

INTRODUCTORY NOTE TO THE FOREIGN STATE IMMUNITY LAW OF
THE PEOPLE'S REPUBLIC OF CHINA
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[January 1, 2024]

On September 1, 2023, the Standing Committee of the National People's Congress promulgated the Foreign State Immunity Law of the People's Republic of China (FSIL), which entered into force on January 1, 2024.¹ The law abandons China's prior adherence to the absolute theory of state immunity and instead adopts the restrictive theory followed by most other countries. Under the restrictive theory, foreign states are immune from suits based on their governmental acts (*acta jure imperii*) but are subject to suits based on their non-governmental acts (*acta jure gestionis*).²

The FSIL largely follows the provisions of the UN Convention on Jurisdictional Immunities of States and Their Property.³ China signed the UN Convention in 2005 but has not ratified it. In fact, even after signing the Convention, China continued to say that “the position of China in maintaining absolute immunity has not been changed, and [China] has never applied or recognized the so-called principle or theory of ‘restrictive immunity.’”⁴ By enacting the FSIL, China has changed its position and extended the restrictive theory to all foreign states.

China's FSIL begins with a presumption that foreign states and their property are immune from jurisdiction unless an exception applies.⁵ The law defines “foreign State” to include “a foreign sovereign State,” “a State organ or a constituent part of a foreign sovereign State,” and “an organization or an individual, authorized by a foreign sovereign State, that exercises sovereign authority and conducts activities in accordance with such authorization.”⁶

Articles 4–6 of the FSIL provide that a foreign state is not immune from suit if it has waived its immunity. Article 4 sets forth means by which a foreign state may expressly consent to jurisdiction.⁷ Article 5 provides that a foreign state is deemed to consent if it files suit as a plaintiff, participates as a defendant and makes a defense on the merits or a counterclaim, or participates as a third party in Chinese courts.⁸ Article 5 further provides that a foreign state participating as a plaintiff or third party waives immunity from counterclaims arising from the same legal relationship or facts.⁹ Article 6, on the other hand, says a foreign state shall not be deemed to have consented to jurisdiction by appearing in Chinese court to assert immunity, by having its representatives testify, or by choosing Chinese law to govern.¹⁰

Article 7 contains a commercial activity exception, providing 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 People's Republic of China, or takes place outside the territory of the People's Republic of China but causes a direct effect in the territory of the People's Republic of China.”¹¹ Article 7's references to the places of the activity and its effect finds no counterpart in the UN Convention¹² and seem to be borrowed from the U.S. Foreign Sovereign Immunities Act (FSIA).¹³ Article 7 defines “commercial activity” as “any act of transaction of goods or services, investment, lending, or any other act of a commercial nature, which is not an exercise of sovereign authority.”¹⁴ Significantly, in determining whether an act is commercial, Chinese courts are directed to “consider all factors relating to the nature and purpose of the act.”¹⁵ This contrasts with the FSIA, which requires U.S. courts to consider only the nature of an act and not its purpose.¹⁶ The result of considering purpose in addition to nature is likely to be a narrower exception—and thus broader immunity—than under the FSIA.¹⁷

The FSIL also has exceptions for employment contracts,¹⁸ territorial torts,¹⁹ interests in certain property,²⁰ intellectual property cases,²¹ and certain matters relating to arbitration.²² In each case, the FSIL follows the UN Convention.

The FSIL also contains a reciprocity clause, which provides that, “If the immunity accorded by a State to the People's Republic of China and its property is less favorable than those provided by this Law, the People's Republic of China applies the principle of reciprocity.”²³ Although such a provision is not found in the UN Convention or in the laws of most other countries,²⁴ it has a precedent in a 2005 Chinese law on the immunity of central bank assets.²⁵ The FSIL extends this principle of reciprocity to state immunity more generally. China's reciprocity clause has particular

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relevance for countries such as the United States that have exceptions to state immunity not found in the FSIL or in the laws of most other states, such as the FSIA's expropriation exception²⁶ and terrorism exceptions.²⁷ The reciprocity clause will permit Chinese courts to exercise jurisdiction over the United States in expropriation or terrorism cases under circumstances where U.S. courts could exercise jurisdiction over China.

