

China's Foreign State Immunity Law: A View from the United States

Chinese Journal of Transnational Law
2024, Vol 1(2) 137–153
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DOI: 10.1177/2753412X241247632
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William S. Dodge*

Abstract

On September 1, 2023, the Standing Committee of the National People's Congress promulgated the Foreign State Immunity Law (FSIL) of the People's Republic of China, which adopts the restrictive theory of foreign state immunity. This article has two goals. First, the article introduces China's FSIL to English language readers by explaining its provisions in some detail. Second, the article provides a U.S. perspective on the FSIL by comparing it to the U.S. Foreign Sovereign Immunities Act (FSIA) and discussing the U.S. experience with foreign state immunity.

Keywords

foreign state immunity, restrictive theory, foreign state immunity law, foreign official immunity, China

On September 1, 2023, the Standing Committee of the National People's Congress promulgated the Foreign State Immunity Law (FSIL) of the People's Republic of China, which entered into force on January 1, 2024.¹ The law adopts the restrictive theory of foreign state immunity, under which

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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., September 1, 2023, effective January 1, 2024), *translated at* http://en.npc.gov.cn.cdurl.cn/2023-09/01/c_924629.htm [hereinafter FSIL]. A draft of the FSIL was published for comment in December 2022. See <https://tlblog.org/wp-content/uploads/2023/04/外国国家豁免法征求意见稿.pdf> (Chinese original) [hereinafter Draft FSIL]; <https://conflictflaws.net/News/2023/03/Law-on-Foreign-State-Immunity-of-China-1.pdf> (English translation). The NPC Observer has a helpful chart comparing the Chinese text of the final version to the draft law. See https://npcobserver.com/wp-content/uploads/2023/09/Foreign-State-Immunity-Law_Comparison_FinalDraft.pdf [hereinafter Comparison Chart].

School of Law, University of California, Davis, USA

* Martin Luther King, Jr. Professor of Law and John D. Ayer Chair in Business Law, University of California, Davis, School of Law. I am grateful to Susan Finder and Wenliang Zhang for their suggestions and insights.

Corresponding author:

William S. Dodge, School of Law, University of California, Davis, USA.

Email: wsdodge@ucdavis.edu

states are immune only from suits based on their governmental acts. For the law of state immunity, this move is particularly significant because China had previously been the most important adherent to the rival, absolute theory of foreign state immunity.²

Today, most countries follow the restrictive theory.³ The restrictive theory has also been adopted in the U.N. Convention on Jurisdictional Immunities of States and Their Property, which currently has 23 parties but has not yet entered into force.⁴ China signed the U.N. Convention in 2005 but has not ratified it. A few years after signing, China's Ministry of Foreign Affairs (MFA) clarified China's position in letters to a Hong Kong court, stating that China continued to follow the absolute theory of foreign state immunity.⁵ The FSIL's adoption thus marks a significant change in Chinese policy.

Although some commentators have suggested that the FSIL targets the United States, such suggestions miss the mark.⁶ Recent U.S. actions such as export controls on computer chips, which China has protested, are governmental acts that remain immune from suit under the new law. Instead, a combination of practical and strategic considerations better explains the shift in policy. On a practical level, China's increasingly lonely adherence to the absolute theory was hurting Chinese parties who could not sue foreign states in Chinese courts even though foreigners could sue China in foreign courts.⁷ On a strategic level, the FSIL represents a significant step in building China's "Foreign-Related Rule of Law," currently a goal of the Chinese leadership.⁸ Also, by ending China's outlier status with respect to state immunity, China continues its strategy of "progressive compliance" with international law, which helps to legitimate China as a rising power.⁹

As noted below, the FSIL tracks the U.N. Convention in many respects, thus following a prominent model of the restrictive theory. However, the FSIL has distinctive characteristics not found in the laws of most other countries. These include a reciprocity clause that permits China to deny immunity to foreign states in circumstances where the foreign state would deny immunity to China, as well as a prominent role for China's MFA in cases brought under the FSIL.

2. Russia, another long adherent to the absolute theory, adopted the restrictive theory of immunity in 2016. *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 [hereinafter Russian Law on State Immunity], translation available at <https://tlblog.org/wp-content/uploads/2023/04/Russia-Federal-Law-№297-FZ-On-jurisdictional-immunities-of-foreign-states.docx>.
3. *See* Pierre-Hugues Verdier & Erik Voeten, *How Does Customary International Law Change? The Case of State Immunity*, 59 Int'l Stud. Q. 209, 220 (2015) (surveying the laws of 121 countries as of 2010 and finding that 76 had adopted the restrictive theory); *see also* Hazel Fox & Philippa Webb, *The Law of State Immunity* 131–64 (3d ed. 2013) (discussing adoption of restrictive theory).
4. United Nations Convention on the Jurisdictional Immunities of States and Their Property, UN Doc. A/59/508 (adopted December 2, 2004, not in force) [hereinafter U.N. Convention].
5. *See* Democratic Republic of The Congo and Others v. FG Hemisphere Associates, LLC [2011] 14 H.K.C.F.A.R. 95, ¶¶ 44, 46 (C.F.A.) (quoting letters from China's Ministry of Foreign Affairs).
6. *See* William S. Dodge, *China Adopts Restrictive Theory of Foreign State Immunity*, Transnational Litigation Blog (September 14, 2023) (discussing commentators).
7. Donald Clarke, *China's Foreign State Immunity Law: Some Comments*, The China Collection (September 6, 2023) ("China finally decided that there was no point in maintaining the doctrine of absolute sovereignty, since other states weren't respecting it in their courts and the only people it was hurting were Chinese plaintiffs.").
8. Moritz Rudolph, *Poliburo Whisperer on Advancing "Foreign-Related Rule of Law"*, NPC Observer (December 18, 2023); *see also* Susan Finder, *How China's Supreme People's Court Supports the Development of Foreign Related Rule of Law*, 8 China L. & Soc. Rev. 62 (2023).
9. Congyan Cai, *The Rise of China and International Law: Taking Chinese Exceptionalism Seriously* 102 (2019).

