjoy immunity from the jurisdiction of Chinese courts. Exceptions to this general rule are elucidated in Articles 4–12 of the CFSIL.

Articles 4–6 of the FSIL provide that a foreign state is not immune when it has consented to the jurisdiction of Chinese courts. Article 4 provides that a foreign state shall not enjoy immunity from suit where it has expressly submitted to the jurisdiction of Chinese courts by any of the methods specified in that article, including by written agreement. According to Article 5, a foreign state is deemed to have submitted to the jurisdiction of Chinese courts with respect to a particular matter if it brings proceedings as a plaintiff in a Chinese court or files a defence or counterclaim in Chinese court proceedings. However, Article 6 clarifies that a foreign state shall not be deemed to have consented to jurisdiction by appearing in Chinese courts to assert immunity, having its representatives testify to it, or choosing Chinese law to govern a particular matter.

The FSIL introduces a commercial activities exception to foreign state immunity from suit. Article 7 provides that a foreign state shall not be immune from proceedings arising from a commercial activity when that activity 'takes place in the territory of the PRC, or takes place outside the territory of the PRC but causes a direct effect in the territory of the PRC'. This provision corresponds to Article 10 of the UN Convention on Immunities. However, the Convention's exception does not mention the activity's location or effect. In this respect, the FSIL more closely resembles the United States' commercial activity exception, which permits suit based upon a commercial act or activity in the United States or upon a commercial act elsewhere that 'causes a direct effect in the United States'.

Article 7 broadly defines 'commercial activity' as activities related to goods or services transactions, investment, lending, and other commercial acts unrelated to the exercise of sovereign power. Further, it requests that Chinese courts comprehensively consider both an activity's nature and purpose when determining whether it constitutes 'commercial activity'. Considering both an activity's nature and purpose is likely to result in a narrower exception—and thus broader

immunity for foreign states—than considering either nature or purpose alone. However, how Chinese courts interpret the definition of 'commercial activity' in judicial practice remains unclear.

Article 8 provides that, subject to certain exceptions, immunity from suit shall not apply with respect to a contract concluded by a foreign state to obtain labour or services provided by an individual performed in whole or in part of the PRC's territory.

Article 9 creates a territorial tort exception to state immunity under which proceedings for compensation arising out of personal injury, death, damage, or loss of movable or immovable property caused by the relevant conduct of a foreign state in the PRC's territory. The territorial tort exception provided by the CFSIL is broader than that provided by the FSIA in two respects. First, although the FSIA's language suggests that only the injury must occur in the United States, the exception has been interpreted to require that the 'entire tort', both conduct and injury, occur on United States soil.[30] Second, the FSIA's tort exception contains two exceptions,[11] while the CFSIL does not include such exceptions.

Article 10 establishes an exception to immunity for claims involving (1) immoveable property in the PRC; (2) interests in moveable or immoveable property arising from gifts, bequests, or inheritance; and (3) interests in trust property and bankruptcy estates. This provision closely follows Article 13 of the UN Convention on Immunities. Article 11 provides that a foreign state shall not enjoy immunity from suit related to certain intellectual property-related matters in the PRC.

Moreover, Article 12 stipulates that a foreign state that has agreed to arbitrate disputes is not immune to jurisdiction with respect to certain matters requiring court review. These include 'the validity of the arbitration agreement', 'the recognition and enforcement of the arbitration award', 'setting aside of the arbitration award', and 'other matters related to arbitration which are subject to review by Chinese courts'.

5. Immunity of Property from Execution

Pursuant to customary international law, the immunity of a foreign state's property from compulsory measures, including the execution of a judgment, is

11) (1) claims based on the exercise of a 'discretionary function'; and (2) claims for malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights. 28 U.S.C. § 1605(a)(5)(A)(B).

separate from—and generally broader than—a foreign state's jurisdictional immunity. Therefore, Articles 13–15 of the CFSIL address the immunity of a foreign state's property from compulsory measures separately from a foreign state's jurisdictional immunity.

Article 13(1) of the CFSIL states that the property of a foreign state generally enjoys immunity from judicial enforcement by Chinese courts. Further, Article 13 (2) clarifies that a foreign state's submission to the jurisdiction of Chinese courts shall not be considered a waiver of immunity from judicial enforcement. Articles 14 and 15 of the FSIL elucidate exceptions to this general rule.

Article 14 includes the following three exceptions to immunity from judicial enforcement: (1) a foreign state has expressly waived such immunity; (2) a foreign state has specifically earmarked property for the enforcement of such measures; and (3) the enforcement of a valid judgment or ruling rendered by a Chinese court against the property of a foreign state, provided that it is used for commercial activities, relates to the proceedings, and is located in the PRC. Furthermore, Article 15 identifies types of property that shall not be considered used for commercial activities for the purpose of Article 14(3), including the bank accounts of diplomatic missions; property of a military character; central bank assets; and property of scientific, cultural, or historical value.