Like the UN Convention, the FSIL has separate provisions on the immunity of state property from compulsory measures such as attachment and execution. Article 13 states the general rule that the property of a foreign state is immune from compulsory judicial measures in Chinese courts.²⁸ Article 14 creates three exceptions to immunity: (1) when the foreign state has expressly waived such immunity;²⁹ (2) when the foreign state has specifically earmarked property for enforcement; and (3) to enforce a Chinese judgment or ruling when the property is used for commercial activities, relates to the proceedings, and is located in China.³⁰ Article 15 lists certain types of property that shall not be regarded as used for commercial activities for the purpose of Article 14(3), including the bank accounts of diplomatic missions, military property, central bank assets, and property of scientific, cultural, or historical value.³¹

Because, as noted above, Article 2 defines "foreign State" to include individuals exercising sovereign authority, the FSIL also applies to the immunity of foreign officials. Article 20 limits the FSIL's impact on foreign officials' immunity by providing that the law shall not affect diplomatic immunity, consular immunity, special-missions immunity, or head-of-state immunity.³² The FSIL follows the UN Convention in both respects. This means that the FSIL, like the UN Convention, applies only to conduct-based immunity (also known as immunity *ratione materiae* or functional immunity), which attaches to the acts of foreign officials taken in their official capacities. This also means that, under the FSIL, the conduct-based immunity of foreign officials is subject to all the law's exceptions.

With respect to procedure, the FSIL has provisions addressing service of process on foreign states and default judgments.³³ When the FSIL does not speak to an issue, other Chinese laws apply.³⁴ Thus, China's Civil Procedure Law will govern questions of personal jurisdiction, parallel proceedings, forum non conveniens, and the collection of evidence.³⁵ Cases under the FSIL will also be subject to the existing reporting system for cases involving privileges and immunities, which requires Chinese courts to report such cases to the next highest court, and ultimately to the Supreme People's Court, and to receive a response before accepting such cases.³⁶

Finally, Article 19 carves out a role for China's Ministry of Foreign Affairs (MFA) in applying the law. It states that Chinese courts "shall accept" certifying documents issued by the MFA on certain factual questions, including whether the state concerned qualifies as a "foreign sovereign State" for the purposes of the FSIL, whether a state has been served process by diplomatic note, and other factual issues relating to the acts of the state concerned.³⁷ Article 19 goes on to say that the MFA may provide opinions to Chinese courts on other issues "concerning major national interests such as foreign affairs."³⁸ The MFA's authority to influence state immunity cases may lead foreign states that are sued in Chinese courts to pressure the MFA to sway decisions in their favor, as occurred when the U.S. State Department made state immunity decisions prior to passage of the FSIA.³⁹

ENDNOTES

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| 1 | Zhonghua Renmin Gongheguo Waiguo Guojia Huomian Fa (中华人民共和国外国国家豁免法) [Foreign State Immunity Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 1, 2023, effective Jan. 1, 2024) [hereinafter FSIL]. | 46 | (C.F.A) (quoting letter from China's Ministry of Foreign Affairs). |
| 2 | JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 471 (9th ed. 2019). | 5 | FSIL art. 3. |
| 3 | United Nations Convention on the Jurisdictional Immunities of States and Their Property, UN Doc. A/59/508 (adopted Dec. 2, 2004, not in force), 44 I.L.M. 803 (2005) [hereinafter UN Convention]. | 6 | <i>Id.</i> art. 2. |
| 4 | <i>See</i> Democratic Republic of The Congo and Others v. FG Hemisphere Associates, LLC [2011] 14 H.K.C.F.A.R. 95, ¶ | 7 | <i>Id.</i> art. 4. |
| | | 8 | <i>Id.</i> art. 5(1)-(3). |
| | | 9 | <i>Id.</i> art. 5(4). |
| | | 10 | <i>Id.</i> art. 6. |
| | | 11 | <i>Id.</i> art. 7. Like the UN Convention, the FSIL has separate exceptions for employment contracts and intellectual property cases. <i>See</i> FSIL arts. 8, 11. |

