BACKGROUND, IMPLICATIONS AND FUTURE OF THE LAW ON FOREIGN STATE IMMUNITY IN CHINA

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Abstract

On September 1, 2023, the Law of the People's Republic of China on State Immunity of Foreign States was adopted by the Fifth Meeting of the Standing Committee of the Fourteenth National People's Congress and came into force on January 1, 2024. The introduction of the law fills the blank of state immunity in Chinese domestic legal system. This essay begins with the background of the enactment of the law from previous legislation and judicial practice. The it will discuss in detail the favorable implications of the enactment of this law on the country at both the corporate and national levels and some issues need to be explained under the text of the law. A better understanding of the significance of the enactment of the law and the meaning behind it can be achieved through a review of its history and context, which will help China to better deal with issues related to State immunity.

Keywords: Foreign State Immunity, Principle of Reciprocity, Integrity.

I. CONCEPT OF STATE IMMUNITY

The regime of immunity is an important one in international law. State immunity is a rule of international law that facilitates the performance of public functions by the state and its representatives by preventing them from being sued or prosecuted in foreign courts.' Essentially, it precludes the courts of the forum state from exercising adjudicative and enforcement jurisdiction in certain classes of case in which a foreign state is a party.[1] Immunity rules are derived from the *jus cogens* of sovereign equality.[2] Furthermore, the rules on State immunity are based on two fundamental principles: No jurisdiction between equals (*par in parem non habet jurisdictionem*) and the principle of non-interference in the internal affairs of other States.[3] Sovereign immunity of the State is a complicated issue. it is regulated by domestic law and at the same time has the character of international law. At the same time, it is situated at the intersection of legal and diplomatic issues, which is why States, when legislating on the sovereign immunity of the State, give profound consideration to the position and function of the executive branch in the overall rule.

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[1] JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 211 (9th ed, 2019).

[2] Bing Bing Jia, *The Immunity of State Officials for International Crimes Revisited*, 10 J. INT'l CRIM. JUST. 1303 (2012).

[3] JIA BINGBING（贾兵兵），GUOJI GONGFA: HEPING SHIQI DE JIESHI YU SHIYONG DIERBAN国际公法：和平时期的解释与适用 第二版）[PUBLIC INTERNATIONAL LAW: ITS INTERPRETATION AND APPLICATION IN TIME OF PEACE SECONDE EDITION], 287 (2019).

The attitude of States towards the immunity of foreign States is reflected in the international treaties to which they are parties, or in their national legislation and judicial practice. From comparative law view, the attitudes of States to immunity can be categorized to absolute immunity doctrine and restrictive immunity doctrine. The two concepts did not arise in parallel, but rather gradually as history progressed. With the establishment of the concept of sovereign equality, States followed the doctrine of absolute immunity in the regulation of State immunity. Absolute immunity doctrine advocates absolute immunity of the State from the jurisdiction of other States in all cases.[4] The most typical expression of the doctrine of absolute immunity is the opinion of the English Court of Appeal in the *Parlement Belge* case. The appeal court elaborate that "the case is within the terms of the rule; it is within the spirit of the rule; therefore, we are of opinion that the mere fact of the ship being used subordinately and partially for trading purposes does not take away the general immunity."[5] It is noteworthy that attention was already paid at that time to the fact that differences in the nature of State conduct could have an impact on the regime of immunity, but this view was not adopted by the court.