This article has two goals. First, the article introduces China's FSIL to English language readers by explaining its provisions in some detail. Second, the article provides a U.S. perspective on the FSIL by comparing it to the U.S. Foreign Sovereign Immunities Act (FSIA)¹⁰ and discussing the U.S. experience with foreign state immunity. Part I provides background on the restrictive theory of state immunity, its adoption by other countries, and China's resistance to that theory. Part II discusses the FSIL's main exceptions to immunity from suit, including the reciprocity clause. Part III turns to the law's procedural provisions, discussing its rules on service of process and default judgments, as well as its interaction with China's Civil Procedure Law (CPL). Part IV covers the immunity of state-owned property from compulsory measures such as attachment and execution. Part V discusses the FSIL's treatment of foreign officials, suggesting that China's decision to follow the U.N. Convention on this matter may create problems. Part VI considers the role of China's MFA in administering the FSIL, which is one of the distinctive features of the new law. It suggests that China may face pressure from foreign governments on questions of state immunity like the pressures the U.S. government faced prior to the adoption of the FSIA in 1976. Part VII concludes.

I. THE RESTRICTIVE THEORY OF FOREIGN STATE IMMUNITY

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*).¹¹ Italy was the first to adopt the restrictive theory in 1886, and a few other states followed during the first half of the twentieth century.¹² The United States adopted the restrictive theory in 1952 with the so-called "Tate Letter," written by Acting State Department Legal Adviser Jack Tate, conveying the Department's new position to the U.S. Justice Department.¹³ Between 1952 and 1976, the State Department made immunity determinations in more than 100 cases.¹⁴ Courts in the United States treated these determinations as binding and, in cases where no determination was made, courts applied the principles that the State Department had articulated in other determinations. Many observers, including the State Department itself, disliked this system because foreign governments often pressured the Department to grant immunity and took offense when it did not.¹⁵

In 1976, the U.S. Congress passed the FSIA which was intended to make immunity decisions less political by establishing clear rules for foreign state immunity and transferring the responsibility for applying those rules from the State Department to the courts. The FSIA applies to foreign states and their agencies or instrumentalities (including some state-owned enterprises),¹⁶ but not

10. The FSIA is codified at 28 U.S.C. §§ 1330, 1332(a)(2)-(4), 1391(f), 1441(d), and 1602-1611.

11. James Crawford, *Brownlie's Principles of Public International Law* 471 (9th ed. 2019); see also *Jurisdictional Immunities of the State* (Ger. v. It.), Judgment, 2012 I.C.J. 97, ¶ 59 (February 3) (noting "that many States ... now distinguish between *acta jure gestionis*, in respect of which they have limited the immunity which they claim for themselves and which they accord to others, and *acta jure imperii*").

12. See Verdier & Voeten, *supra* note 3, at 220 (listing seven countries as having adopted the restrictive theory by 1950: Italy, Belgium, Switzerland, Egypt, Greece, Netherlands, and Austria).

13. Letter From Jack B. Tate, Acting Legal Adviser to the State Department, to Acting Attorney General Philip B. Perlman, May 19, 1952, in 26 Dep't of State Bull. 984 (1952).

14. *Sovereign Immunity Decisions of the Department of State, May 1952 to January 1977*, 1977 Digest of United States Practice in International Law 1017 (Michael Sandler, Detlev F. Vagts, & Bruno A. Ristau eds., 1977).

15. See *infra* notes 135-39 and accompanying text (discussing U.S. experience between 1952 and 1976).

16. 28 U.S.C. § 1603(b)(2) (defining agency or instrumentality of a foreign state to include an entity "a majority of whose shares or other ownership interest is owned by a foreign state").

to foreign officials.¹⁷ The FSIA begins by providing that foreign states are immune from suit in federal and state courts unless an exception to immunity applies.¹⁸ It then creates several exceptions.¹⁹ The FSIA also contains provisions on service of process,²⁰ default judgments,²¹ and the immunity of assets from attachment and execution.²²

Some other countries also enacted statutes codifying the restrictive theory of state immunity, including the United Kingdom (1978), Pakistan (1981), South Africa (1981), Malawi (1984), Malaysia (1984), Canada (1985), Australia (1985), Singapore (1985), Argentina (1995), Israel (2008), Japan (2009), and Russia (2016).²³ Others adopted the restrictive theory by court decision.²⁴

In 2004, the U.N. General Assembly adopted the U.N. Convention on Jurisdictional Immunities of States and Their Property, which codifies the restrictive theory.²⁵ The Convention requires 30 parties to enter into force and has so far been ratified by only 23 countries.²⁶ China signed the Convention in 2005 but has not ratified it.²⁷ In 2008, China's MFA stated in a letter to a Hong Kong court that China still followed the absolute theory of foreign state immunity: "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."²⁸ In a second letter sent in 2009, the MFA explained that it signed the U.N. Convention "to express China's support of the ... coordination efforts made by the international community" but that "[a]fter signature of the Convention, the position of China in maintaining absolute immunity has not been changed, and has never applied or recognized the so-called principle or theory of 'restrictive immunity.'"²⁹

Therefore, China's adoption of the restrictive theory of state immunity in the FSIL represents an important change of policy. From January 1, 2024, the immunity of foreign states from jurisdiction

17. *Samantar v. Yousuf*, 560 U.S. 305 (2010) (holding that the FSIA does not apply to foreign officials).

18. 28 U.S.C. § 1604.

19. These include exceptions for waivers of state immunity, commercial activities, expropriations, rights in property in the United States, territorial torts, arbitration, maritime liens, terrorism, and counterclaims. *Id.* §§ 1605, 1605A, 1605B, 1607.

20. *Id.* § 1608(a)-(c).

21. *Id.* § 1608(e).

22. *Id.* §§ 1609–11.

23. State Immunity Act 1978, c. 33 (U.K.); State Immunity Ordinance 1981 (Pak.); Foreign States Immunities Act 87 of 1981 (S. Afr.); Immunities and Privileges Act 1984, c. 16:01 (Malawi); Immunities and Privileges Act 1984 (Malaysia); State Immunity Act, R.S.C., 1985, c. S-18 (Can.); Foreign States Immunities Act 1985 (Austl.); State Immunity Act, 1985, c. 313 (Sing.); Law No. 24.488 (Statute on the Immunity of Foreign States before Argentine Tribunals) 1995 (Arg.); Foreign State Immunity Law 2008 (Isr.); Act on the Civil Jurisdiction of Japan with Respect to a Foreign State, Act No. 24 of 2009 (Japan); Russian Law on State Immunity, *supra* note 2.

