

Sovereign Immunity: Chinese Views and Practices

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INTRODUCTION

Since the establishment of diplomatic relations between the People's Republic of China and the United States in 1979, the Sino-U.S. relationship has undergone substantial development. In the legal field, for example, a series of agreements have been reached on such diverse issues as nuclear energy cooperation,¹ avoidance of double taxation,² scientific and technical cooperation,³ and exploitation of marine resources.⁴ Over the past few years, the legal communities of both countries, including lawyers, judges, and law professors, have been exchanging visits with increasing frequency. Teachers and students from each country are teaching and studying in law schools and universities of the other. Lawyers have become increasingly involved in trade and economic transactions between the two nations. Increasing numbers of conferences, symposia, and seminars on legal and economic questions are being held jointly by scholars and practitioners from both countries. In short, legal ties between China and the United States have become stronger and broader than ever before.

At the same time, however, legal problems, or problems with legal elements, have arisen occasionally between China and the United States. Examples include disputes over the Taiwan Relations Act, China's diplomatic properties in the United States, United States arms sales to Taiwan, and private lawsuits in United States courts

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1. Agreement on Nuclear Cooperation, July 23, 1985, United States-China, 24 I.L.M. 1393.

2. Agreement for the Avoidance of Double Taxation and the Prevention of Tax Evasion, April 30, 1984, United States-China, 23 I.L.M. 677.

3. Accord on Industrial and Technological Cooperation, Jan. 12, 1984, United States-China, 23 I.L.M. 144. On January 12, 1984, China and the United States also agreed to extend their bilateral Agreement on Cooperation in Science and Technology (30 U.S.T. 35, T.I.A.S. No. 9179) for another five years.

4. Agreement Concerning Fisheries Off the U.S. Coasts, July 23, 1985, United States-China, T.I.A.S.

against the Chinese government. This shows that legal issues constitute an important aspect of our bilateral relationship. Finding proper solutions to existing and future legal problems, so as to make the legal factor a positive one in the promotion of our overall relationship, remains a common task before us all. Legal workers from both sides have a great deal to do in this respect.

In the last few years, several legal actions have been instituted in United States courts against the Chinese government which have caused concern in both countries.⁵ One common question in these actions is that of sovereign immunity. This subject is not only relevant to Chinese attitudes towards international law but also bears on the Sino-U.S. relationship.

I once asked a well-known American law professor what, in his opinion, was the single most important international law question at present. He answered, "Perhaps sovereign immunity." This may not be too much of an exaggeration. There are scholars from other countries who have the same opinion. This question is of great significance both from the point of view of academic inquiry and from that of practical application. If the volumes of literature written on sovereign immunity are examined, and the number of lawsuits relating to the

5. The most controversial of these is the Huguang Railroad Bonds case, *Jackson v. People's Republic of China*, 596 F. Supp. 386 (N.D. Ala. 1984). Plaintiffs instituted an action seeking payment on bearer bonds issued by the imperial Chinese government in 1911. Jurisdiction of the court was invoked under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1391, and 1602 *et seq.*, and on October 21, 1981, a default judgment was entered against the defendant after China's failure to appear or answer. Damages were subsequently awarded in 1982.

In August of 1983, China made a special appearance requesting the court to set aside the default judgment. Noting that the controversy was fraught with jurisdictional issues and mindful of the far-reaching ramifications the decision might ultimately have on Sino-American relations, the court found that justice and the public interest dictated that the judgment be set aside pursuant to FED. R. CIV. PROC. 60(b).

China then entered a motion to dismiss, arguing that the Foreign Sovereign Immunities Act, enacted in 1976, does not retroactively apply to a cause of action arising out of a 1911 transaction. China also argued that it had relied upon the doctrine of absolute sovereign immunity and that since jurisdiction in the case was based exclusively on the Act, the court lacked subject matter jurisdiction.

The court granted the motion to dismiss, noting that, "[t]he law dictates that a statute shall not be retroactively applied to alter antecedent rights unless such is the unequivocal import of its terms or the manifest intention of the legislators." 596 F. Supp. at 389. The court found nothing in the language of the Foreign Sovereign Immunities Act or its legislative history to suggest that it was intended to be applied retroactively.