- 12 Compare UN Convention art. 10.
- 13 See 28 U.S.C. § 1605(a)(2).
- 14 FSIL art. 7.
- 15 *Id.*
- 16 28 U.S.C. § 1603(d).
- 17 If the U.S. Supreme Court had been free to consider the purpose of Argentina's bonds in *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992), for example, it might have concluded that they did not constitute a commercial activity.
- 18 FSIL art. 8.
- 19 *Id.* art. 9.
- 20 *Id.* art. 10.
- 21 *Id.* art. 11.
- 22 *Id.* art. 12.
- 23 *Id.* art. 21.
- 24 Russia's 2016 law on foreign state immunity does have a reciprocity clause. See Federal Law No. 297-FZ on the Jurisdictional Immunity of a Foreign State and the Property of a Foreign State in the Russian Federation art. 4.
- 25 Zhonghua Renmin Gongheguo Waiguo Zhongyang Yinhang Caichan Mian Shou Sifa Qiangzhi Cuoshi Fa art. 3 (中华人民共和国外国中央银行财产免受司法强制措施法) [Law of the People's Republic of China on Immunity 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. 5, 2005).
- 26 28 U.S.C. § 1605(a)(3).
- 27 *Id.* §§ 1605A, 1605B.
- 28 FSIL art. 13.
- 29 Article 13 provides that a waiver of immunity from suit is not a waiver of immunity from execution.
- 30 FSIL art. 14. Because of a change to the draft law, the third exception covers Chinese rulings that recognize foreign court judgments. See William S. Dodge, *China Adopts Restrictive Theory of State Immunity*, TRANSNATIONAL LITIGATION BLOG (Sept. 14, 2023).
- 31 FSIL art. 15.
- 32 *Id.* art. 20. Diplomatic and consular immunity are governed by the Vienna Convention on Diplomatic Relations, Apr. 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95, and the Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261, respectively, both of which China is a party to. Head of state immunity and special-missions immunity, by contrast, are governed by customary international law. See generally William S. Dodge & Chimène I. Keitner, *A Roadmap for Foreign Official Immunity Cases in U.S. Courts*, 90 FORDHAM L. REV. 677 (2020).
- 33 FSIL arts. 17–18.
- 34 *Id.* art. 16.
- 35 Zhonghua Renmin Gongheguo Minshi Susong Fa arts. 276–278, 280–82, 284 (中华人民共和国民事诉讼法) [Civil Procedure Law of the People's Republic of China] (promulgated by the Nat'l People's Cong., Apr. 9, 1991, effective Apr. 9, 1991, last amended Sept. 1, 2023).
- 36 Zuiguo Renmin Fayuan Guanyu Renmin Fahyuan Shouli Sheji Tequan Yu Houian De Minshi Anjian Youguan Wenti De Tonzhi (最高人民法院关于人民法院受理涉及特权与豁免的民事案件有关问题的通知) [Notice of the Supreme People's Court on the Relevant Issues concerning the People's Courts to Accept Civil Cases Involving Privilege and Immunity] (promulgated by the Supreme People's Court, May 22, 2007, effective May 22, 2007); see Susan Finder, *Lawsuits Against Foreign Countries in the Chinese Courts*, SUPREME PEOPLE'S COURT MONITOR (Mar. 29, 2020) (discussing the notice).
- 37 FSIL art. 19.
- 38 *Id.*
- 39 *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 487 (1983) (noting diplomatic pressure on the State Department prior to the FSIA).