24. See Fox & Webb, *supra* note 3, at 147 (discussing Kenya, Ireland, New Zealand, Nigeria, and Zimbabwe); *id.* at 152–59 (discussing Italy, Belgium, France, Spain, Portugal, Austria, Germany, and Switzerland).

25. U.N. Convention, *supra* note 4.

26. Those countries are Austria, Benin, Czech Republic, Equatorial Guinea, Finland, France, Iran, Iraq, Italy, Japan, Kazakhstan, Latvia, Lebanon, Liechtenstein, Mexico, Norway, Portugal, Romania, Saudi Arabia, Slovakia, Spain, Sweden, and Switzerland. Status Table, United Nations Convention on Jurisdictional Immunities of States and Their Property, available at https://treaties.un.org/pages/ShowMTDSGDetails.aspx?src=UNTSOnline&tabid=2&mtsg_no=III-13&chapter=3&lang=en.

27. *Id.*

28. See *Democratic Republic of The Congo and Others v. FG Hemisphere Associates, LLC* [2011] 14 H.K.C.F.A.R. 95, ¶ 44 (C.F.A) (quoting letter).

29. See *id.* ¶ 46 (quoting letter).

and execution in Chinese courts is subject to several exceptions. Moreover, China has chosen to apply the restrictive theory to all foreign states, not just to those states that might decide to join the U.N. Convention.³⁰

II. IMMUNITY AND EXCEPTIONS

China's FSIL begins with a presumption that foreign states and their property are immune from jurisdiction. Article 3 says: "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."³¹ Article 2 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."³² These provisions generally follow the U.N. Convention.³³

The main difference between the United States' FSIA and China's FSIL lies in their definitions of "foreign state." Like the FSIL, the FSIA's definition of "foreign state" includes political subdivisions and organs of the state.³⁴ But, the FSIA extends immunity to companies that are directly majority-owned by a foreign state, even if they do not exercise sovereign authority,³⁵ and the FSIA does not apply to individuals.³⁶

A. Waiver Exception

Articles 4–6 of the FSIL provide that a foreign state is not immune when it has consented to the jurisdiction of Chinese courts. Article 4 sets forth means by which a foreign state may expressly consent to jurisdiction.³⁷ 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 of the case or a counterclaim," or participates as a third party in Chinese courts.³⁸ 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.³⁹ Article 6, on the other hand, says that 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

30. If China were to ratify the U.N. Convention and if the Convention were to enter into force, the Convention would supersede the FSIL with respect to foreign states that are also parties to the Convention. *See* FSIL art. 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.).

31. FSIL art. 3.

32. *Id.* art. 2.

33. U.N. Convention, *supra* note 4, arts. 2(1)(b), 5.

34. 28 U.S.C. § 1603(a)-(b).

35. *Id.* § 1603(b); *see also* *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003) (interpreting this provision). China has consistently taken the position that state-owned enterprises are not entitled to state immunity based on ownership. *See* Xueliang Ji, *A Tale of Two Immunities: The Ongoing Transition from Absolute to Restrictive Sovereign Immunity in China*, *Asia Pacific Law Review* 5, <https://doi.org/10.1080/10192557.2023.2274633> (published online November 8, 2023).

36. *Samantar v. Yousuf*, 560 U.S. 305 (2010). For further discussion of foreign officials, *see infra* Part V.

37. FSIL art. 4.

38. *Id.* art. 5(1)-(3).

39. *Id.* art. 5(4).

govern a particular matter.⁴⁰ These provisions follow the U.N. Convention.⁴¹ The U.S. FSIA 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.”⁴² It also contains a provision on counterclaims.⁴³

B. Commercial Activity Exception

The FSIL also contains a commercial activity exception. Article 7 provides 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.”⁴⁴ This provision corresponds to Article 10 of the U.N. Convention,⁴⁵ but the Convention’s exception does not mention the location of the activity or its effect.⁴⁶ In this respect, the FSIL more closely resembles the United States’ commercial activity exception, which permits suit based upon a commercial act or activity in the United States or a based upon a commercial act elsewhere that “causes a direct effect in the United States.”⁴⁷

Article 7 of the FSIL 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.”⁴⁸ One revision that the NPC Standing Committee made to the draft of the FSIL was to add “lending” (借贷) to the FSIL’s definition of commercial activity.⁴⁹ This change makes it more likely that lending to foreign governments under China’s Belt and Road Initiative will fall within the commercial activity exception.⁵⁰

Article 7 goes on to say: “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.”⁵¹ The reference to both “nature and purpose” is significant. The U.N. Convention allows

40. *Id.* art. 6.

41. U.N. Convention arts. 7–9.

42. 28 U.S.C. § 1605(a)(1). U.S. courts have held that “an implied waiver may arise where a foreign state concludes a contract that contains a choice-of-law clause designating the laws of the United States as applicable.” *Ashraf-Hassan v. Embassy of France*, 40 F. Supp. 3d 94, 100 (D.D.C. 2014), *aff’d* 610 F. App’x 3 (D.C. Cir. 2015). For criticism, see John F. Coyle & Ingrid (Wuerth) Brunk, *Contractual Waivers of Foreign Sovereign Immunity*, Transnational Litigation Blog (September 20, 2022). China’s FSIL, by contrast, does not consider choosing Chinese law to be a waiver of state immunity.

43. 28 U.S.C. § 1607.

44. FSIL art. 7.

45. U.N. Convention art. 10. Like the U.N. Convention, the FSIL deals separately with employment contracts and intellectual property cases. *See* FSIL arts. 8, 11; U.N. Convention arts. 11, 14. The U.S. FSIA does not have separate provisions on employment contracts and intellectual property, but its commercial activity exception, 28 U.S.C. § 1605(a)(2), may cover them.

46. U.N. Convention art. 10. Instead, it requires that, “by virtue of the applicable rules of private international law, differences relating to the commercial transaction fall within the jurisdiction of a court of another State.” *Id.*

47. 28 U.S.C. § 1605(a)(2).

48. FSIL art. 7.

49. *See* Comparison Chart, *supra* note 1.

