

# A Study of Diplomatic Intervention in the Implementation of the Foreign State Immunities Act

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**Abstract:** The diplomatic intervention has become a tool in the lawsuit of state immunity, the study of the limits of diplomatic intervention is very necessary, excessive diplomatic intervention will bring about the damage to the interests of the individual, affecting the independence of the judiciary judgment as well as making China's international image damaged and other risks, China should set the limits of diplomatic intervention, and the limits of diplomatic intervention should be set. Excessive diplomatic intervention may bring risks such as damage to personal interests, independence of judicial judgment and China's international image, etc. China should set up a system of "three trials in one", construct a hierarchical legal system and set up a risk assessment system to solve the above risks.

## 1 INTRODUCTION

The Fifth Meeting of the Standing Committee of the Fourteenth National People's Congress adopted the Law of the People's Republic of China on Foreign State Immunity on September 1, 2023, which came into effect from January 2024 onwards. The Foreign State Immunity Law clarifies that China's diplomatic immunity policy has shifted from absolute immunity to restricted immunity (Li, 2023). The principle of limited immunity is based on the acts of foreign governments divided into two categories, Sovereign Acts (e.g., diplomatic, military) and Non-Sovereign Acts (e.g., commercial investment, trade), and correspondingly, foreign state property is divided into Sovereign Property (such as embassy buildings, military equipment) and Commercial Property (such as investment funds, trade commodities), when a foreign government engaged in acts of sovereignty acts involving sovereign property, other countries may not use jurisdiction over it, On the contrary, when a foreign government engages in acts involving non-sovereign acts and commercial property, other countries can apply to their courts (Li, 2023). Diplomatic intervention refers to a state's efforts to protect its interests by influencing the course of justice in a state immunity proceeding through formal diplomatic means such as diplomatic statements, debates and protests. In recent years, law has

increasingly become the most authoritative and effective central tool for governments to deal with national interests and public affairs, resulting in a gradual increase in the proportion of the legal system of each country that is directly related to political activities, (transnational commercial disputes and litigation over the execution of overseas assets will lead to diplomatic involvement, which has resulted in the gradual blurring of the boundaries between the legal process and diplomacy (Yang, 2024;Fan, 2024).

Some scholars believe that, as a rule, the handling of foreign relations affairs falls within the scope of responsibilities of the diplomatic service, and therefore, state immunity litigation is vulnerable to changes in foreign relations (Whether for absolute or limited immunity, the foreign relations of the forum state have a certain degree of influence on the practice of justice (Sun, 2021;Fan, 2024). Such as the jurisdiction of a foreign state or the execution of its property judicial acts are prone to diplomatic disputes or even incur retaliation thus showing that diplomatic involvement in the implementation of justice has two sides, can rely on it to safeguard the legitimate rights and interests of the State may also cause a conflict of interest between the countries (He, 2020). This paper takes China's Foreign State Immunity Law as the base point, and through the literature research method, in the main part, through researching and combing different literature about China's Foreign State Immunity Law and diplomatic intervention, clarifies

the role of diplomatic intervention in the State Immunity Law, and summarizes the possible impacts of over- and under-exposure to diplomatic intervention, and the case study method, through selecting representative international cases about Foreign State Immunity Law, and summarizes the role of diplomatic intervention in the case. By selecting representative international cases on the Foreign State Immunity Act, analyzing and summarizing the specific forms of diplomatic intervention in the cases and their impact on the judgments, and drawing out the actual effectiveness of diplomatic intervention in immunity litigation, the problems brought about by diplomatic intervention in the implementation of the State Immunity Act will be explored and summarized, and relevant recommendations will be given.

## 2 LITERATURE REVIEW

Around the issue of diplomatic intervention in the implementation of China's Foreign State Immunity Law, some scholars have proposed that, by clarifying the procedure, content and effectiveness of diplomatic intervention, and promoting its complementarity with civil litigation, so that it is both sovereignty maintenance and judicial effectiveness. This can not only in the state immunity lawsuit to protect foreign relations and legitimate rights and interests, can also enhance China's national international legal discourse, but also for other areas of administrative intervention mechanism to provide a model (Fan, 2024).

