China's Draft Law on Foreign State Immunity—Part II

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In December 2022, Chinese lawmakers published a draft law on foreign state immunity, an English translation of which is now available. In a prior post, I looked at the draft law's provisions on immunity from suit. I explained that the law would adopt the restrictive theory of foreign state immunity, bringing China's position into alignment with most other countries.

In this post, I examine other important provisions of the draft law, including immunity from attachment and execution, service of process, default judgments, and foreign official immunity. These provisions generally follow the U.N. Convention on Jurisdictional Immunities of States and Their Property, which China signed in 2005 but has not yet ratified.

China's draft provisions on immunity from attachment and execution, service of process, and default judgments make sense. Applying the draft law to foreign officials, however, may have the effect of limiting the immunity that such officials would otherwise enjoy under customary international law. This is probably not what China intends, and lawmakers may wish to revisit those provisions before the law is finally adopted.

Immunity from Attachment and Execution

Articles 13 and 14 of China's draft law cover the immunity of foreign state property from "judicial compulsory measures," which the U.N. Convention calls "measures of constraint" and the U.S. Foreign Sovereign Immunities Act (FSIA) refers to as measures of attachment and execution. They include both pre-judgment measures to preserve assets and post-judgment measures to enforce judgments. Under customary international law, immunity from attachment and execution is separate from and generally broader than immunity from suit. It protects foreign state property located in the forum state, in this case the property of foreign states located in China.

Article 13 provides that the property of a foreign state shall be immune from judicial compulsory measures with three exceptions: (1) when the foreign state has expressly waived such immunity; (2) when the foreign state has specifically designated property for the enforcement of such measures; and (3) to enforce Chinese court judgments when the property is used for commercial activities, relates to the proceedings, and is located in China. Article 13 further states that a waiver of immunity from jurisdiction shall not be deemed a waiver of immunity from judicial compulsory measures.

Article 14 goes on to identify types of property that shall *not* be regarded as used for commercial activities for the purpose of Article 13(3). These include the bank accounts of diplomatic missions, property of a military character, central bank assets, property that is part of the state's cultural heritage, property of scientific, cultural, or historical value used for exhibition, and any other property that a Chinese court thinks should not be regarded as being in commercial use.

Articles 13 and 14 of China's draft law closely parallel Articles 19-21 of the U.N. Convention. The main difference appears in Article 13(3)'s exception for enforcing court judgments, which is expressly limited to Chinese court judgments and requires that the property "relates to the proceedings." Article 19(c) of the U.N. Convention, by contrast, is not limited to judgments of the state where enforcement is sought and does not require that the property relate to the proceedings. On first glance, China's draft law appears to resemble more nearly § 1610(a)(2) of the U.S. FSIA, which is expressly limited to U.S. judgments and requires that the property be used for the commercial activity on which the claim was based.

Upon reflection, however, it appears that China's limitation of draft Article 13(3) to Chinese court judgments sets it apart from the U.S. practice as well as the U.N. Convention. In the United States, a party holding a foreign judgment may seek recognition of that judgment in U.S. courts, thereby converting it into a U.S. judgment. Because the U.S. judgment recognizing the foreign judgment falls within the scope of § 1610(a), it is possible to attach the property of a foreign state in the United States to enforce a non-U.S. judgment.

It seems that the same is not true in China, which is to say that Article 13(3) cannot be used to enforce foreign judgments. Under Article 289 of China's Civil Procedure Law (numbered Article 282 in this translation of the law prior to its

2022 amendment), the recognition of a foreign judgment results in a "ruling" (??). The text of Article 13(3), however, is limited to "judgments on the merits" (??), which appears to exclude Chinese decisions recognizing foreign judgments. (I am grateful to my students Li Jiayu and Li Yadi for explaining the distinction to me.) In short, Article 13(3) appears *really* to be limited to Chinese court judgments, as neither the U.N. Convention nor the U.S. FSIA are in practice.

There are other differences between the U.S. FSIA and China's draft law. With respect to the property of a foreign state itself, the FSIA requires that the property be used for a commercial activity in the United States by the foreign state—even when the foreign state has waived its immunity—which can be a difficult set of conditions to satisfy. Articles 13(1) and (2) of China's draft law, by contrast, impose no similar conditions. The U.S. FSIA has separate and looser rules for attaching the property of agencies or instrumentalities of foreign states in § 1610(b), rules that do not require the property to be used for a commercial activity in the United States as long as the agency or instrumentality is engaged in a commercial activity in the United States. And § 1611(b) of the FSIA singles out only central bank and military assets as exceptions to the rules allowing post-judgment attachment and execution, whereas the draft law's Article 14 additionally mentions bank accounts of diplomatic missions, property that is part of the state's cultural heritage, and property of scientific, cultural, or historical value used for exhibition.