50. Even without this change, “lending” would generally be considered a “commercial activity.”

51. FSIL art. 7.

consideration of both.⁵² The U.S. FSIA, on the other hand, expressly states: “The 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.”⁵³ Considering “purpose,” as the FSIL does, is likely to result in a narrower exception—and thus in broader immunity for foreign states—than considering “nature” alone. For example, applying the FSIA’s nature-only test, the U.S. Supreme Court held that issuing foreign government bonds is a commercial activity, even if done for a sovereign purpose.⁵⁴ It is unclear if Chinese courts applying the FSIL will reach the same conclusion.

C. Territorial Tort Exception

Article 9 of the FSIL creates an exception to state immunity for “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.”⁵⁵ This generally tracks Article 12 of the U.N. Convention.⁵⁶ As I observed in an earlier analysis,⁵⁷ the initial published draft of the FSIL did not make clear whether the tortious act, the injury, or both had to occur within the territory of China.⁵⁸ The final version promulgated by the NPC Standing Committee removes this ambiguity, making clear that the “relevant conduct” must occur in China.

The territorial tort exception in the U.S. FSIA is narrower than the FSIL’s exception in two respects. First, although the language of the FSIA might suggest that only the injury must occur in the United States,⁵⁹ the exception has been interpreted to require that the “entire tort,” both conduct and injury, occur on U.S. soil.⁶⁰ Second, the FSIA’s exception itself contains two exceptions—two categories of tort claims that *cannot* be brought against a foreign state even if they occur entirely within the United States: (1) Claims based on the exercise of a “discretionary function”⁶¹; and (2) claims for “malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.”⁶² China’s FSIL does not include such exceptions.

D. Property Exception

FSIL Article 10 creates an exception to immunity for claims involving: (1) immoveable property in China; (2) interests in moveable or immoveable property arising from gifts, bequests, or

52. U.N. Convention art. 2(2).

53. 28 U.S.C. § 1603(d).

54. *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992).

55. FSIL art. 9.

56. U.N. Convention art. 12.

57. William S. Dodge, *China’s Draft Law on Foreign State Immunity Would Adopt Restrictive Theory*, Transnational Litigation Blog (April 12, 2023).

58. Draft FSIL, *supra* note 1, art. 9 (对于外国国家在中华人民共和国领域内造成人身损害或者死亡,或者动产、不动产的损失引起的赔偿诉讼).

59. 28 U.S.C. § 1605(a)(5).

60. *See Doe v. Fed. Democratic Republic of Ethiopia*, 851 F.3d 7, 10 (D.C. Cir. 2017) (“The entire tort—including not only the injury but also the act precipitating that injury—must occur in the United States.” (quotation marks and citations omitted)).

61. 28 U.S.C. § 1605(a)(5)(A).

62. *Id.* § 1695(a)(5)(B).

inheritance; and (3) interests in trust property and bankruptcy estates.⁶³ This provision closely follows Article 13 of the U.N. Convention.⁶⁴ The U.S. FSIA also contains a property exception.⁶⁵ It applies to the first two categories of cases (immoveable property and succession), but does not apply to cases involving state interests in trust property or bankruptcy estates.

E. Arbitration Exception

Article 12 of the FSIL provides that a foreign state that has agreed to arbitrate disputes is not immune from jurisdiction with respect to certain matters requiring review by a court. These include “the validity of the arbitration agreement,” “the recognition and enforcement of the arbitration award,” “setting aside of the arbitration award,” and “other matters related to arbitration which are subject to review by the courts of the People’s Republic of China.”⁶⁶ This provision corresponds to Article 17 of the U.N. Convention.⁶⁷

Like Article 17 of the U.N. Convention, the FSIL’s arbitration exception is limited to disputes arising from commercial activities, including investment disputes.⁶⁸ The arbitration exception in § 1605(a)(6) of the FSIA is potentially broader because it extends to disputes “with respect to a defined legal relationship, whether contractual or not.”⁶⁹

F. Reciprocity Clause

China’s FSIL also contains a reciprocity clause. Article 21 provides: “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.”⁷⁰ The U.N. Convention does not have a reciprocity provision. Nor do most other states that have codified the law of state immunity, although Russia’s law does.⁷¹

In Chinese, the term translated here as “reciprocity” is *duideng* (对等), which connotes equivalent treatment for unfriendly foreign actions.⁷² In the context of foreign state

63. FSIL art. 10.

64. U.N. Convention art. 13.

65. 28 U.S.C. § 1605(a)(4).

66. FSIL art. 12.

67. U.N. Convention art. 17.

68. An annex to the U.N. Convention states the understanding that “[t]he expression ‘commercial transaction’ includes investment matters.” U.N. Convention annex.

69. 28 U.S.C. § 1605(a)(6).

70. FSIL art. 21. In the draft FSIL, this provision included the word “may” (可以), but in the final version of the law, this word has been removed. *See* Comparison Chart, *supra* note 1, art. 21. The effect of this change is that applying the principle of reciprocity is mandatory on Chinese courts.

71. Russian Law on State Immunity, *supra* note 2, art. 4.

72. “Duideng” is distinct from another principle of reciprocity, *huhui* (互惠), which is used in the context of judicial assistance. Whereas *duideng* is a response to negative treatment, *huhui* is a response to positive treatment. China’s Civil Procedure Law provides that reciprocity (*huhui*) may be relied on to provide judicial assistance in service of process, investigation and collection of evidence, and other litigation activities. *Zhonghua Renmin Gongheguo Minshi Susong Fa* art. 293 (《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., April 9, 1991, effective April 9, 1991, last amended September 1, 2023) [hereinafter CPL]). Reciprocity (*huhui*) also provides the basis for recognizing and enforcing foreign judgments in China. *Id.* art. 298; *see also* William S. Dodge & Wenliang Zhang, *Reciprocity in China-U.S. Judgments Recognition*, 53 Vand. J. Transnat’l L. 1541 (2020). China has recently liberalized its approach to foreign judgments. *See* Meng Yu

immunity, *duideng* means that, if foreign states grant less immunity to China, China will respond by granting less immunity to those foreign states. Under a 2005 law on the immunity of central bank assets, the same principle of reciprocity (*duideng*) was applied to foreign states that granted less immunity to the central bank assets of the People's Republic of China.⁷³ Article 21 of the FSIL extends this principle to questions of foreign state immunity generally.⁷⁴

The FSIL's reciprocity clause has implications for the United States. The U.S. FSIA contains exceptions for expropriations in violation of international law⁷⁵ and for terrorism⁷⁶ that are not found in the laws of most other countries.⁷⁷ Under Article 21, China would be able to hear expropriation and terrorism claims against the United States to the extent that U.S. courts are authorized to hear such claims against China.⁷⁸

III. PROCEDURAL PROVISIONS

In addition to its provisions on immunity from suit, the FSIL specifies how foreign states may be served and when default judgments against foreign states may be entered. It also provides, with respect to questions not addressed in the FSIL, China's CPL and other relevant laws continue to apply.