6. Procedural Matters

In addition to the provisions on immunities, the CFSIL specifies how a foreign state may be served and when a default judgment may be entered against a foreign state. Regarding issues not addressed by the FSIL, Article 16 states that the CPL and other relevant Chinese laws continue to apply.

Article 17 provides that Chinese courts may serve process on a foreign state in accordance with the means specified in international treaties to which the foreign state and PRC are contracting or acceding parties or by other means accepted by the foreign state and not precluded by the PRC's law. If neither of these means is available, a service may be provided by sending a diplomatic note to the foreign state's diplomatic authorities. A foreign state that filed a defence on the merits of the case in proceedings instituted against it shall not thereafter challenge the means whereby the service of the litigation documents had been affected.

If the foreign state does not appear before a Chinese court within the time limit specified by the court, Article 18 requires the Chinese court, 'on its own motion, [to] find out whether the foreign state enjoys jurisdictional immunity'. The court cannot enter a default judgment until at least six months after the foreign

state has been served. Thereafter, the judgment shall be served on the foreign state according to Article 17. The time limit for a foreign state to appeal a default judgment is six months from the date on which the service of the judgment is affected.

7. Role of MFA and Reciprocity Clause

The MFA plays an important role in the foreign state immunity framework established by the FSIL. As mentioned above, the MFA is entitled to determine whether an entity constitutes a 'foreign state'. Additionally, Article 19 (1) authorises the MFA to determine whether and when a state has been served process by diplomatic note, and other factual issues related to the acts of the state concerned. It should be emphasised that Chinese courts 'shall accept' certifying documents issued by the MFA enumerated in Article 19(1).

Article 19(2) provides that the MFA 'may' provide opinions to Chinese courts on other issues 'concerning major national interests such as foreign affairs'. The distinction between the first and second paragraphs of Article 19 suggests that certifications under the first paragraph are binding on Chinese courts, whereas opinions under the second paragraph may not be. Nonetheless, as 'foreign affairs are no small matters' and are a fundamental principle treasured by the Chinese government, it seems unlikely that Chinese courts will ignore the opinions that the MFA chooses to provide.

Noteworthily, the CFSIL contains a reciprocity clause, as Article 21 unambiguously states that if the immunity accorded by a state to the PRC and its property is less favourable than that provided by this Law, the PRC applies the reciprocity principle. The UN Convention on Immunities does not have a reciprocity provision—nor do most other states that have codified the law of state immunity.[12] Reciprocity for the purpose of the CFSIL implies that if a foreign state grants less immunity to the PRC, the PRC will respond by granting less immunity to that foreign state.

8. Concluding Remarks

The PRC's adoption of the restrictive theory of state immunity is a significant milestone in the law of state immunity and a significant step in China's

12) However, Russian law contains such a clause. See Russia Federal Law No. 297-FZ on the Jurisdictional Immunity of a Foreign State and the Property of a Foreign State in the Russian Federation [hereinafter Russian Law on State Immunity], art.4 (2016).

development of foreign-related legislation. Generally speaking, China has modelled its CFSIL on the UN Convention on Immunities, which harmonises Chinese law with the laws of other states that have adopted the restrictive approach. However, as noted above, the FSIL has distinctive characteristics—including its reciprocity clause and the MFA's important role—that are not found in the laws of most other countries.

Needless to say, the CFSIL represents a new chapter for foreign states in Chinese courts. The adoption of the restrictive immunity doctrine significantly increases the scope for proceedings to be pursued against foreign states with respect to their commercial transactions and for enforcement actions to be implemented against foreign states' commercial assets within the PRC.

Parties entering into commercial transactions with foreign states will benefit from the CFSIL in the event that a dispute arises, and enforcing their rights against a state in Chinese courts becomes necessary. Including express waivers of immunity extending to both immunity from suit and enforcement and confirming that the contract is considered by the state to be of a commercial nature arising from commercial activities will provide additional protection to non-state actors and mitigate the risk of a Chinese court concluding that immunity remains available.

The CFSIL itself is silent on whether it would apply to the Hong Kong and Macao Special Administrative Regions. However, because the issue of state immunity concerns acts of state and foreign affairs, which fall within the remit of the Central People's Government pursuant to the Basic Laws of Hong Kong and Macau, it is imperative that foreign state immunity rules in Hong Kong and Macao be aligned with the position now reflected in the new law.

It will be interesting to observe how lawsuits will be brought against foreign states in Chinese courts and how Chinese courts will exercise judicial discretion in such cases in light of the CFSIL.