Other scholars have suggested that if the issue of foreign state immunity is left entirely to the foreign affairs department to resolve, it will result in the foreign affairs department being subjected to excessive pressure from foreign countries; on the contrary, after the Chinese courts accept the case, it will to a certain extent help the diplomatic negotiation, and the individuals and enterprises may also be able to influence the diplomatic relations through the litigation. In addition, the diplomatic service plays a decisive role in the determination of foreign states in state immunity litigation, diplomatic service, and other factual issues of state action, and also plays a role in other events concerning major national interests that should not be underestimated (Li, 2023). In addition, other scholars have further proposed that China's Foreign State Immunity Law is a special law with the composite attributes of justice and diplomacy, which adjusts China's long-standing "Absolute Immunity Doctrine" by systematically

regulating the issue of foreign state immunity. The law covers both legal and political issues, so it is essential to further clarify the relationship between the implementation of the Foreign State Immunity Law and the Foreign Relations Law, the Civil Procedure Law and other relevant laws (Tang, 2024).

Based on this, this study argues that existing studies discuss the inevitability and risks of diplomatic intervention but lack the exploration of the limits of intervention, therefore, this report will explore the different issues that diplomatic intervention brings to the implementation of the Foreign State Immunity Act.

## 3 THE IMMUNITY REGIME

### 3.1 Current Situation of Diplomatic Immunity Policy

#### 3.1.1 The Formation of the Immunity System and Its Development in the International Arena

The immunity system originated in the 19th century, by the Anglo-American countries through case law established the absolute immunity system that all the acts and property of a state are not subject to jurisdiction in another country (Huang, 1978). This principle was also endorsed by most countries. However, after the 1950s, with the frequent participation of many countries in international civil and commercial activities, the state in order to better safeguard the interests of their own country began to shift from absolute immunity to restrictive immunity, that is, the acts and property of the state according to the Sovereignty and Non-Sovereignty to make a distinction, so as to make it clear that only the Sovereignty and Non-Sovereignty of the state. In order to better safeguard the interests of the state, the state began to shift from absolute immunity to limited immunity, that is, the acts of the state and property according to the Sovereign Act and Non-Sovereign act to make a distinction, so as to make it clear that only the sovereign act of the immunity, and vice versa, non-sovereign act is no longer immunity (Tang, 2024). At the international level, the European Convention on State Immunity formulated by the Council of Europe in 1972 and the United Nations Convention on Jurisdictional Immunities of States and Their Property formulated by the United Nations in 2004 can embody the principle of limitation of immunity, although the latter did not enter into force but still obtained the ratification of a number of

countries, so the limitation of immunity system to become the mainstream trend of the present day.(Gong, 2005).

### 3.1.2 The Turning toward the Principle of Limiting Immunity and the Institutional Setting in China

The development of the immunity regime in China can be summarized as a shift from adherence to the absolute immunity regime to the emergence of the principle of permissible exceptions to the limitation of immunity doctrine (Qi, 2015). China's early adherence to absolute immunity doctrine, influenced by historical, cultural and economic development factors, held that foreign states enjoyed absolute immunity in Chinese courts and did not support Chinese state-owned enterprises' claims for state immunity (Tang, 2024). However, as the mainstream international trend shifted, China began to adjust its policies along with it, and it has embodied the position of limiting the principle of immunity through individual legislations and diplomatic practices, such as the 1992 Law on the Territorial Sea and the Contiguous Zone, the 2005 Law on Immunity from Judicial Coercive Measures for the Properties of the Central Bank of a Foreign State and the interpretation of the relevant articles of the Basic Law of Hong Kong in 2011, which involve the principle and stance of the state immunity. principles and positions. In addition, China has signed the United Nations Convention on State Immunity and has reflected its support for limiting immunity in international treaties in the field of ships and aircraft (Tang, 2024). Eventually, China formulated and promulgated the Law on State Immunity of Foreign States, which established China's shift from the principle of absolute immunity to the principle of restricted immunity.

China's limited immunity system is mainly reflected in the Foreign State Immunity System, which refers to the exclusive institutional design of civil disputes arising from foreign states and their property based on specific rules to clarify that the court will not grant jurisdiction in general or will grant jurisdiction in specific cases (Bulletin of the Standing Committee of the National People's Congress, 2023). The system, under the umbrella of the Constitution, has constructed a complete legal system that is guided by the Foreign Relations Law and the Civil Procedure Law, which provide the principles of state immunity from lawsuits relating to diplomatic and judicial attributes, and centered around the Foreign State Immunity Law, which

provides the legal basis for dealing with cases of immunity designed for foreign states and their property, and is supplemented by other laws. system (Tang, 2024). This system makes it clear that the jurisdiction of Chinese courts in dealing with commercial disputes between citizens, enterprises and foreign states will be based on judicial settlement (Tang, 2024). In addition, the Foreign State Immunity Law also stipulates the principle that foreign states and their property enjoy immunity in China as well as the exceptions to immunity jurisdiction.