A. Service

Article 17 of the FSIL provides that Chinese courts⁷⁹ may serve process on a foreign state as provided in treaties between China and the foreign state or by "other means accepted by the foreign

& Guodong Du, *China's 2022 Landmark Judicial Policy Clears Final Hurdle for Enforcement of Foreign Judgments*, Conflict of Laws.net (July 1, 2022).

73. *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., October 25, 2005, effective October 5, 2005).

74. *Duideng* also appears in Article 5(2) of China's Civil Procedure Law and in Article 99(2) of China's Administrative Litigation Law to address restrictions on the litigation rights of Chinese parties imposed by foreign countries. See CPL art. 5(2); *Zhonghua Renmin Gongheguo Xingzheng Susong Fa* art. 99(2) (中华人民共和国行政诉讼法) [Administrative Litigation Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., April 4, 1989, effective October 1, 1990, last amended September 1, 2023).

75. 28 U.S.C. § 1605(a)(3).

76. The FSIA has an exception for state-sponsored terrorism that applies only to countries that have been designated as state sponsors of terrorism by the U.S. State Department. 28 U.S.C. § 1605A. There is a separate exception for international terrorism in the United States that is not limited to particular countries. 28 U.S.C. § 1605B.

77. To my knowledge, no other country has an expropriation exception. Only Canada has a terrorism exception. See State Immunity Act, R.S.C. 1985, c. S-18, art. 6.1 (Can.). Iran has recently challenged Canada's law before the International Court of Justice as a violation of customary international law. See William S. Dodge, *Why Terrorism Exceptions to State Immunity Do Not Violate International Law*, Transnational Litigation Blog (August 10, 2023).

78. Chinese courts could presumably not rely on the FSIA's state-sponsored terrorism exception, for example, because the U.S. State Department has not designated China as a state sponsor of terror. See U.S. Dep't of State, State Sponsors of Terrorism, <https://www.state.gov/state-sponsors-of-terrorism/> (listing Cuba, Iran, North Korea, and Syria as state sponsors of terrorism).

79. In another change from the draft law, the NPC Standing Committee has added "The courts of the People's Republic of China" (中华人民共和国的法院) to the beginning of Article 17 on service of process. The general practice in China is that courts, rather than litigants, serve process.

State and not precluded by the law of the People's Republic of China."⁸⁰ If neither of these means is possible, then service may be made by sending a diplomatic note.⁸¹ A foreign state may not object to improper service after it has made a pleading on the merits.⁸² This provision closely follows the U.N. Convention.⁸³

The U.S. rules for service under the FSIA are complex and distinguish between service on a foreign state and service on an agency or instrumentality of a foreign state.⁸⁴ For service in a foreign state, there are four options that, if available, 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 MFA; and (4) through diplomatic channels.⁸⁵ For service on an agency or instrumentality, there are six options: (1) In accordance with any special arrangement between the plaintiff and the agency or instrumentality; (2) by delivery to an agent in the United States; (3) in accordance with an international convention; (4) as directed by an authority of the foreign state in response to a letter of request; (5) by mail from the clerk of the court; and (6) as directed by the U.S. court consistent with the law of the place where service is to be made.⁸⁶

B. Default Judgments

If the foreign state does not appear, Article 18 of the FSIL requires a Chinese court, "on its own motion, [to] find out whether the foreign State enjoys jurisdictional immunity."⁸⁷ The court may not enter a default judgment until at least 6 months after the foreign state has been served. The judgment must then be served on the foreign state, which will have 6 months to appeal.⁸⁸ The U.N. Convention is similar but with 4-month time periods.⁸⁹

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.⁹⁰ The FSIA 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."⁹¹ In other words, courts in the United States are

80. FSIL art. 17. The United States and China are both parties to the Hague Service Convention, which provides for service through the receiving state's Central Authority. Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, opened for signature November 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163.

81. FSIL art. 17.

82. *Id.*

83. U.N. Convention art. 22.

84. 28 U.S.C. § 1608(a)-(b).

85. *Id.* § 1608(a).

86. *Id.* § 1608(b). The first option, if available must be tried first. If the first option is unavailable, the second or third may be used. Only if service cannot be made under any of the first three options may the last three be used. *See id.*

87. FSIL art. 18

88. *Id.*

89. U.N. Convention art. 23.

90. 28 U.S.C. § 1330(a); *see also* *Arbaugh v. Y&H Corp.*, 546 U.S. 500, 501 (2006) (noting that federal courts "have an independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party").

91. 28 U.S.C. § 1608(e).

additionally obligated to examine the substance of the claim before granting a default judgment. China's FSIL does not appear to impose any similar obligation.

C. Other Procedural Matters

FSIL Article 16 states: "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." This provision makes clear that litigation against foreign states is subject to the same rules as other litigation in China except as expressly provided in the FSIL.

This includes, most prominently, China's CPL.⁹² The CPL, which was amended in September 2023 when the FSIL was promulgated, has a part devoted specifically to "Foreign-Related Civil Litigation Procedures."⁹³ The CPL's provisions on personal jurisdiction,⁹⁴ parallel proceedings,⁹⁵ forum non-conveniens,⁹⁶ and the collection of evidence⁹⁷ will all apply to suits against foreign states brought under the FSIL.

Cases brought under the FSIL will also be subject to the reporting system established by the Notice of the Supreme People's Court (SPC) on the Relevant Issues concerning the People's Courts to Accept Civil Cases Involving Privilege and Immunity.⁹⁸ Under this system, the court with which the case is filed (generally an intermediate people's court), must report the case to its higher people's court for review. If the higher people's court agrees with the decision to accept the case, it must report the case to the SPC for review.⁹⁹ The case may not be accepted until the SPC has replied. In practice, this means that the FSIL will be interpreted and applied principally by the SPC.