On appeal by the plaintiffs, the Court of Appeals for the Eleventh Circuit affirmed the decision, holding that the District Court had not abused its discretion in granting the defendant's motion to set aside the default judgment, and that the Foreign Sovereign Immunities Act did not apply retroactively to confer subject-matter jurisdiction in the case. *Id.*, *aff'd*, 794 F.2d 490 (11th Cir.), *reh'g denied*, 801 F.2d 404 (1986) (*en banc*), *cert. denied*, 55 U.S.L.W. 3607 (Mar. 9, 1987).

question are considered, the significance of the question of sovereign immunity and its relevance to people in the legal profession become immediately clear.

HISTORICAL BACKGROUND AND MODERN APPROACHES

The so-called sovereign immunity of a foreign state means, in its narrow sense, that a sovereign state, without its consent, cannot be subjected to the jurisdiction of the courts of another state. This long-established principle of international law finds its origin in the ancient Latin maxim *par in parem non habet imperium* and has historically been considered an "absolute." However, I prefer not to use the word "absolute" because states can always waive their immunity and consent to the jurisdiction of foreign courts. It should be mentioned here that one of the earliest cases expounding this principle, and which is still frequently cited, is *The Schooner Exchange v. M'Fadden*, decided by the United States Supreme Court in 1812.⁶ For more than a century after this decision, the traditional principle of sovereign immunity was constantly reaffirmed and abided by in almost all states. In United States jurisprudence, for example, many cases supporting this practice can be cited.⁷

Since the beginning of this century, however, and particularly since the end of World War II, some continental European states have gradually departed from the traditional principle and turned to the so-called "restrictive doctrine" of sovereign immunity, which classifies acts by states as either "sovereign" and "non-sovereign," or "public" and "private," in order to draw the line of jurisdiction.⁸ The

6. 11 U.S. (7 Cranch) 116 (1812). Stating the traditional rule, Chief Justice Marshall said that "[t]he jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself." *Id.* at 136.

"This full and absolute territorial jurisdiction being alike the attribute of every sovereign . . . would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects. One sovereign being in no respect amenable to another; and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him." *Id.* at 137.

7. See, e.g., *Berizzi Brothers Co. v. S.S. Pesaro*, 271 U.S. 562 (1926); *Ex Parte Republic of Peru*, 318 U.S. 578 (1942); *Chemical Natural Resources, Inc. v. Republic of Venezuela*, 420 Pa. 134 (1966), 215 A.2d 864 (1966), cert. denied, 385 U.S. 822 (1966).

8. "According to the newer or restrictive theory of sovereign immunity, the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*). There is agreement by proponents of both theories, supported by practice, that sovereign immunity should not be claimed or granted in actions with respect to real property (diplomatic and perhaps consular property excepted) or with respect to the disposition of the property of a deceased person even though a foreign

United States Foreign Sovereign Immunities Act of 1976⁹ adopted this restrictive doctrine, and other states such as Britain,¹⁰ Canada,¹¹ Pakistan,¹² Singapore,¹³ and Australia¹⁴ have followed suit in enacting legislation of a similar nature in recent years. In the meantime, the number of private lawsuits against foreign governments has increased in the courts of states advocating the restrictive theory. As a result, the impression has been created that the restrictive approach has become a modern trend. However, a survey of the laws and practices of various states indicates that the restrictive theory has been followed by only a small group of states — mainly western industrialized states — while the traditional theory is still adhered to by almost all socialist and many developing nations.

In 1979, the United Nations International Law Commission sent out a questionnaire to governments, soliciting their views on the question of state jurisdictional immunity in connection with its codification work on the topic. Among the twenty-seven states that replied, fourteen of them grant to foreign states complete immunity, and three others did not by then have legislation or judicial practice regarding the question.¹⁵ As to the other states that did not reply, it is safe to

sovereign is the beneficiary." Letter from Acting Legal Advisor, Jack B. Tate, to Acting Attorney General, Philip B. Perlman (May 19, 1952), 26 DEP'T ST. BULL. 984 (1952).