### 3.1.3 Academic Controversies on Diplomatic Intervention

Diplomatic intervention is now a tool to assist in diplomatic immunity litigation, but many scholars have different ideas about it. Some scholars believe that the courts need to make decisions in accordance with the uniform provisions of the law, while the diplomatic department needs to consider the political and diplomatic relations in the case, and the state immunity lawsuit will involve complex and sensitive foreign affairs, if China lacks the appropriate measures to deal with it may be in an unfavorable position in the international community (Yin, 2011;Fan, 2024). In addition, through the applicable legal rules to deal with foreign relations affairs, can effectively prevent judicial disputes between the parties and the defendant foreign countries to rise to international political conflicts (Cai, 2015).

In addition to this, there are scholars who believe that the current institutional framework of the Foreign State Immunity Act is insufficiently adapted to the international political-diplomatic and economic environment in which China currently finds itself, and that the use of diplomatic intervention as a tool for immunity from lawsuits will bring unnecessary diplomatic disputes to China (Fan, 2024). The opponents argue that by defining the legal procedures, scope of application and legal effects of diplomatic intervention, can build a synergistic mechanism with civil litigation, so that it can serve the dual functions of sovereignty protection and judicial effectiveness. This can not only in the state immunity litigation in the appropriate handling of foreign relations can also effectively safeguard the legitimate rights and interests, but also to enhance China's international legal discourse, but also for other areas of the executive power and judicial power interface system provides a model for innovation (Fan, 2024). In addition, China's diplomatic organs in the state immunity litigation, foreign countries recognized, cross-border service of judicial

documents and other issues of state behavior plays a decisive role in other events on the major interests of the country cannot be ignored (Li, 2023).

### **3.2 Functions and Risks of Diplomatic Intervention in State Immunity Litigation**

#### **3.2.1 Functions of Diplomatic Intervention**

Diplomatic intervention in state immunity litigation has multiple functions, mainly reflected in the maintenance of national interests, improving the structure of the litigation and improving judicial transparency and fairness and other aspects. First of all, diplomatic intervention has the function of Filling in the Gaps of the litigation structure, state immunity usually involves the jurisdiction of foreign-related civil litigation, private international law and the conflict between private interests (Fan, 2024). In such cases, diplomatic intervention, through the Ministry of Foreign Affairs, can provide the court with opinions and information about the background of the case to help the court to understand the case more fully and ensure that the court makes a fairer judgment.

Secondly, diplomatic intervention can enhance the transparency and openness of litigation. By publicizing diplomatic opinions and policy statements, the court can obtain more information about the case, thus making the litigation process more transparent and ensuring that the interests of all parties are fully protected, thus improving the fairness of the litigation decision.

#### **3.2.2 Risks of Diplomatic Intervention**

Diplomatic intervention in immunity litigation will also bring some risks, such as personal interests will be damaged, for example, a Chinese enterprise in the development of foreign countries to sue the local government but because of the need to maintain diplomatic relations between the two countries and was forced to withdraw the case, the diplomatic intervention may lead to damage to the interests of individuals. In addition, there is also the risk of over-interference in diplomatic intervention, as over-reliance on diplomatic opinions may affect the independence of judicial judgment and damage China's international image. In addition, there is the risk of procedural opacity, there are many sensitive information that China does not have the relevant provisions to indicate that can be made public, such as the foreign affairs departments and foreign

embassies in China and the request for reports, opinions and briefings system of this type of information, if the diplomatic opinion and evidence of the material is not made public. It is difficult for the courts to make fair judgments based on fully transparent materials and for the parties concerned to recognize them, which may lead to further complications in foreign relations matters (Fan, 2023).

### **4 FUTURE DIRECTIONS FOR OPTIMIZING DIPLOMATIC INVOLVEMENT IN THE IMPLEMENTATION OF THE FOREIGN STATE IMMUNITIES ACT**

#### **4.1 The Need for Research on the Limits of Diplomacy**

Although diplomatic intervention in state immunity litigation is a useful way to regulate sovereignty and judicial conflicts, the risk of abuse of diplomatic intervention should not be ignored. It may trigger the weakening of judicial authority, instrumentalization of law, damage to China's international image and escalation of sovereignty conflicts. Therefore, in order to adapt to the complexity of cross-border disputes in the digital age, China needs to build a "three-in-one" review mechanism to prevent the risk of Instrumentalization of Immunity.