IV. IMMUNITY OF PROPERTY FROM EXECUTION

Under customary international law, the immunity of a foreign state's property from compulsory measures like execution of a judgment is separate from—and generally broader than—a foreign state's immunity from suit.¹⁰⁰ Accordingly, Articles 13–15 of the FSIL address the immunity of a foreign state's property from compulsory measures separately from a foreign state's immunity from suit.

92. CPL, *supra* note 72.

93. *Id.* Part 4.

94. *Id.* arts. 276–278.

95. *Id.* arts. 280–281.

96. *Id.* art. 282.

97. *Id.* art. 284. China and the United States are both parties to the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, March 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 231.

98. 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), *translation available at* <http://en.pkulaw.cn/display.aspx?cgid=a587ef3e6c37ed33bdfb&lib=law>. For further discussion, see Susan Finder, *Lawsuits Against Foreign Countries in the Chinese Courts*, Supreme People's Court Monitor (March 29, 2020).

99. A similar reporting system exists for decisions not to recognize or enforce foreign arbitration awards.

100. Jurisdictional Immunities of the State (Ger. v. It.), Judgment, 2012 I.C.J. 97, ¶ 113 (February 3) (observing "that the immunity from enforcement enjoyed by States in regard to their property situated on foreign territory goes further than the jurisdictional immunity enjoyed by those same States before foreign courts").

Article 13 states the general rule that “[t]he property of a foreign State enjoys immunity from compulsory judicial measures in the courts of the People’s Republic of China” and further provides that a foreign state’s waiver of immunity from suit is not a waiver of immunity from compulsory measures.¹⁰¹ Article 14 creates three exceptions to immunity: (1) when the foreign state has expressly waived such immunity; (2) when the foreign state has specifically earmarked property for the enforcement of such measures; and (3) “to enforce a valid judgment or ruling rendered by a court of the People’s Republic of China” when the property is used for commercial activities, relates to the proceedings, and is located in China.¹⁰² Article 15 goes on to identify 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, property of a military character, central bank assets, and property of scientific, cultural, or historical value.¹⁰³ These provisions generally follow the U.N. Convention.¹⁰⁴

One of the changes the NPC Standing Committee made to the draft FSIL was to add the word “ruling” (裁定) to Article 14(3).¹⁰⁵ This is significant because Chinese court decisions that recognize foreign judgments are considered “rulings” rather than “judgments.”¹⁰⁶ The addition of “ruling” to the text means that Article 14(3) may be used to enforce *foreign* court judgments against the property of a foreign state located in China by obtaining a Chinese court ruling recognizing the foreign judgment. This change brings the FSIL into greater alignment with the U.N. Convention, which similarly permits the execution of domestic and foreign judgments against the property of foreign states.¹⁰⁷

The U.S. rules on the immunity of state from attachment and execution of state property found in the FSIA are different in certain respects. First, 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,¹⁰⁸ even when the foreign state has waived its immunity, which can be a difficult set of conditions to satisfy.¹⁰⁹ Articles 14(1) and (2) of China’s FSIL, by contrast, impose no similar conditions. Second, the U.S. FSIA has separate and looser rules for attaching the property of agencies or instrumentalities of foreign states in the United States, rules that do not require the property to be used for commercial activity in the United States as long as the agency or instrumentality is engaged in a commercial activity in the United States.¹¹⁰ Finally, the FSIA singles out only central bank and military assets as exceptions to the rules allowing post-judgment attachment and

101. FSIL art. 13.

102. *Id.* art. 14.

103. *Id.* art. 15.

104. U.N. Convention arts. 18–21.

105. See Comparison Chart, *supra* note 1, art. 14.

106. I identified this issue in an earlier analysis of the draft FSIL. See Dodge, *supra* note 57.

107. See U.N. Convention, *supra* note 4, art. 18 (referring to pre-judgment measures “in connection with a proceeding before a court of another State”); *id.* art. 19 (referring to post-judgment measures “in connection with a proceeding before a court of another State”); see also United Nations Convention on Jurisdictional Immunities of States and Their Properties: A Commentary 303, 318 (Roger O’Keefe & Christian J. Tams eds., 2013) (discussing the phrase “proceeding before a court of another State”).

108. 28 U.S.C. § 1610(a).

109. William S. Dodge, *Foreign Sovereign Immunity in the Enforcement of Investor-State Awards*, in *Reflections on International Arbitration—Essays in Honour of Professor George Bermann* 865 (Julie Bedard & Patrick Pearsall eds., 2022).

110. 28 U.S.C. § 1610(b).

execution,¹¹¹ whereas the FSIL's Article 15 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.¹¹²

V. FOREIGN OFFICIALS

As noted above, Article 2 of the FSIL defines "foreign state" to include an "individual, authorized by a foreign sovereign State, that exercises sovereign authority and conducts activities in accordance with such authorization."¹¹³ The FSIL's impact on foreign official immunity is limited by Article 20, which says that the FSIL shall not affect diplomatic immunity, consular immunity, special-missions immunity, or head-of-state immunity.¹¹⁴ In these respects, the FSIL closely follows the U.N. Convention, which similarly defines "foreign state" to include "representatives of the State acting in that capacity"¹¹⁵ and exempts diplomatic immunity, consular immunity, special-missions immunity, and head of state immunity from the scope of the Convention.¹¹⁶ This means that the foreign official immunity governed by the FSIL, like the U.N. Convention, is the immunity of foreign officials for acts taken in their official capacities. Such immunity is called "conduct-based immunity" in the United States and sometimes "immunity *rationae materiae*" or "functional immunity" elsewhere.¹¹⁷

In following the U.N. Convention on foreign official immunity, the FSIL has inherited its problems. For example, the U.N. Convention does not clearly state that conduct-based immunity for acts taken in an official capacity continues after the foreign official leaves office.¹¹⁸ In addition, by defining foreign officials acting in their official capacity as part of the foreign state, the U.N. Convention extends its exceptions to immunity to these same officials.¹¹⁹ If, for example, a foreign official makes misrepresentations in connection with a foreign state's issuance of bonds, the U.N. Convention's exception for commercial transactions would seem to allow claims for fraud not just against the foreign state but also against the foreign official.