FOREIGN STATE IMMUNITY LAW OF THE PEOPLE'S REPUBLIC OF CHINA*
[January 1, 2024]

The Law of the People's Republic of China on Foreign State Immunity

(Adopted at the Fifth Meeting of the Standing Committee of the Fourteenth National People's Congress on September 1, 2023)

Article 1 This Law is enacted pursuant to the Constitution of the People's Republic of China to improve China's foreign state immunity system and define the jurisdiction of the courts of the People's Republic of China over civil cases involving a foreign State and its property with a view to protecting the lawful rights and interests of the parties concerned, safeguarding the sovereign equality of States, and promoting friendly exchanges with other countries.

Article 2 In this Law, a foreign State means:

1. a foreign sovereign State;
2. a State organ or a constituent part of a foreign sovereign State; or
3. an organization or an individual, authorized by a foreign sovereign State, that exercises sovereign authority and conducts activities in accordance with such authorization.

Article 3 Unless otherwise provided by this Law, a foreign State and its property enjoy immunity from the jurisdiction of the courts of the People's Republic of China.

Article 4 A foreign State shall not enjoy immunity from the jurisdiction of the courts of the People's Republic of China in proceedings instituted with regard to a particular matter or case if it has expressly submitted to the jurisdiction of the courts of the People's Republic of China with regard to the matter or case:

1. in an international treaty;
2. in a written agreement;
3. in a written document filed with the court of the People's Republic of China handling the case;
4. in a written document submitted to the People's Republic of China through diplomatic or other channels; or
5. in other manner of express submission to the jurisdiction of the courts of the People's Republic of China.

Article 5 A foreign State shall be considered as having submitted to the jurisdiction of the courts of the People's Republic of China with regard to a particular matter or case if it has:

1. instituted proceedings in a court of the People's Republic of China as a plaintiff;
2. participated in proceedings before a court of the People's Republic of China as a defendant, and made a defense on the merits of the case or a counterclaim;
3. participated in proceedings before a court of the People's Republic of China as a third party; or
4. been counterclaimed on the basis of the same legal relationship or facts during proceedings it instituted as a plaintiff or in the claims it made as a third party before a court of the People's Republic of China.

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Notwithstanding the provision of sub-paragraph 2 of the preceding paragraph, where a foreign State can prove that it could not have acquired knowledge of facts on which a claim to immunity can be based until after it made the defense, it can claim immunity within a reasonable period after it knew or ought to have known about those facts.

Article 6 A foreign State shall not be considered as having submitted to the jurisdiction of the courts of the People's Republic of China if:

1. it makes a defense for the sole purpose of claiming immunity;
2. its representative appears before a court of the People's Republic of China as a witness; or
3. it consents to the application of the law of the People's Republic of China to a particular matter or case.

Article 7 A foreign State shall not enjoy immunity from the jurisdiction of the courts of the People's Republic of China in any proceedings arising out of a commercial activity between the foreign State and an organization or an individual of another State including the People's Republic of China, which takes place in the territory of the People's Republic of China, or takes place outside the territory of the People's Republic of China but causes a direct effect in the territory of the People's Republic of China.

In this Law, a commercial activity means any act of transaction of goods or services, investment, lending, or any other act of a commercial nature, which is not an exercise of sovereign authority. The courts of the People's Republic of China, in determining whether an act is a commercial activity, shall consider all factors relating to the nature and purpose of the act.

