# China's New Foreign State Immunity Law: Some Foreign Relations Aspects

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On September 1, 2023, the Standing Committee of China's National People's Congress (NPC Standing Committee) passed the Law of the People's Republic of China on Foreign State Immunity (FSIL) (English translation here). The FSIL will enter into force on January 1, 2024.

This law heralds a fundamental shift of China's attitude towards foreign state immunity, from strict adherence to the absolute theory to adoption of the restrictive theory. According to Article 1 of the law, the FSIL aims to "to protect the lawful rights and interests of litigants, to safeguard the equality of state sovereignty, and to promote friendly exchanges with foreign countries." A report on the draft law also suggests that it is intended to build China's foreign-related legal system and to promote China's Belt and Road Initiative.

The FSIL borrowed from the foreign state immunity laws of other countries and from the UN Convention on Jurisdictional Immunities of States and Their Properties. In a prior post on Transnational Litigation Blog (TLB), one of us discussed some significant provisions of the FSIL, comparing them to the relevant provisions of the UN Convention. In this post, we examine some foreign relations aspects of the new law, including the role of the Ministry of Foreign Affairs, the principle of reciprocity, and whether the FSIL extends to Hong Kong and Macau.

## The Prominent Role of Foreign Ministry

Several provisions of the FSIL reflect the important role of China's Ministry of Foreign Affairs (MFA). The most notable is Article 19.

Article 19 provides in its first paragraph that Chinese courts "shall accept" documents issued by the MFA on certain factual questions. These include whether the state concerned qualifies as a "foreign sovereign state" for purposes of the FSIL, whether and when a state has been served by diplomatic note, and other factual issues relating to the acts of the state concerned. This last provision vests the MFA with authority to decide factual questions regarding the foreign state's conduct.

The second paragraph of Article 19 empowers the MFA to issue opinions to Chinese courts on other issues "that concern foreign affairs and other such major state interests." The distinction between the first and second paragraphs suggests that opinions on other issues are not necessarily binding on Chinese courts. On the other hand, it seems unlikely that Chinese courts will ignore opinions that the MFA decides to express.

Article 19 is somewhat similar to Article 21 of the UK State Immunity Act (SIA). The SIA grants the UK Secretary of State authority to determine conclusively whether a foreign state is covered by the Act and whether service has been made through diplomatic channels. By contrast, the US Foreign Sovereign Immunities Act (FSIA) does not give the US government authority to decide such issues. The US Supreme Court has suggested that the executive branch's views on questions of foreign relations might be entitled to some deference, but the issue remains unresolved in US law.

Articles 4 and 17 of the FSIL also give China's MFA roles to play. Article 4 provides that a foreign state shall not enjoy immunity from jurisdiction if the foreign state has expressly consented to the jurisdiction of Chinese courts. Article 4(4) allows a foreign state to consent, among other means, by submitting a document through diplomatic channels. Article 17 permits service of process through diplomatic channels if the foreign state cannot be served pursuant to an international agreement or other means acceptable to the foreign state.

The UN Convention's provision on consent to jurisdiction (Article 7) does not mention diplomatic channels. Article 2(7) of the UK's SIA, on the other hand, does allow the head of foreign state's diplomatic mission in the United Kingdom to

submit to the jurisdiction of UK courts. The US FSIA makes no express mention of diplomatic channels in its provision on waiving immunity. The UN Convention's provision on service of process (Article 22) does allow service through diplomatic channels, as does Article 12 of the UK's SIA. The US FSIA also permits use of diplomatic channels to serve a foreign state but only if three other means of service listed in § 1608 are not available.

The prominent role of China's MFA under the FSIL is noteworthy, particularly in comparison to the more limited roles played by the governments of the United Kingdom and the United States. The Legislative Affairs Commission of the NPC Standing Committee has stated that the FSIL should "ensure that the policy of foreign affairs of the State is accurately captured in the case." The provisions discussed above—particularly Article 19—seem designed to do this. On the other hand, active involvement by the MFA in cases under the FSIL may raise concerns about lack of predictability and interference with the administration of justice.