The first review is the review of diplomatic necessity. Led by the Ministry of Foreign Affairs, the diplomatic department to assess the risk value of diplomatic intervention, focusing on the review of the lawsuit involves significant national interests, the review needs to be submitted to the necessity of diplomatic intervention report and intervention program to avoid unnecessary diplomatic conflicts with other countries, incurring retaliation.

The second trial, judicial feasibility review. Led by the International Commercial Court of the Supreme Court, the court needs to review the validity of the supporting documents provided by the diplomatic department and focus on whether the diplomatic intervention breaks through the legal boundaries of the Foreign State Immunity Act.

The third trial, international compliance review. The expert members of international law will argue and examine whether the intervention is in line with international customary law, such as the United

Nations Convention on Jurisdictional Immunities of States and Their Property. The expert commissioner is required to issue a report on the legal compliance of diplomatic intervention.

#### 4.2 Domestic Responses

With regard to the potential risks posed by diplomatic intervention in State immunity litigation, China can build a risk prevention and control system from the following points.

First, the construction of a Layered Progressive legal support system, in the Foreign State Immunity Act to clarify the legal boundaries of diplomatic intervention, such as prohibiting diplomatic intervention can directly interfere with the outcome of the legal decision examples of the types of cases prohibited diplomatic intervention in order to avoid the excessive use of diplomatic intervention.

Second, the innovation of judicial and diplomatic coordination mechanism, the establishment of a special department to deal with the coordinated review of immunity cases, members of the department consists of representatives of the People's Supreme Court and the Ministry of Foreign Affairs, the Ministry of Foreign Affairs to provide advice to the court but the final judgment is carried out by the court to avoid excessive interference in the judiciary by the diplomatic sector.

Third, improve the risk assessment mechanism. The Ministry of Foreign Affairs and the Ministry of Commerce have established a risk assessment system to conduct comprehensive risk assessments based on diplomatic relations with the country involved in the case, the level of the rule of law and the sensitivity of the case. In addition, cultivate professionals who are proficient in international law and foreign affairs, and improve China's ability to defend itself in immunity cases so as to better safeguard China's interests.

#### 4.3 International Countermeasures

In order to properly deal with the risks posed by diplomatic intervention, at the international level, first of all, the country needs to build a regional immunity cooperation network. Nowadays, there is a lack of regional cooperation consensus on state immunity litigation, China can promote the Asian and African countries to adopt a treaty to unify the scope of application of diplomatic intervention, the rules and effectiveness of diplomatic intervention in order to avoid the use of different ways to avoid the use of different countries brought about by the conflict of diplomatic intervention can also avoid too much

interference in the implementation of justice.

Secondly, the ratification process of the United Nations Convention on State Immunity should be promoted. This Convention has been formulated for many years, but has not been widely recognized, China should promote more countries to agree to this Convention in order to help build a unified rule of law on state immunity, which can also enhance China's international discourse, to maintain China's image of advocating the rule of law society.

Finally, China needs to innovate dispute resolution measures for immunity. The introduction of a more neutral mechanism for the consideration of cases, in order to balance the diplomatic views, when the case involves public international law, should be transferred to the ICJ to adjudicate, because the decision is internationally binding, which can also avoid diplomatic conflicts.

### 5 CONCLUSION

This paper adopts the literature research method and case study method to study the possible risks of diplomatic intervention in the Foreign State Immunity Act and summarizes several major risks of diplomatic intervention and the necessity of research on the limits of diplomatic intervention.

The risks of diplomatic intervention in the implementation of state immunity are as follows, diplomatic intervention may lead to the damage of personal interests. Diplomatic involvement can also lead to diplomatic disputes which can lead to retaliation. In addition, over-reliance on the use of diplomatic intervention may damage China's international image and weaken the image of China as an advocate of a legalized society. Therefore, China's response to the risks posed by diplomatic intervention has the following optimization direction, China should clarify the limits of diplomatic intervention, prohibit diplomatic intervention can directly affect the verdict. In addition, in order to avoid retaliation behavior diplomatic department should be open and transparent use of supporting documents to reduce the other countries accused us of backroom operation, at the same time in the diplomatic intervention should be carried out in advance before the risk assessment. Diplomatic intervention in the immunity lawsuit should try to use when diplomatic relations are facing major risks, in cases involving public international law should be transferred to the ICJ trial judgment, in order to avoid damage to our international image.

All in all, diplomatic intervention has two sides,

China should reasonably use diplomatic intervention to more effectively protect our interests.

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