China's Draft Law on Foreign State Immunity Would Adopt Restrictive Theory

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On the question of foreign state immunity, the world was long divided between countries that adhere to an absolute theory and those that adopted a restrictive theory. Under the absolute theory, states are absolutely immune from suit in the courts of other states. Under the restrictive theory, states are immune from suits based on their governmental acts (acta jure imperii) but not from suits based on their non-governmental acts (acta jure gestionis).

During the twentieth century, many countries adopted the restrictive theory. (Pierre-Hugues Verdier and Erik Voeten have a useful list of the dates on which countries switched on the last page of this article.) Russia and China were the most prominent holdouts. Russia joined the restrictive immunity camp in 2016 when its law on the jurisdictional immunity of foreign states went into effect. That left China. In December 2022, Chinese lawmakers published a draft law on foreign state immunity, an English translation of which has recently become available. If adopted, this law would move China to into the restrictive immunity camp as well.

China's draft law on foreign state immunity has important implications for other states, which would now be subject to suit in China on a range of claims from which they were previously immune. The law also contains a reciprocity clause in Article 20, under which Chinese courts may decline to recognize the immunity of a foreign state if the foreign state would not recognize China's immunity in the same circumstances. Chinese courts could hear expropriation or terrorism claims against the United States, for example, because the U.S. Foreign Sovereign Immunities Act (FSIA) has exceptions for expropriation and terrorism.

In this post, the first of two, I look at the draft law's provisions on foreign state immunity from suit from a U.S. perspective. In the second post, I will examine the law's provisions on the immunity of a foreign state's property from attachment

and execution, its provisions on service and default judgments, and its potential effect on the immunity of foreign officials.

It is clear that China's draft law has been heavily influenced by the provisions of the U.N. Convention on Jurisdictional Immunities of States and Their Property, which China signed in 2005 but has not yet ratified. But the purpose of the draft law is not simply to prepare China for ratification. Indeed, Article 21 of the law provides that when a treaty to which China is a party differs from the law, the terms of the treaty shall govern. Rather, the purpose of the law appears to be to extend the basid rules of the U.N. Convention, which is not yet in effect, to govern the immunity of *all* foreign countries when they are sued in Chinese courts, including countries like the United States that are unlikely ever to join the Convention.

China's Adherence to the Absolute Theory of Foreign State Immunity

The People's Republic of China has long taken the position that states and their property are absolutely immune from the jurisdiction of the courts of other states. The question rose to the level of diplomatic relations in the early 1980s. China was sued in federal court for nonpayment of bonds issued by the Imperial Government of China in 1911, did not appear to defend, and suffered a default judgment. After much back and forth, the State Department convinced China to appear and filed a statement of interest asking the district court to set aside the judgment and consider China's defenses. "The PRC has regarded the absolute principle of immunity as a fundamental aspect of its sovereignty, and has forthrightly maintained its position that it is absolutely immune from the jurisdiction of foreign courts unless it consents to that jurisdiction," the State Department noted. "China's steadfast adherence to the absolute principle of immunity results, in part, from its adverse experience with extraterritorial laws and jurisdiction of western powers." In the end, the district court set aside the default, held that the FSIA did not apply retroactively to this case, and held that China was immune from suit. The Eleventh Circuit subsequently affirmed.

In 2005, China signed the U.N. Convention on Jurisdictional Immunities of States and Their Property. The Convention (available in each of the U.N.'s official languages here) adopts the restrictive theory, providing exceptions to foreign

state immunity for commercial activities, territorial torts, etc. Although China has not ratified the Convention and the Convention has not yet entered into force—entry into force requires 30 ratifications, and there have been only 23 so far—China's signature seemed to signal a shift in position.

The question arose again in *Democratic Republic of the Congo v. FG Hemisphere Associates LLC* (2011), in which the Hong Kong Court of Final Appeal had to decide whether to follow China's position on foreign state immunity. During the litigation, China's Ministry of Foreign Affairs wrote several letters to the Hong Kong courts setting forth its position, which the Court of Final Appeal quoted in its judgment. In 2008, the Ministry stated:

> *The consistent and principled position of China is that a state and its property shall, in foreign courts, enjoy absolute immunity, including absolute immunity from jurisdiction and from execution, and has never applied the so-called principle or theory of 'restrictive immunity'. The courts in China have no jurisdiction over, nor in practice have they ever entertained, any case in which a foreign state or government is sued as a defendant or any claim involving the property of any foreign state or government, irrespective of the nature or purpose of the relevant act of the foreign state or government and also irrespective of the nature, purpose or use of the relevant property of the foreign state or government. At the same time, China has never accepted any foreign courts having jurisdiction over cases in which the State or Government of China is sued as a defendant, or over cases involving the property of the State or Government of China. This principled position held by the Government of China is unequivocal and consistent.*

In 2009, the Ministry wrote a second letter explaining its signing of the U.N. Convention. The diverging practices of states on foreign state immunity adversely affected international relations, it said, and China had signed the Convention "to express China's support of the … coordination efforts made by the international community." But the Ministry noted that China had not ratified the Convention, which had also not entered into force. "Therefore, the Convention has no binding force on China, and moreover it cannot be the basis of assessing China's principled position on relevant issues." "After signature of the Convention, the position of China in maintaining absolute immunity has not been changed," the Ministry continued, "and has never applied or recognized the so-called principle

or theory of ‘restrictive immunity.’”

The Draft Law on Foreign State Immunity

China’s draft law on foreign state immunity would fundamentally change China’s position, bringing China into alignment with other nations that have adopted the restrictive theory. The draft law begins, as most such laws do, with a presumption that foreign states and their property are immune from the jurisdiction of Chinese courts. Article 3 states: “Unless otherwise provided for by this law, foreign states and their property shall be immune from the jurisdiction of the courts of the People’s Republic of China.”

Article 2 defines “foreign state” to include “sovereign states other than the People’s Republic of China,” “institutions or components of … sovereign states,” and “natural persons, legal persons and unincorporated organisations authorised by … sovereign states … to exercise sovereign powers on their behalf and carry out activities based on such authorization.” Article 18(1) provides that Chinese courts will accept the Ministry of Foreign Affairs’ determination of whether a state constitutes a sovereign state for these purposes.

These provisions of the draft law generally track Article 2(1)(b) of the U.N. Convention, which similarly defines “State” to include a state’s “organs of government,” “agencies or instrumentalities” exercising “sovereign authority,” and “representatives of the State acting in that capacity.” The draft law differs somewhat from the U.S. FSIA, which determines whether a corporation is an “agency or instrumentality” of a foreign state based on ownership and which does not apply to natural persons.

Exceptions to Immunity from Suit

Waiver Exception

China’s draft law provides that a foreign state may waive its immunity from suit expressly or by implication. Article 4 states: “Where a foreign state expressly submits to the jurisdiction of the courts of the People’s Republic of China in respect of a particular matter or case in any following manner, that foreign state shall not be immune.” A foreign state may expressly waive its immunity by treaty,

contract, written submission, or other means.

Article 5 provides that a foreign state "shall be deemed to have submitted to the jurisdiction of the courts of the People's Republic of China" if it files suit as a plaintiff, participates as a defendant "and makes a defence or submits a counterclaim on the substantive issues of the case," or participates as third party in Chinese courts. Article 5 further provides that a foreign state that participates as a plaintiff or third party shall be deemed to have waived its immunity to counterclaims arising out of the same legal relationship or facts. But Article 6 provides that a foreign state shall *not* be deemed to have submitted to jurisdiction by appearing in Chinese court to assert its immunity, having its representatives testify, or choosing Chinese law to govern a particular matter.

These provisions closely track Articles 7-9 of the U.N. Convention. The U.S. FSIA, § 1605(a)(1), similarly provides that a foreign state shall not be immune in any case "in which the foreign state has waived its immunity either explicitly or by implication." Section 1607 also contains a provision on counterclaims. In contrast to China's draft law, U.S. courts have held that choosing U.S. law to govern a contract constitutes an implied waiver of foreign state immunity (a position that has been rightly criticized).

Commercial Activities

China's draft law also contains a commercial activities exception. Article 7 provides that a foreign state shall not be immune from proceedings arising from commercial activities when those activities "take place in the territory of the People's Republic of China or take place outside the territory of the People's Republic of China but have a direct impact in the territory of the People's Republic of China." Article 7 defines "commercial activity" as "any transaction of goods, services, investment or other acts of a commercial nature otherwise than the exercise of sovereign authority." "In determining whether an act is a commercial activity," the law says, "the courts of the People's Republic of China shall consider the nature and purpose of the act." Unlike the FSIA, but like the U.N. Convention, the draft law deals separately with employment contracts (Article 8) and intellectual property cases (Article 11).