111. *Id.* § 1611(b).

112. FSIL art. 15.

113. *Id.* art. 2.

114. *Id.* art. 20. Diplomatic and consular immunity are governed by the Vienna Convention on Diplomatic Relations, April 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95, and the Vienna Convention on Consular Relations, April 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* Case Concerning the Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3 (February 14) (holding that foreign ministers, in addition to heads of state and heads of government, are absolutely immune from suit while in office under customary international law). In the draft FSIL, Article 20 referred only to immunities under Chinese law and international treaties. In the final law, a reference to "international custom" (以及国际习惯) was added, although it seems to be limited to head of state immunity, leaving the status of special-missions immunity in question. China is not a party to the U.N. Convention on Special Missions, December 8, 1969, 1400 U.N.T.S. 231.

115. U.N. Convention art. 2(1)(b)(iv).

116. *Id.* art. 3(1)-(2).

117. *See* William S. Dodge & Chimène I. Keitner, *A Roadmap for Foreign Official Immunity Cases in U.S. Courts*, 90 Fordham L. Rev. 677, 700-09 (2020) (describing conduct-based immunity); *see also* Hazel Fox and Philippa Webb, *The Law of State Immunity* 564 (3d ed. 2013) (referring to the same as immunity *ratione materiae* or functional immunity).

118. U.N. Convention Commentary, *supra* note 107, at 52-3.

119. *Id.* at 82.

Under customary international law, conduct-based immunity continues even after a foreign official leaves office and does not appear to contain an exception for commercial activities or other exceptions that limit the immunity of foreign states.¹²⁰ Of course, states may, by joining a treaty,¹²¹ override customary international law among the treaty parties.¹²² But if a state limits foreign official immunity in ways that violate customary international law, the state is internationally responsible for such violations.¹²³ By limiting conduct-based immunity in the same ways as the U.N. Convention, China's FSIL may well be in violation of customary international law.

The United States handles questions of foreign official immunity differently.¹²⁴ In *Samantar v. Yousuf*,¹²⁵ the U.S. Supreme Court held that foreign officials are not covered by the FSIA. The immunities of diplomats and consuls in the United States are governed by treaties.¹²⁶ But other foreign official immunities, including head-of-state immunity and conduct-based immunity, are governed by federal common law.¹²⁷ Courts in the United States are currently divided over whether the U.S. State Department's determinations of foreign official immunity are binding on courts.¹²⁸ But because there is no statute on these questions, U.S. courts are able to give effect to customary international law on foreign official immunity.

VI. THE ROLE OF THE FOREIGN MINISTRY

Article 19 describes the role of China's MFA in administering the FSIL.¹²⁹ Article 19 provides in its first paragraph 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 purposes of the FSIL, whether and when a state has been served process by diplomatic note, and other factual issues relating to the acts of the state concerned.¹³⁰ The last provision gives the MFA at least some authority to decide factual questions regarding a foreign state's conduct.

120. See Fox & Webb, *supra* note 3, at 564–8 (describing conduct-based immunity under customary international law).

121. It is important to remember that the U.N. Convention has not entered into force.

122. States may not override peremptory *jus cogens* norms. Vienna Convention on the Law of Treaties art. 53, opened for signature May 23, 1969, 1155 U.N.T.S. 331. However, foreign official immunity and foreign state immunity are not *jus cogens* norms.

123. Draft Articles on Responsibility of States for Internationally Wrongful Acts art. 1, in Report of the International Law Commission on the Work of Its Fifty-Third Session, UN GAOR, 56th Sess., Supp. No. 10, at 43, UN Doc. A/56/10 (2001), reprinted in [2001] 2 Y.B. Int'l L. Comm'n 26, UN Doc. A/CN.4/SER.A/2001/Add. 1 (Part 2).

124. For detailed discussion, see Dodge & Keitner, *supra* note 117.

125. 560 U.S. 305 (2010).

126. Like China, the United States is party to the Vienna Convention on Diplomatic Relations, April 18, 1961, 23 U.S.T. 3227, 500 U.N.T.S. 95, and the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261.

127. *Samantar*, 560 U.S. at 325.

128. Compare *Matar v. Dichter*, 563 F.3d 9, 15 (2d Cir. 2009) (stating that State Department determinations of foreign official immunity are controlling), with *Yousuf v. Samantar*, 699 F.3d 763, 773 (4th Cir. 2012) (stating that such determinations are not controlling but carry "substantial weight").

129. FSIL art. 19. This provision is easily overlooked, and, indeed, I overlooked it in my initial analysis of the final law. William S. Dodge, *China Adopts Restrictive Theory of Foreign State Immunity*, Transnational Litigation Blog (September 14, 2023). I am grateful to Professor Wenliang Zhang for calling my attention to the provision and for sharing his insights. See Wenliang Zhang, Huoxiang Ruan & William S. Dodge, *China's New Foreign State Immunity Law: Some Foreign Relations Aspects*, Transnational Litigation Blog (December 12, 2023).

130. FSIL art. 19.

The second paragraph of Article 19 says that the MFA may provide opinions to Chinese courts on other issues “concerning major national interests such as foreign affairs.”¹³¹ The distinction between the first and second paragraphs suggests that certifications under the first paragraph are binding on Chinese courts, whereas opinions under the second paragraph may not be. On the other hand, it seems unlikely that Chinese courts will ignore opinions that the MFA chooses to provide.

The U.S. State Department plays no similar role in administering the FSIA. The interpretation of the FSIA, is a question of “statutory construction” belonging to the courts rather than the executive branch.¹³² “While the United States’ views on such an issue are of considerable interest,” the Supreme Court has said, “they merit no special deference.”¹³³ Courts in the United States do not even defer to the State Department on whether a defendant qualifies as a “foreign state” for purposes of the FSIA.¹³⁴ The reason for the limited role of the State Department lies in the FSIA’s history.