## The Principle of Reciprocity

The foreign relations aspects of the FSIL are also reflected in its reciprocity provision. Article 21 provides: "Where foreign states accord the PRC and its property narrower immunity than is provided by this Law, the PRC will apply the principle of reciprocity." In Chinese, the term translated here as "reciprocity" is duideng, which connotes equal treatment for unwanted or unfriendly foreign actions. In the context of foreign state immunity, duideng means that, if foreign states grant less immunity to China, China will respond by granting less immunity to those foreign states.

Under the prior Law of the People's Republic of China on Immunity of the Property of Foreign Central Banks from Compulsory Judicial Measures, the same principle of reciprocity (duideng) was applied in Article 3 to foreign states that granted less immunity to central bank assets of the People's Republic of China. Article 20 of the FSIL extends this principle to issues of foreign state immunity more generally. This principle of reciprocity (duideng) also appears in Article 5(2) of China's Civil Procedure Law (CPL) and Article 99(2) of China's Administrative Litigation Law to address restrictions on the litigation rights of Chinese parties imposed by foreign countries.

The principle of reciprocity (duideng) found in the FSIL is distinct from another principle of reciprocity (huhui) used in the context of judicial assistance between China and foreign countries. The CPL generally provides that reciprocity (huhui) may be relied upon to provide judicial assistance in service of process, investigation and collection of evidence, and other litigation activities (Article 293). Above all, reciprocity (huhui) provides the basis for recognizing and enforcing foreign judgments (Article 298). Although Chinese courts used to interpret this principle narrowly by requiring foreign courts to recognize Chinese judgments first, it has recently liberalized its position.

Because "huhui" serves to encourage or promote, whereas "duideng" serves to respond and punish, it is potentially misleading to translate both principles as "reciprocity." It might be better to reserve "reciprocity" for the principle "huhui." which underlies the recognition of foreign judgments for example. "Duiding," as used in the FSIL and other Chinese laws mentioned above, might be translated instead as "equal treatment."

## Hong Kong and Macau

Another foreign relations aspect of the FSIL is its territorial scope of application. Hong Kong and Macau are part of the People's Republic of China, but they have separate legal systems. Does the FSIL apply not only in Mainland China but also in Hong Kong and Macau?

The text of the FSIL does not address this question explicitly. However, the FSIL's reference to "Courts of the People's Republic of China" stands in sharp contrast to the references in the CPL and other Chinese laws to "People's Courts of the People's Republic of China" or "People's Courts." By using a different—and potentially broader—term, the NPC Standing Committee has certainly not restricted the FSIL's application to courts in Mainland China.

However, Article 18(2) of Hong Kong's Basic Law states that "National laws shall not be applied in the Hong Kong Special Administrative Region [HKSAR] except for those listed in Annex III to this Law." Under this provision, only when the FSIL is added to Annex III will the FSIL formally apply in Hong Kong courts.

But even if the FSIL is not added to Annex III, Hong Kong courts can be expected

to follow it. In *Democratic Republic of the Congo v. FG Hemisphere Associates LLC* (2011), the Hong Kong Court of Final Appeal held that "[t]he HKSAR cannot, as a matter of legal and constitutional principle, adhere to a doctrine of state immunity which differs from that adopted by the PRC" (¶ 183(a)). In that case, the court held that Hong Kong courts had to follow the doctrine of absolute state immunity, which was then China's official position, even though Hong Kong courts had previously adopted the doctrine of restrictive immunity. Now that China has adopted the restrictive theory, the decision in *FG Hemisphere Associates* requires Hong Kong courts to follow China's new approach. Although the details with respect to Macau are different, courts in Macau can similarly be expected to follow China's new policy on foreign state immunity as reflected in the FSIL.

## Conclusion

China has adopted a new approach to foreign state immunity by enacting the FSIL. Applying the FSIL will be primarily a task for China's courts, including courts in Hong Kong and Macau, which will have to follow the new policy. Among other things, Chinese courts must apply the FSIL's reciprocity provision, which requires them to accord "equal treatment" if foreign states grant China less immunity than the law provides. However, the leading role that courts will play under the FSIL must not cause one to ignore the significant role of China's MFA under the new law, particularly in determining when foreign states are covered by the FSIL and in determining factual issues relating to the conduct of foreign states.