9. 28 U.S.C. § 1602 *et seq.*

10. State Immunity Act, 1978, ch. 33.

11. State Immunity Act, ch. 95, 1980-1983 Can. Stat. 2949 (1982).

12. State Immunity Ordinance 1981, No. VI (Pak.). *See also* Qureshi v. U.S.S.R., 1981 P.L.D. 377 (Pak.).

13. State Immunity Act 1979, No. 19, § 1(1), Tables of the Written Laws of Singapore (Nat'l Univ. of Sing. 1982).

14. Foreign States Immunities Act (1985) 25 I.L.M. 715.

15. *Materials on Jurisdictional Immunities of States and Their Property*, U.N. LEGIS. SERIES at 557, U.N. Doc. ST/LEG/SER.B/20, U.N. Sales No. E/F.81.V.10 (1982).

Of the twenty-seven states which responded to the questionnaire, the states which purported to follow the traditional theory of sovereign immunity were: Brazil at 562-63, Czechoslovakia at 564-66, Ecuador at 567-69, Hungary at 575-77, Portugal at 592-94, Romania at 594-96, Sudan at 601-02, Sweden at 602-04, Syria at 604-07, Trinidad and Tobago at 610-14, Tunisia at 614-16, USSR at 616-19, Venezuela at 638-41, and Yugoslavia at 641-45. The states that appeared to adhere to the restrictive view were: Egypt at 569-71, Federal Republic of Germany at 571-75, Lebanon at 578-80, Mexico at 584-87, Netherlands at 587-89, Norway at 589-92, Senegal at 596-98, Spain at 598-601, United Kingdom at 619-29, and the United States at 630-38. The remaining states which indicated they had no legal precedent for either the traditional or restrictive theory were: Kenya at 577-78, Madagascar at 581-84, and Togo at 607-10. In addition to the questionnaire, the Commission requested that member states submit relevant material on the subject of state immunities, including national legislation, decisions of domestic tribunals, and official records and correspondence. The national legislation of the following ten states may be characterized as adhering to the traditional principle of sovereign immunity: Argentina at 3-4, Byelorussian SSR at 6, Chile at 12-13, Colombia at 13-14, Czechoslovakia at 14-15, German Democratic Republic at 15-17, Hungary at 17-19, Romania at 27, USSR at 40, and Yugoslavia at 69-70. The eight states which enacted legislation of a restrictive nature were: Austria at 5-6, Canada at 7-11, Norway at 19-20, Pakistan at 20-27, Singa-

presume that many of them also belong to the group supporting the traditional theory because, though they may lack sovereign immunity legislation of any kind, they invariably object with diplomatic notes or policy statements to the exercise of jurisdiction over them by foreign courts. In the Sixth Committee of the thirty-seventh session of the U.N. General Assembly, representatives and legal experts of many countries responded to the report of the International Law Commission on the work of its thirty-fourth session by voicing firm opposition to the restrictive approach to sovereign immunity and calling for an end to the enactment and enforcement of legislation of a restrictive nature.¹⁶ The Asian-African Legal Consultative Committee pointed out in a 1982 memorandum that a large number of Latin-American, Asian, African, and socialist countries have so far rejected the restrictive theory of sovereign immunity and questioned whether the practice of restrictive sovereign immunity by western countries serves the interests of the developing countries. Although the number of states following a certain practice is not conclusive in determining a rule of international law, it is no doubt an important factor.¹⁷

pore at 28-34, South Africa at 34-40, United Kingdom at 41-55, and the United States at 55-69.

The decisions of domestic tribunals of the following seven states respected the traditional principle: Australia at 181-83, Burma at 214-21, Chile at 250-51, China at 251-52, Czechoslovakia at 252-53, Japan at 338-41, and the Philippines at 360-73. The twelve states whose tribunals reached decisions based on restrictive theories were: Austria at 183-209, Belgium at 209-14, Canada at 221-50, France at 253-72, Federal Republic of Germany at 272-325, Italy at 325-38, Madagascar at 342-44, Netherlands at 344-60, South Africa at 373-426, Switzerland at 427-40, United Kingdom at 441-68, and the United States at 468-553.