II. FROM ABSOLUTE IMMUNITY TO RESTRICTED IMMUNITY

A. Reasons for Shift

With the development of trade between States, State conduct has taken on a richer connotation. The practice of absolute immunity has become problematic with the increase in State activities and the expansion of commercial activities involving State government departments or agencies.[6] The landmark event in the shift in the rule of immunity from absolute to restrictive immunity was the issuance by the United States Government of the Tate letter. On May 19, 1952, the State Department announced in the Tate Letter a new policy with regard to the filing of suggestions of immunity in suits against foreign sovereigns. The letter indicated that the Department would begin to follow a restrictive theory of sovereign immunity.[7] The restrictive theory was adopted in Foreign Sovereign Immunities Act in 1976. It is worth mentioning that there is strong motivation behind this improvement of the United States' government. Because the United States followed a "long established policy" of forswearing immunity for its commercial vessels, Tate believed the U.S. government should refrain from suggesting that similarly situated foreign vessels receive immunity in its own courts.[8] Under the restrictive theory of sovereign immunity, a state or state instrumentality is immune from the jurisdiction of the courts of another

[4] *Id.* at 289.
[5] Parlement Belge 5 P. D. 197.
[6] *Supra* note 4.
[7] International Law-Sovereign Immunity-The First Decade of the Tate Letter Policy., https://tlblog.org/throwback-thursday-the-tate-letter-and-foreign-sovereign-immunity/ (last visited Dec. 25, 2023).
[8] *Id.*

state, except with respect to claims arising out of activities of the kind that may be carried on by private persons.[9]

An increasing number of States have begun to demonstrate that they are adopting the principle of restrictive immunity through legislation or judicial practice. The introduction of the United Nations Convention on Jurisdictional Immunities of States and Their Property has provided a model for the implementation of the principle of restrictive immunity by States. The emergence of the Convention had led the States concerned to change their long-standing positions.[10] For example, Japan had abandoned its traditional practice under absolute immunity principle in accordance with the Convention.[11] However, the Convention did not enter into force because the designated number of ratifications was not reached. This fact reflects the desire of States to allow themselves greater legislative space and flexibility in matters of immunity.

B. Criteria for Principle of Restricted Immunity

The most remarkable development of the principle of restricted immunity is that it precludes the right of immunity of states when they conduct commercial acts. However, there is no clear definition of commercial acts and the provisions of the domestic law of each State also vary. There are two typical criteria for judging commercial acts: judging by the nature of the contract and judging by the purpose of the contract. According to the Convention, the purpose and nature of contracts should be considered together when judging whether it is commercial act. In addition, more exceptions to the rule have sprung up without undermining the fundamental purpose of State immunity. There are two broad approaches to these exceptions: exhaustive enumeration and characterization. Articles 10 to 17 of the Convention take the enumerative approach. However, it seemed difficult to achieve exhaustiveness, and such an enumeration would be more difficult to agree upon among States. In this case, the characterization approach, which is based on the purpose of State immunity, seems to be more operational, and Professor Browlie's report to the Institute of International Law mentions such an approach[12], in which the Court would consider both the recognition and the denial of immunity.

In conclusion, the above clarifies the concept of the system of State immunity, and at the same time describes the development trend of the system of State immunity from absolute immunity to relative immunity in inter-State and domestic legislation, which is of reference significance for analyzing the law on State immunity in China.

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[9] Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1604-1607 (1976).

[10] S*upra* note 3.

[11] Kimio Yakushiji, *Legislation of the Act on Civil Jurisdiction over Foreign States, Acceptance of the U.N. Convention on Jurisdictional Immunity of States and Their Property, and Their Possible Effects upon the Jurisprudence of Japanese Domestic Courts on State Immunity*, 53 JAPANESE Y.B. INT'l L. 202 (2010).

[12] See Yearbook of the Institute of International Law, 1987, vol. 62, Part I, pp. 45-97, especially pp. 54-55, and articles 2 and 3 of the draft resolution (at pp. 98-101).

III. CHINESE PAST ATTITUDE ABOUT STATE IMMUNITY

A. Legislation

When it comes to China's attitude on the issue of immunity, the issue can be analyzed from a historical perspective. From the legislative view, before the Law of the People's Republic of China on the Immunity of Foreign States came into force, there was no systematic domestic legislation on State immunity in China, there is only some piecemeal legislations. Legislation can be divided into substantive one and procedural one. In substantive area, Law of the People's Republic of China on Immunity of the Property of Foreign Central Banks from Compulsory Judicial Measures provides rules on immunity for the special subject of foreign central banks[13] There is also no clear rule in procedural area, Civil Procedure Law of the People's Republic of China only mentions the application of the law to subjects enjoying diplomatic privileges and immunities[14] In contrast, China seems to be more active on this issue at the level of international law. China acceded to United Nations Convention on Jurisdictional Immunities of States and Their Property and actively participated in the negotiation process but has not yet ratified it and it has not entered into force.