In extending the commercial activities exception to activities that "have a direct impact" in China, the draft law seems to have borrowed from the commercial

activities exception in the U.S. FSIA. Section 1605(a)(2) of the FSIA applies not just to claims based on activities and acts in the United States, but also to activities abroad "that act cause[] a direct effect in the United States."

The draft law's definition of "commercial activity," on the other hand, differs from the FSIA. Whereas the draft law tells Chinese courts to consider both "the nature and purpose" of the act," § 1603(d) of the FSIA says "[t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose." (Article 2(2) of the U.N. Convention makes room for both approaches.) Considering the purpose of a transaction would make it easier for a government to argue that certain transactions, like issuing government bonds or buying military equipment are not commercial activities and thus to claim immunity from claims arising from such transactions.

Territorial Torts

Article 9 of the draft law creates an exception to immunity "for personal injury or death, or for damage to movable or immovable property, caused by that foreign state within the territory of the People's Republic of China." This exception corresponds to Article 12 of the U.N. Convention and § 1605(a)(5) of the U.S. FSIA. Unlike § 1605(a)(5), China's draft law contains no carve-outs maintaining immunity for discretionary activities and for malicious prosecution, libel, misrepresentation, interference with contract rights, etc.

The English translation of the draft law does not make clear whether it is the tortious act, the injury, or both that must occur within the territory of China. The FSIA's territorial tort exception has been interpreted to require that the "entire tort" occur within the United States. Article 12 of the U.N. Convention does not. This question has become particularly important with the rise of spyware and cyberespionage. As Philippa Webb has discussed at TLB, U.S. courts have dismissed spyware cases against foreign governments on the ground that the entire tort did not occur in the United States, whereas English courts have rejected this requirement and allowed such cases to go forward. If the Chinese version of the draft law is ambiguous, it would be worth clarifying the scope of the exception before the law is finalized.

Property

Article 10 of the draft law creates an exception to immunity for claims involving immoveable property in China, interests in moveable or immoveable property arising from gifts, bequests, or inheritance, and interests in trust property and bankruptcy estates. This provision closely parallels Article 13 of the U.N. Convention and finds a counterpart in § 1605(a)(4) of the FSIA.

Arbitration

The draft law also contains an arbitration exception. Article 12 provides that a foreign state that has agreed to arbitrate disputes is not immune from suit with respect to "the effect and interpretation of the arbitration agreement" and "the recognition or annulment of arbitral awards." Like Article 17 of the U.N. Convention, the arbitration exception in the draft law is limited to disputes arising from commercial activities but extends to investment disputes. The arbitration exception in § 1605(a)(6) of the FSIA, by contrast, extends to disputes "with respect to a defined legal relationship, whether contractual or not."

Reciprocity Clause

One of the most interesting provisions of China's draft law on state immunity is Article 20, which states: "Where the immunity granted by a foreign court to the People's Republic of China and its property is inferior to that provided for by this Law, the courts of the People's Republic of China may apply the principle of reciprocity." Neither the U.N. Convention nor the U.S. FSIA contains a similar provision, but Russia's law on the jurisdictional immunities of foreign states does in Article 4(1). Argentina's law on immunity also includes a reciprocity clause specifically for the immunity of central bank assets, apparently adopted by Argentina at the request of China.

The reciprocity clause in the draft law means that Chinese courts would be able to exercise jurisdiction over the United States and its property in any case where U.S. law would permit U.S. courts to exercise jurisdiction over China and its property. The FSIA, for example, has an exception for expropriations in violation of international law in § 1605(a)(3) and exceptions for terrorism in § 1605A and § 1605B. Although China's draft law does not contain any of these exceptions, its reciprocity clause would allow Chinese courts to hear expropriation or terrorism

claims against the United States. The same would be true if Congress were to amend the FSIA to allow plaintiffs to sue China over Covid-19, as some members of Congress have proposed.

Conclusion

China's adoption of the draft law would be a major development in the law of foreign state immunity. For many years, advocates of the absolute theory of foreign state immunity could point to China and Russia as evidence that the restrictive theory's status as customary international law was still unsettled. If China joins Russia in adopting the restrictive theory, that position will be very difficult to maintain.

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