The Swedish Supreme Court recognizes the restrictive view, but has not denied immunity in practice. *Id.* at 426-27.

The official records and correspondence of the following five states reflected the traditional doctrine: Colombia at 78-82, Czechoslovakia at 82-83, German Democratic Republic at 84-86, Poland at 90-91, and the USSR at 92. The ten states whose official documents supported the restrictive theory were: Barbados at 74-75, Canada at 75-78, Denmark 83-84, Finland at 84, Federal Republic of Germany at 86-89, Greece at 89-90, Norway at 90, Surinam at 91-92, United Kingdom at 93-98, and the United States at 98-128.

16. 37 U.N. GAOR C.6 (37th meeting) at 2, U.N. Doc. A/C.6/37/SR.37 (1982).

In responding to the International Law Commission's report on the work of its thirty-fourth session, the twenty-five states which made arguments which may be characterized as opposing the restrictive theory of sovereign immunity (followed by the Summary Report numbers and page numbers for their arguments) were: USSR (SR.39 at 9), Jamaica (SR.40 at 8-9), German Democratic Republic (SR.40 at 16-17), People's Republic of China (SR.44 at 11), Chile (SR.44 at 17-18), Byelorussian SSR (SR.45 at 6), Venezuela (SR.45 at 10-11), Czechoslovakia (SR.46 at 3-4), Mongolia (SR.46 at 16), Poland (SR.46 at 17), Ukrainian SSR (SR.46 at 26), Syria (SR.47 at 8), Tunisia (SR.47 at 21), Bulgaria (SR.48 at 14), Indonesia (SR.48 at 17), Bahamas (SR.48 at 18), Argentina (SR.49 at 8), Sierra Leone (SR.49 at 12), Libya (SR.49 at 16), Ethiopia (SR.50 at 5), Iraq (SR.50 at 13), Zaire (SR.51 at 5), Hungary (SR.51 at 9-10), Kenya (SR.51 at 12), and Trinidad and Tobago (SR.51 at 15). Mexico opposed the enactment of the Foreign Sovereign Immunities Act of 1976 by the United States (SR.47 at 15).

17. On state practice as a source of international law, *see* C. DE VISSCHER, THEORY AND

In short, there now exist two different sets of theory and practice regarding the question of sovereign immunity. I say "different," not "opposing," because similarities remain between the two schools, as even the restrictive theory cannot but recognize in principle the immunity from jurisdiction enjoyed by foreign states. The difference between the two lies in the scope and content of such immunity.

It is quite natural, of course, that states should possess different views on international issues or follow different patterns of practice in our diverse world. However, since every state has a stake in the application of the principle of sovereign immunity, if the restrictive "trend" prevails, then theoretically, any state may find itself in trouble: it may be haled into the courts of a remote land, a default judgment may be rendered against it if it fails to appear before the court, and it may even find its properties attached and subjected to execution in satisfaction of a judgment against it. Actions of this kind tend to cause friction or tension between the states concerned. Therefore, the question of sovereign immunity requires careful consideration and serious treatment by all states. In the United States, since the adoption of the Foreign Sovereign Immunities Act, hundreds of sovereign immunity cases have been brought in the courts, including the *Huguang* Railway Bonds case.¹⁸ For a while, that case threatened to seriously affect the relationship between China and the United States. The judgment, though subsequently rendered in China's favor, was based on an issue of statutory interpretation, rather than on a repudiation of the restrictive doctrine of sovereign immunity. China, of course, is pleased with the outcome, although the case is still on appeal.¹⁹ The reason this case was such a source of friction between China and the United States lies in the different views and practices that the two countries have adopted in regard to the application of sovereign immunity. In order to clarify this issue, an outline of the basic Chinese propositions and practices with respect to the question of sovereign immunity follows.

THE CHINESE APPROACH TO SOVEREIGN IMMUNITY

First, China stands by the traditional principle of the jurisdictional immunity of states. We hold that compulsory jurisdiction over a foreign state is inconsistent with the principle of sovereign equality

REALITY IN PUBLIC INTERNATIONAL LAW 156-57 (rev. ed. Corbett trans. 1968), reprinted in HENKIN, PUGH, SCHACHTER, & SMIT, INTERNATIONAL LAW at 56 (1980). See also Statute of the International Court of Justice art. 38(1)(b).