B. Judicial Practice

When it comes to the judicial practice, there are three symbolic cases show the attitude of China on the issue of state immunity. The first one is *Lake Canton Railway Bonds* Case[15], in this case, Russell Jackson, a U.S. citizen, along with other plaintiffs, sued the China in the U.S. District Court for the Northern District of Alabama for payment of certain bonds issued by the Qing government in 1911. China neither responded to the claim nor appeared in the United States court, and after the United States court issued a default judgment, China sent a diplomatic note to the United States stating that the United States court's decision violated "the basic norms of international law" and that the case reflected China's adherence to the principle of absolute sovereign immunity. The second case is Congo Case[16], The difference between this case and Lake Canton Railway Bonds Case lies in the fact that at the time of the present case China had become a party to the United Nations Convention on Jurisdictional Immunities of States and Their Property, which, although it had not yet entered into force, reflected to a certain extent China's attitude towards the issue. Although China had signed the treaty, the position of absolute immunity doctrine was reaffirmed in the present case at both the diplomatic and legal levels. In contrast

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[13] Waiguo Zhongyang Yinhang Caichan Sifa Qiangzhi Cuoshi Huomian Fa（外国中央银行财产司法强制措施豁免法）[Law of the Property of Foreign Central Banks from Compulsory Judicial Measures] (promulgated by the Standing Comm. Nat'l People's Cong., Oct 25, 2005, effective Oct 25, 2005) (Chinalawinfo), Article1.

[14] Minshi Susong Fa (民事诉讼法) [Civil Procedure Law] (promulgated by the Standing Comm. Nat'l People's Cong., Sep 1, 2023, effective Jan 1, 2024) (Chinalawinfo), Article 272 and Article 305.

[15] Jackson v. The People's Republic of China 550 F.Supp.869 (1982).

[16] Democratic Republic of the Congo and Others v. FG Hemisphere Associates LLC, FACV 5，6& 7/2010.

to the cases mentioned above, the recent cases of State immunity practice in relation to China have been more politically motivated. Since the outbreak of the global covid epidemic, individuals, companies, and States in the United States have been taking China to court, alleging that China allegedly took intentional acts or neglected its duties that led to the spread of the covid epidemic.[17]

C. Conclusion

Through above cases, we conclude that on the issue of State immunity, China prefers diplomatic rather than legal methods to solve the problem. Similarly, the issue of State immunity is not systematically regulated in China's domestic law. However, China's diplomatic and judicial practice shows that it basically follows the principle of absolute immunity. A bigger problem lies in the fact that China, having signed the United Nations Convention on Jurisdictional Immunities of States and Their Property, continues to adopt an attitude of absolute immunity in its judicial practice, resulting in a conflict between international law and domestic judicial practice.

Compared to legal methods, the use of exclusively diplomatic means gives States greater flexibility. However, this approach is not sustainable, and the Tate letter reveals that the U.S. has moved to a doctrine of restricted immunity for state immunity without a clear delineation of the separation of powers between the executive and the judiciary in state immunity. The FSIA reconfigures the separation of powers in foreign sovereign immunity by substituting the judiciary for the executive as the decider of immunity in a particular case. immunity in a particular case.[18] The executive branch still plays a large role in the immunity space, especially in determinations of foreign official immunity under federal common law, but this power's boundary is clearly defined by law.[19] With the increase in foreign economic exchanges, [20] China is also in dire need of such a systematic step in law.