A “principal purpose” of the FSIA, the House and Senate Reports explained, was “to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations.”¹³⁵ In the 1940s, the U.S. Supreme Court started deferring to determinations of foreign state immunity by the State Department.¹³⁶ Between 1952, when the State Department adopted the restrictive theory of state immunity, and 1976, when Congress passed the FSIA, the Department made more than one hundred such determinations.¹³⁷ This system created significant foreign relations problems. The acting Legal Adviser of the State Department told Congress that some foreign states came “to believe that since the decision can be made by the executive branch it should be strongly affected by foreign policy considerations” and regarded “a decision by the State Department refusing to suggest immunity as a political decision unfavorable to them rather than a legal decision.”¹³⁸ The executive branch asked Congress to remove its authority over state immunity determinations so that the State Department “would be in a position to assert that the question of immunity is entirely one for the courts.”¹³⁹

131. *Id.*

132. *Republic of Austria v. Altmann*, 541 U.S. 677, 701 (2004).

133. *Id.* The Court went on to suggest that the State Department’s views on the implications of exercising jurisdiction over a particular defendant in a particular case “might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy.” *Id.* at 702. However, the State Department has never intervened in this way, and how much deference such an intervention would warrant remains unsettled.

134. *See, e.g., Klinghoffer v. S.N.C. Achille Lauro*, 937 F.2d 44, 47–9 (2d Cir. 1991) (applying international law to determine whether Palestine Liberation Organization was a “foreign state” for purposes of the FSIA); *see also* Restatement (Fourth) of the Foreign Relations Law of the United States § 452 cmt. a (Am. L. Inst. 2018) (Whether a particular party is a ‘state’ under the Foreign Sovereign Immunities Act ... is a question of statutory interpretation informed by the views of the executive branch.).

135. H. Comm. on the Judiciary, Jurisdiction of U.S. Courts in Suits Against Foreign States, H.R. Rep. No. 94-1487, at 7 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6606; S. Comm. on the Judiciary, Define Jurisdiction of U.S. Courts in Suits Against Foreign States, S. Rep. No. 94-1310, at 9 (1976).

136. *See Republic of Mexico v. Hoffman*, 324 U.S. 30, 35 (1945); *Ex Parte Republic of Peru*, 318 U.S. 578, 589 (1943).

137. Sovereign Immunity Decisions of the Department of State, *supra* note 14.

138. Immunity of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims & Governmental Relations of the H. Comm. on the Judiciary, 93d Cong. 14 (1973) (statement of Charles N. Brower, Acting Legal Adviser, Dep’t of State).

139. Letter from Richard G. Kleindienst, Attorney Gen., & William P. Rogers, Sec’y of State, to the Speaker of the House of Representatives (January 16, 1973), reprinted in Immunity of Foreign States: Hearing on H.R. 3493 Before the Subcomm. on Claims & Governmental Relations of the H. Comm. on the Judiciary, 93d Cong. 34 (1973). With

China, of course, does not have the same doctrine of separation of powers as the United States.¹⁴⁰ It seems inconceivable that the Chinese government would surrender all authority over questions of state immunity to Chinese courts. On the other hand, the FSIL establishes a system in which Chinese courts play a central role. The law could have established a system in which the MFA would make determinations of foreign state immunity and those determinations would bind Chinese courts.¹⁴¹ But China chose not to take that path.

The role that Article 19 creates for the MFA in administering the FSIL, however, creates some of the same dangers that the United States faced before enactment of the FSIA. It is not difficult to imagine that foreign states that are subject to suit in Chinese courts under the FSIL will pressure the MFA to issue binding determinations of fact in their favor or to provide opinions on other issues to help their cases. When the MFA refuses to do so, foreign states may take offense. Under the absolute theory of foreign state immunity, China did not face these dangers because foreign states were always immune from suit. Now that China has adopted the restrictive theory, Chinese courts will have to decide when foreign states are immune from suit and when they are not. The MFA's ability to influence such decisions can be expected to subject it to the same pressures that the U.S. State Department once faced.

VII. CONCLUSION

China's adoption of the restrictive theory of state immunity is a significant milestone in the law of state immunity as well as a significant step in China's developing Foreign-Related Rule of Law. China has modeled its FSIL on the U.N. Convention, which tends to harmonize China's law with the laws of other states that have adopted the restrictive approach. But China's FSIL also has distinctive characteristics, including its reciprocity clause and the leading role of the MFA, that are not found in the laws of most other countries.

From a U.S. perspective, the reciprocity clause is noteworthy in part because the United States has exceptions in its own FSIA, like its expropriation exception and terrorism exceptions, that are not found in the FSIL or in the laws of most other countries. China's reciprocity clause could allow the FSIA's exceptions to be turned against the United States, permitting suits for expropriation in violation of international law or terrorism in circumstances where the United States would apply those exceptions to China.

The U.S. experience also provides perspective on the role of China's MFA under the FSIL. Although it is natural that the MFA should want to control certain factual determinations concerning state immunity and be able to provide opinions on other issues affecting foreign relations, the

respect to questions of foreign official immunity, to which the FSIA does not apply, the State Department maintains that its determinations and articulations of principles are binding on courts in the United States. *See* Brief for the United States as Amicus Curiae at 11, *Mutond v. Lewis*, 141 S. Ct. 156 (2020) (No. 19-185) ("Under this Court's decisions, the principles recognized by the Executive Branch governing foreign-official immunity are to be followed by the courts. That is true not only in cases in which the Executive files a suggestion of immunity, but also in cases in which courts must decide for themselves whether a foreign official is immune from suit."). As noted above, U.S. courts are currently divided on whether State Department determinations of foreign official immunity are binding. *See supra* note 128 and accompanying text.

140. *See* Minhao Benjamin Chen & Zhiyu Li, *Courts Without Separation of Powers: The Case of Judicial Suggestions in China*, 64 Harv. Intl. L.J. 203 (2023).

141. India's Code of Civil Procedure, for example, provides that "[n]o foreign State may be sued in any Court otherwise competent to try the suit except with the consent of the Central Government." Code Civ. Pro. (1908) § 86; *see also* Fox & Webb, *supra* note 3, at 147–48 (discussing India).

MFA may come to wish that it did not have such authority after all. The experience of the U.S. State Department in administering the restrictive theory between 1952 and 1976 shows that the power to influence determinations of state immunity invites pressure from foreign governments to exercise that power in their favor. In the end, the State Department concluded that it would be better for U.S. foreign relations to surrender that power to the courts. Only time will tell if China's experience will be the same.

Declaration of Conflicting Interests

The author declared no potential conflicts of interest with respect to the research, authorship, and/or publication of this article.

Funding

The author received no financial support for the research, authorship, and/or publication of this article.