Service of Process

China's draft law also provides for service of process on a foreign state. Article 16 states that service may be made as provided in treaties between China and the foreign state or "by other means acceptable to the foreign state and not prohibited by the laws of the People's Republic of China." (The United States and China are both parties to the Hague Service Convention, which provides for service through the receiving state's Central Authority.) If neither of these means is possible, then service may be made by sending a diplomatic note. A foreign state may not object to improper service after it has made a pleading on the merits. Again, this provision closely follows the U.N. Convention, specifically Article 22.

Section 1608 of the FSIA is the U.S. counterpart. It distinguishes between service on a foreign state and service on an agency or instrumentality of a foreign state.

For service on a foreign state, § 1608 provides four options that, if applicable, must be attempted in order: (1) in accordance with any special arrangement between the plaintiff and the foreign state; (2) in accordance with an international convention; (3) by mail from the clerk of the court to the ministry of foreign affairs; (4) through diplomatic channels. For service on an agency or instrumentality, § 1608 provides a separate list of means.

Default Judgment

If the foreign state does not appear, Article 17 of China's draft law requires a Chinese court to "take the initiative to ascertain whether the foreign state is immune from … jurisdiction." The court may not enter a default judgment until at least six months after the foreign state has been served. The judgment must then be served on the foreign state, which shall have six months in which to appeal. Article 23 of the U.N. Convention is similar, except that it provides periods of four months between service and default judgment and four months in which to appeal.

U.S. federal courts must similarly ensure that a defaulting foreign state is not entitled to immunity, because the FSIA makes foreign state immunity a question of subject matter jurisdiction, and federal courts must address questions of subject matter jurisdiction even if they are not raised by the parties. Section 1608(e) goes on to state that "[n]o judgment by default shall be entered by a court of the United States or of a State against a foreign state … unless the claimant establishes his claim or right to relief by evidence satisfactory to the court." In other words, courts in the United States are additionally obligated to examine the *substance* of the claim before granting a default judgment. China's draft law does not appear to impose any similar obligation.

Foreign Officials

Article 2 of China's draft law defines "foreign state" to include "natural persons … authorized … to exercise sovereign powers." Thus, unlike the U.S. FSIA, China's draft law may cover the immunity of some foreign officials.

The impact of the draft law on foreign official immunity is mitigated by Article 19, which says that the law shall not affect diplomatic immunity, consular immunity, special missions immunity, or head of state immunity. Article 3 of the U.N.

Convention similarly specifies that these immunities are not affected by the Convention. What is missing from these lists of course, is conduct-based immunity. Under customary international law, foreign officials are entitled to immunity from suit based on acts taken in their official capacities, and such immunity continues after the official leaves office.

It appears that China's draft law would govern the conduct-based immunity of foreign officials in Chinese courts and would give them less immunity than customary international law requires. By including "natural persons" within the definition of "foreign state," the draft law makes the exceptions to immunity for foreign states discussed in my prior post applicable to foreign officials as well. Thus, foreign officials who engage in commercial activity on behalf of a state might be subject to suit in their personal capacities and not just as representatives of the state. This does not make much sense.

Although it appears that China simply copied this quirk from the U.N. Convention, it makes no more sense in Chinese domestic law than it makes in the Convention. Chinese authorities would be wise to reconsider this issue before the law is finalized. They could address the problem by adding conduct-based immunity to Article 19's list of immunities not affected. Or, better still, they could omit "natural persons" from the definition of "foreign state" in Article 2.

Conclusion

Adoption of China's draft law on foreign state immunity would be a major step in the modernization of China's laws affecting transnational litigation. As described in this post and my previous one, the draft law generally follows the provisions of the U.N. Convention and would apply those rules to all states including states that chose not to join the Convention. The provisions of the U.N. Convention are generally sensible, but they are not perfect. In those instances where the U.N. Convention rules are defective—for example, with respect to the conduct-based immunity of foreign officials—China should not follow them blindly.

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