IV. IMPLICATIONS OF THE INTRODUCTION OF THE LAW OF THE PEOPLE'S REPUBLIC OF CHINA ON FOREIGN STATE IMMUNITY

The introduction of the Law of the People's Republic of China on Foreign State Immunity has filled the gap in China's provisions on State immunity and systematically regulated the issue of State immunity. More importantly, the introduction of the law signaled China has shifted its attitude about the immunity

[17] *Feiyan Yiqing: Cong Falv Jiaodu Fenxi Meiguo Misuli Zhou Su Zhongguo Zhengfu A*n (肺炎疫情：从法律角度分析美国密苏里州诉中国政府案)[*The Pneumonia Epidemic: A Legal Analysis of the U.S. Case of Missouri v. Government of China*]. BBC ZHONGWEN (Apr. 23, 2020), https://www.bbc.com/zhongwen/simp/world-52391457.

[18] *Supra* note 7.

[19] *Id.*

[20] The Ministry of Commerce released data showing that from January to October this year, China's foreign investment continued to grow, foreign non-financial direct investment of 736.2 billion yuan, an increase of 17.3% year-on-year, *see*, https://www.gov.cn/lianbo/bumen/202311/content_6915634.htm.

from absolute theory to restricted theory. The law stipulates exceptions both from substantive immunity and execution immunity. The section on exceptions to substantive immunity includes commercial acts[21], acts of labor[22], personal injury[23] and property-related damage[24], intellectual property[25], and arbitration[26] The principle of restricted immunity would have two significant implications: On the one hand, this will benefit the private enterprises: adopting the principle of restricted immunity would protect the interests of Chinese private enterprises. In the event of legal disputes between Chinese private enterprises and other States whose conducts constitute commercial acts, the States could be brought to the courts under the principle of restricted immunity. The law of immunity under the principle of restricted immunity broadens the avenues for Chinese private enterprises to assert their rights and interests. Also, it will also give the foreign enterprise stable expectations that when they of judicial protection when conducting commercial acts with the Chinese government. The spillover effect of this implication is the increase in the level of China's openness. And, On the other hand, based on the principle of reciprocity, the enactment of the law will help to implement the principle of the sovereign equality of States and safeguard China's sovereignty, security, and development interests. According to Article 21 of the law, where a foreign state accords to the China and its property immunities less favorable than those provided for in this law, China will apply the principle of reciprocity. [27] Besides of the two implications, the enaction of the law is also notable for the legislative and judicial construction in China. The law is conducive to filling the gaps in the legal system and accelerating the completion of improve China's foreign-related legal system and it facilitate the realization of the functional role of the judiciary in the field of foreign affairs and to enhance the effectiveness of foreign-related justice.[28]

V. ISSUES NEED TO BE EXPLAINED

A. Application of Principle of Reciprocity

However, there are some issues raised by the enactment of the law. The first issue is the application of the principle of reciprocity. The application of the

[21] Waiguo Guojia HuoMian Fa (外国国家豁免法)[Law on Foreign State Immunity] (promulgated by the Standing Comm. Nat'l People's Cong., Sep 1, 2023, effective Jan 1, 2024) (Chinalawinfo), Article7.

[22] *Id*, Article 8.

[23] *Id*, Article 9.

[24] *Id*, Article 10.

[25] *Id*, Article 11.

[26] *Id*, Article 12.

[27] *Id*, Article 21.

[28] *Quanguo Renda Changwei Hui Fagongwei Fuze Ren Jiu Waiguo Guojia Huomian Fa Da Jiz he Wen*(全国人大常委会法工委负责人就外国国家豁免法答记者问)[*Head of the Legislative Affairs Commission of the Standing Committee of the National People's Congress answers questions on the Law on Foreign State Immunity*] Xinhua Net（Sep 4, 2023），http://www.npc.gov.cn/npc/c2/c30834/202309/t20230904_431522.html.

principle of reciprocity in the law of State immunity will be discussed below from three perspectives: its legal basis, significance, and detailed design.