Article 8 A foreign State shall not enjoy immunity from the jurisdiction of the courts of the People's Republic of China in any proceedings arising out of a contract concluded by the foreign State for labor or services provided by an individual where the contract is performed, in whole or in part, in the territory of the People's Republic of China, except where:

1. the procurement of labor or services provided by the individual is for the purpose of performing specific functions in the exercise of sovereign authority of the foreign State;
2. the individual providing labor or services is a diplomatic agent, a consular officer, a staff of a representative office of an international organization in China enjoying immunity, or any other personnel enjoying the relevant immunity;
3. the individual providing labor or services, at the time when the proceedings are instituted, is a national of the foreign State and has no habitual residence in the territory of the People's Republic of China; or
4. the foreign State has agreed otherwise with the People's Republic of China.

Article 9 A foreign State shall not enjoy immunity from the jurisdiction of the courts of the People's Republic of China in any proceedings for compensation arising out of personal injury or death or damage to or loss of movable or immovable property caused by the relevant conduct of the foreign State in the territory of the People's Republic of China.

Article 10 A foreign State shall not enjoy immunity from the jurisdiction of the courts of the People's Republic of China in any proceedings concerning property matters in respect of:

1. any rights, interests or obligations of the foreign State in immovable property located in the territory of the People's Republic of China;
2. any rights, interests or obligations of the foreign State in movable or immovable property arising by way of gift, testamentary gift, succession or vacant succession; or
3. rights, interests or obligations of the foreign State in the management of trust property or bankruptcy estate, or in the liquidation process of a legal person or an unincorporated organization.

Article 11 A foreign State shall not enjoy immunity from the jurisdiction of the courts of the People's Republic of China in any proceedings concerning intellectual property matters in respect of:

1. the determination of ownership and related rights and interests in an intellectual property of the foreign State that is protected by the law of the People's Republic of China; or
2. the infringement by the foreign State, in the territory of the People's Republic of China, of an intellectual property and related rights and interests protected by the law of the People's Republic of China.

Article 12 If a foreign State

- has entered into an agreement in writing according to which a dispute arising out of a commercial activity between the foreign State and an organization or an individual of another State, including the People's Republic of China, is submitted to arbitration; or
- has agreed in an international investment treaty or otherwise in writing to submit an investment dispute between the foreign State and an organization or an individual of another State, including the People's Republic of China, to arbitration,

the foreign State shall not enjoy immunity from the jurisdiction of the courts of the People's Republic of China in the following matters which are subject to review by the courts:

1. the validity of the arbitration agreement;
2. the recognition and enforcement of the arbitration award;
3. setting aside of the arbitration award; or
4. other matters related to arbitration which are subject to review by the courts of the People's Republic of China as provided by the law.

Article 13 The property of a foreign State enjoys immunity from compulsory judicial measures in the courts of the People's Republic of China.

Submission by a foreign State to the jurisdiction of the courts of the People's Republic of China shall not be considered as its waiver of immunity from compulsory judicial measures.

Article 14 The property of a foreign State shall not enjoy immunity from compulsory judicial measures in the courts of the People's Republic of China if:

1. the foreign State has expressly waived immunity from compulsory judicial measures by an international treaty, a written agreement, a written document filed with a court of the People's Republic of China, or other means;
2. the foreign State has allocated or earmarked the property for the enforcement of compulsory judicial measures; or
3. the compulsory judicial measures are taken to enforce a valid judgment or ruling rendered by a court of the People's Republic of China, and the property of the foreign State is located in the territory of the People's Republic of China, used for a commercial activity, and connected to the proceedings.

Article 15 The following property of a foreign State shall not be considered as property used for a commercial activity provided for in sub-paragraph 3 of Article 14 of this Law:

1. property, including bank account, of diplomatic missions, consular posts, special missions, missions to international organizations, and delegations to international conferences, which is used for the performance of official functions or intended for such use;

2. property of a military character, or property which is used for military purpose or intended for such use;
3. property of the central bank or a financial regulatory administration exercising central bank functions of a foreign State or of a regional economic integration organization, including cash, notes, bank deposits, securities, foreign exchange reserves, gold reserves, and the immovable property and other property of the central bank or a financial regulatory administration exercising central bank functions;
4. property which forms part of the cultural heritage or archives of a foreign State, and which is not placed or intended to be placed for sale;
5. object of scientific, cultural or historical value used for exhibition, which is not placed or intended to be placed for sale as property; and
6. other property which a court of the People's Republic of China considers as not being used for a commercial activity.