18. *Jackson v. People's Republic of China*, 596 F.Supp. 386 (N.D. Ala. 1984). See *supra* note 5.

19. The case was decided on appeal. See *supra* note 5.

among states enshrined in the United Nations Charter.²⁰ Accordingly, courts at various levels in China do not hear cases against foreign states or governments. Likewise, we oppose assumption of jurisdiction by foreign courts in any case in which the Chinese government is named a defendant.

Second, it is China's view that the restrictive theory of sovereign immunity, characterized by classification of state acts into those which are "sovereign" and "non-sovereign," is theoretically unfounded. States, as sovereign entities, by definition behave in the capacity of sovereigns. It is erroneous to assume that states have dual and different identities. Moreover, the distinction between the two kinds of state acts is hardly workable in practice because it lacks consistency and precision in content, and it provides no common criterion for differentiation. For instance, various criteria have been applied to determine what constitutes a commercial activity. These criteria include the nature of the activity, the purpose of the activity, a combination of the two, and whether a particular act can be done by an individual. In judicial practice, there are many instances where courts of different states, or even of the same state, have made completely different determinations on essentially the same set of facts. This inevitably leads to arbitrary and varied practice, resulting in the nullification of the principle of sovereign immunity.

Third, the principle of sovereign immunity requires *only* the avoidance of the exercise of jurisdiction over foreign states. It does not absolve states from their obligations. Some people might say that the application of this principle would make it impossible for disputes between states and private individuals or legal persons to be resolved, hence creating unfairness in the dealings between them. However, there exist various ways and means of settling disputes between states and private natural and legal persons. For instance, states may consent to waive immunity in agreements or contracts; they may resort to conciliation and arbitration procedures; or the home government of the individuals or legal entities involved may exercise diplomatic protection in appropriate cases. There are many other ways to deal with the problem. For example, the Sino-American Agreement on Investment Guaranties²¹ provides, among other things, for the right of subrogation to be exercised by the parties. Therefore, it is incorrect to say that the application of the traditional principle of sovereign immunity denies resolution of disputes between states and natural or

20. See U.N. Charter art. 1, para. 2; art. 2, para. 1.

21. Agreement Relating to Investment Guaranties, Oct. 30, 1980, United States-China, 32 U.S.T. 4010, T.I.A.S. No. 9924.

legal persons to the disadvantage of the latter. On the contrary, it is the restrictive approach which threatens such persons because the international tensions which would inevitably arise from allowing foreign states to be sued arbitrarily in domestic courts would only disrupt the inter-governmental trading arrangements which allow international trade and commerce to flourish.

Fourth, it must be emphasized that the principle of state jurisdictional immunity applies to states *per se* and to state organs, but not to enterprises and corporations having separate legal capacity. The latter do not enjoy immunity from the exercise of jurisdiction by foreign courts over disputes arising out of their transnational activities. In recent years, a series of lawsuits against Chinese companies and enterprises have taken place in a number of countries, including the United States, without a claim of immunity on the part of China. Other Chinese companies and enterprises have also brought legal actions in foreign courts. It is significant to note that today in China and some other states, notably socialist states, international trade, economic transactions, and other activities of a civil law nature are undertaken mainly by legal entities and individuals. Normally, the state itself and governmental agencies do not engage directly in these activities. This understanding should help to ease the unnecessary concern that the existence and application of the traditional principle of sovereign immunity would pose a legal impediment to the conduct of economic and trade activities with states, such as China, which have a dominant public economic sector. It should be recalled that the rationale underlying the restrictive theory was to counter the increase in state trading activities in the modern era.²² Even if this argument carried some compelling force in the past, new developments in China and other states certainly have made it less persuasive.

RECONCILING DIFFERENT APPROACHES

Considering the divergent views and practices in this area, one may wonder if there are any effective ways to cope with this difficult situation. Obviously, no real conflict will arise between states which

22. "The reasons which obviously motivate state trading countries in adhering to the [traditional, absolute] theory with perhaps increasing rigidity are most persuasive that the United States should change its policy." *See supra* note 8, at 985.