Legal Basis

Firstly, the principle of reciprocity is the is origin form the principle of sovereign equality. The principle of the sovereign equality of States is reflected in the principle of reciprocity when States interact with each other. Mutuality among States characterizes the creation of compliance with and sanctions under international law.[29] The principle of reciprocity has been regarded by some scholars as a meta-rule of the international law system.[30]

Significance

The establishment of the principle of reciprocity is conducive to China's safeguarding of its national sovereignty, especially in the face of litigation of a more political nature (such as the litigation during the covid epidemic), when it can take a more proactive approach in stating China's position. In fact, the principle of reciprocity has also been reflected in China's previous piecemeal legislation, for example, in the Law of the People's Republic of China on Immunity of the Property of Foreign Central Banks from Compulsory Judicial Measures Law of the People's Republic of China on Immunity of the Property of Foreign Central Banks from Compulsory Judicial Measures, it has been stipulated that if a foreign country does not grant immunity to the property of the Central Bank of the People's Republic of China or the financial management institution of the Special Administrative Region of the People's Republic of China or if the immunity granted is less than that stipulated in this Law, the People's Republic of China shall act in accordance with the principle of reciprocity.[31] As can be seen here, China's attitude when it comes to immunity legislation is consistent. The inclusion of the principle of reciprocity as a fundamental principle in the law on State immunity this time has made its radiation broader and more complete.

Detailed Design

With this comes the question of the detailed institutional design of the principle of reciprocity. The principle of reciprocity can be categorized into two situations: one is where the immunity under foreign law is treated less favorably than that of China, in which case Article 21 explicitly provides for the application of the principle of reciprocity in China; the other is where the immunity under foreign law is treated more favorably than that of China, and China has not provided for how to deal with such a situation. In this paper, it is considered that in the absence of a valid international treaty, there is no need to expand the existing legal provisions of China.[32] The crux of the matter is whether an exception to immunity can be granted based on an international treaty under

[29] Li Haopei（李浩培）, Guojifa De Gainian Yu Yuanyuan（国际法的概念与渊源）[Concepts and sources of international law], 35(1994).

[30] Francesco Parisi & Nita Ghei, *The Role of Reciprocity in International La*w, 36 CORNELL INT'l L.J. 93 (2003).

[31] *Supra* note 13, Article3.

[32] Because the United Nations Convention on Jurisdictional Immunities of States and Their Property has not yet entered into force.

principle of reciprocity in domestic law. However, the issue should not be discussed in the context of the principle of reciprocity since it was essentially a question of the relationship between international and domestic law. Even in the absence of the principle of reciprocity, the existence of an international treaty should be considered in the matter of immunity. Chinese domestic law is ambiguous on this issue, which makes it controversial.[33] Although the overall principle is vague, it is fortunate that the issue is made explicit in the Law. According to article 22 of the law, in the case of any discrepancy between any international treaty concluded or acceded to by the People's Republic of China and this Law, the international treaty s hall prevail, except for the provisions with respect to which the People's Republic of China has made reservations. However, in the case of any discrepancy between any international treaty concluded or acceded to by the People's Republic of China and this Law, the international treaty s hall prevail, except for the provisions with respect to which the People's Republic of China has made reservations.[34] In accordance with the principle of *Lex specialis derogat legi generali.*[35], the relationship between domestic immunity law and international treaties should be dealt with as a matter of priority in accordance with the provisions of article 22. In discussing the specific design of the principle of reciprocity, some scholars have considered the subject of the implementation of the principle of reciprocity, the mandatory nature of the principle of reciprocity, as well as the specific judgment criteria of the principle of reciprocity.[36] Starting from the text, article 21 is very general, but we can infer it from the context. Article 19 of the law provides that the Ministry of Foreign Affairs has the following two powers: to issue to the Chinese courts' documents certifying certain factual issues relating to the conduct of foreign States and to issue opinions to the Chinese courts on issues relating to foreign affairs and other matters of vital national interests. It can be inferred from this article that formally the principle of reciprocity is implemented by the courts, but with flexibility. As to the specific criteria for judging the principle of reciprocity, judicial practice had yet to be further confirmed, but such judgments should be case-by-case the principle of reciprocity could not be applied solely based on legal provisions.