Article 16 Where there is no applicable provision in this Law, the civil procedure law and other relevant laws of the People's Republic of China shall apply to the adjudication and enforcement proceedings of civil cases involving a foreign State and its property.

Article 17 The courts of the People's Republic of China shall effect service of writs of summons or such other litigation documents on a foreign State in accordance with:

1. the means specified in international treaties to which the foreign State and the People's Republic of China are contracting or acceding parties; or
2. other means accepted by the foreign State and not precluded by the law of the People's Republic of China.

Where the service cannot be effected by means specified in the preceding paragraph, service may be effected by transmitting a diplomatic note to the diplomatic authorities of the foreign State, and the service shall be deemed to have been effected on the date of the issuance of the diplomatic note.

The litigation documents served by means specified in the first and second paragraphs of this Article shall be accompanied by copies of their translation into the language stipulated in the international treaties to which the foreign State and the People's Republic of China are contracting or acceding parties, or, in the absence of such treaties, into the official language of the foreign State.

When serving a copy of the statement of claim on a foreign State, the foreign State shall, at the same time, be notified to file a defense within three months from the date of receipt of the copy of the statement of claim.

A foreign State that filed a defense on the merits of the case in proceedings instituted against it shall not thereafter challenge the means by which the service of the litigation documents had been effected.

Article 18 If a foreign State on which the service of litigation documents is effected fails to appear before a court of the People's Republic of China within the time limit specified by the court, the court shall, on its own motion, find out whether the foreign State enjoys jurisdictional immunity. The court of the People's Republic of China may render a default judgment on a case involving a foreign State which does not enjoy immunity from the jurisdiction of the courts of the People's Republic of China six months after the date on which the service of the litigation documents is effected.

A default judgment rendered by a court of the People's Republic of China against a foreign State shall be served in accordance with Article 17 of this Law.

The time limit for a foreign State to appeal a default judgment rendered by a court of the People's Republic of China is six months from the date on which the service of the judgment is effected.

Article 19 The courts of the People's Republic of China shall accept the certifying documents issued by the Ministry of Foreign Affairs of the People's Republic of China on the following questions of fact concerning acts of State:

1. whether the State involved in a case constitutes a foreign sovereign State as defined in sub-paragraph 1 of Article 2 of this Law;
2. whether and when the service of the diplomatic note specified in Article 17 of this Law is effected; and
3. other questions of fact concerning acts of State.

The Ministry of Foreign Affairs of the People's Republic of China may provide an opinion to the courts of the People's Republic of China on issues concerning major national interests such as foreign affairs other than those mentioned in the preceding paragraph.

Article 20 The provisions of this Law shall not affect the privileges and immunities enjoyed by diplomatic missions, consular posts, special missions, missions to international organizations, delegations to international conferences of a foreign State and members of the foregoing missions or delegations in accordance with the law of the People's Republic of China and the international treaties to which the People's Republic of China is a contracting or acceding party.

The provisions of this Law shall not affect the privileges and immunities enjoyed by heads of State, heads of government, foreign ministers and other officials of equivalent status of a foreign State in accordance with the law of the People's Republic of China, the international treaties to which the People's Republic of China is a contracting or acceding party, and international custom.

Article 21 If the immunity accorded by a State to the People's Republic of China and its property is less favorable than those provided by this Law, the People's Republic of China applies the principle of reciprocity.

Article 22 Where an international treaty to which the People's Republic of China is a contracting or acceding party provides otherwise, the provisions of the international treaty shall apply, with the exception of provisions on which the People's Republic of China has declared reservations.

Article 23 This Law shall come into force on January 1, 2024.