Compare with M. Boguslavskii, STAATLICHE IMMUNITÄT 40-44 (Rathfelder trans. 1965), reprinted in HENKIN, PUGH, SCHACHTER, & SMIT, INTERNATIONAL LAW at 505 (1980): "The theory of 'functional ['restrictive'] immunity' appeared at the end of the nineteenth century, but it underwent a 'renaissance' after the establishment of the Soviet state. It was employed by bourgeois courts against the Soviet state and against other socialist states . . . [I]n contemporary conditions [it is] one of the weapons of the imperialist reaction in its struggle against all progressive forces. . . ."

follow the same practice or similar practices. A state that has adopted the restrictive theory of immunity is unlikely to challenge the exercise of jurisdiction over it by the court of another state. The issue to be decided in such cases usually involves a determination merely of the nature of particular state acts and whether they fall within the scope of immunity. However, exercise of jurisdiction by a domestic court over a state that adheres to the traditional principle would be likely to give rise to a serious conflict between the two governments involved.

It is sometimes said that sovereign immunity is merely a rule of customary international law, and as such should change as the circumstances warrant. In China's view, it is not merely a customary rule, but a fundamental principle of international law. In the modern international community, the immunity of a state from compulsory jurisdiction of the courts of another state is a basic prerequisite for any state to conduct international activities independently and free from interference. It is also an indispensable precondition for normal dealings between states. Even assuming that sovereign immunity is merely a rule of customary law, the general principle of international law that forbids any nation from unilaterally altering rules of law established by international custom should apply equally to the effect of this rule. No state may impose on other states its own view of customary international law. A British scholar once wrote, "consistent practice in the past creates a rule which can only be destroyed by abundant modern practice which goes consistently against the rule; if modern practice partly supports the rule and partly goes against it, it is insufficient to destroy the rule."²³ According to this view, the restrictive theory can at best be described as a special customary rule applicable only within the group of states which subscribe to it. As between states of this group and other states recognizing the traditional principle of immunity, the general customary rule, that is, the traditional principle, should continue to apply. This proposition is consistent with the conclusions drawn by the International Court of Justice in the *Asylum Case*²⁴ and the *Anglo-Norwegian Fisheries Case*,²⁵ and it represents one way to deal with immunity disputes between states.

Another method is for states to conclude bilateral agreements which provide for the resolution of immunity cases. Such agreements may be of a general nature or limited to a particular area. For

23. Akehurst, *Custom as a Source of International Law*, 1974-1975 BRIT. Y.B. INT'L L. at 20-21.

24. *Asylum (Colom. v. Peru)* 1950 I.C.J. 266.

25. *Fisheries (U.K. v. Nor.)* 1951 I.C.J. 116.

instance, a treaty of friendship, commerce, and navigation may provide for the waiver of immunity in all situations involving state organs. Alternatively, it may be handled in a borrowing agreement whereby the central bank, a state organ, voluntarily consents to be placed under foreign court jurisdiction in connection with its bond-issuing activities.

The ideal way for dealing with the problem is perhaps the conclusion of an international convention which is generally applicable. In fact, since 1978, the United Nations International Law Commission has been preparing a set of draft articles on state jurisdictional immunity which is designed to provide a basis for a future convention. However, the task is by no means easy, given the divergence of views and practices of states on the subject. It remains to be seen whether the Commission's work will eventually result in an international convention acceptable to a majority of states in the world. The European Convention on State Immunity of 1972, although of only a regional nature and concluded more than a decade ago, has barely acquired a sufficient number of states party to become effective.²⁶

CONCLUSION

In the absence of generally binding international instruments, and in view of the conflicting state practices in today's world, it is highly desirable for states concerned to increase understanding of one another's policies, laws and views. States must try to accommodate one another's actual conditions and interests, and strive to solve immunity disputes in a reasonable and equitable way within the bounds of their respective laws and policies. This is precisely the way China and the United States approached the *Huguang* Railway Bonds Case. Both countries must strive to resolve similar disputes in this manner until some other agreement can be reached.

26. European Convention on State Immunity, May 16, 1972, Europ. T.S. No. 74.