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[33] The General Principles of Civil Law used to stipulate that where international treaties concluded by China or to which it is a party have different provisions from those of China's civil law, the provisions of the international treaty shall apply, except for those provisions to which China has declared reservations. However, this provision has been deleted from the newly promulgated Civil Code.

[34] *Supra* note 21, Article 22.

[35] Minfa Dian（民法典）[Civil Code](promulgated by the Nat'l People's Cong., May 28, 2020, effective Jan 1, 2021) (Chinalawinfo), Article 11.

[36] Wang Xinmeng, Xu Shu（王欣濛，徐树）, *Duiddeng Yuanze Zai Guojia Huomian Lingyu De Shiyong*（对等原则在国家豁免领域的适用）[*Application of the principle of reciprocity in the field of State immunity*], 6 WuHan Daxue Xuebao（ZheXue Shehui Kexue Ban）武汉大学学报（哲学社会科学版）[Journal of Wuhan University [Philosophy and Social Science Edition)]68, 132.

B. Integrity of Legislation

Another issue relates to the integrity of Chinese legislation. The identification of State is a sensitive issue in immunity law. It is extremely important for China which has many State-owned enterprises. The definition of the State determines whether these enterprises can be the subject of immunity. From the point of view of State immunity, the broader the definition of the State, the more favorable it is for Chinese State-owned enterprises to be immune from judicial proceedings in foreign courts. Therefore, the Law of the People's Republic of China on Foreign State Immunity, which is consistent with United Nations Convention on Jurisdictional Immunities of States and Their Property in its definition of country can include certain state-owned enterprises in China in the scope of immunity to a certain extent.[37] But the problem is that the definition of "state-owned enterprises" not only relates the issue of immunity, but also relates to the international recognition of subsidies. The link between the two is that State-owned enterprises may be recognized as State for the purposes of state immunity law or as public bodies for the purposes of subsidies,[38] and public bodies and government are juxtaposed therein and are similar concepts.[39] The State is the concept of external interaction, and the Government is the concept of internal administration. The principle of State immunity essentially has its origins in the principle of sovereign equality and therefore takes the concept of the State. Subsidies are financial support, or any form of income support or price support, provided by a State for the benefit of the enterprise concerned,[40] and it is the fiscal function of government and public bodies which exercise the functions of government. However, the State and the government/public bodies are closely related concepts, with the government being an important administrative institution of a State. Therefore, if a State-owned enterprise is recognised as a State, then there is stronger evidence that it falls within the scope and public bodies. However, unlike the State immunity, if a state-owned enterprise is found to be a public body within the subsidy rules, it increases the risk of the State being subject to countervailing duties. At this point, the identification of state-owned enterprises creates tension within the rules in different areas. Returning to the provisions of the Law of the People's Republic of China on Foreign State Immunity, it will be found that the definition of state here is more similar to that of United Nations Convention on Jurisdictional Immunities of States and Their Property, but care should be taken in subsequent judicial

[37] *Supra* note 21, Article 2.3: an organization or individual authorized by a foreign sovereign state to exercise sovereign authority and engaged in activities upon such authorization; United Nations Convention on Jurisdictional Immunities of States and Their Property, Article 2.3: agencies or instrumentalities of the State or other entities, to the extent that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the State.

[38] Agreement on Subsidies and Countervailing Measures, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14, Article 1.

[39] *Id.*

[40] *Id.*

practice to interpret and balance the position of state-owned enterprises under state immunity law.

VI. CONCLUSION

In conclusion, the introduction of the Law of the People's Republic of China on Foreign State Immunity is a symbolic event because it fills the gap in state immunity. And it solves the inconsistence in Chinese judicial practice and the Convention. However, there still some issues in the application of the law, which needs to be explained in the judicial interpretation and practice.