

Can Huawei sue the US government for defamation? A study on the threshold of foreign state immunity from a comparative perspective

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Introduction

Huawei has been criticized by the US government for its 5G products and services. This article raises a hypothetical¹ question: What if the allegations are false, can Huawei sue the US for defamation? If not, does it mean a state can rely on defamation to gain commercial advantage for its companies, or harm the competitiveness of companies from competing countries?

Defamation is particularly interesting and relevant for Huawei for two reasons. First, Jiang Xisheng (chief secretary of Huawei's board of directors), on behalf of Huawei, replied to the allegations that "[w]ith some people... no matter what you say to them, they will only say what they want to say. They won't listen to you."² Thus, this indicates that (1) there may be some untruth in the allegations and (2) it is difficult to rebut the allegations merely by words. Secondly, the feasibility of suing for defamation does not seem to have been considered. So far, Huawei has only considered suing the US government in the US arguing the ban in the US on its products is unconstitutional.³

This article will assess whether Huawei can sue, and, if yes, where can Huawei sue the US Government. In particular, it evaluates whether it is possible to sue the US government in Canada, England and Wales, Australia, China and the US. The focus of this article is whether Huawei *can* sue at all by lifting state immunity (i.e. a question of the legal threshold for suing the US government). It is not a study of whether a defamation claim will succeed (i.e. a question of the substantive laws) and hence the details of defamation laws is beyond the scope of this article. It will, however, evaluate how some of the allegations may be untrue, thus forming the grounds of a defamation claim.

In terms of academic contribution, it seeks to illustrate the difference in the scope of the foreign immunity laws of the above jurisdictions, through using the facts of Huawei-US controversy as a test case.

¹ It is unknown with certainty regarding which allegation is true and which is untrue. Obviously only Huawei and the US government know the best, but certainly not the ordinary public when the allegations involve complex technological questions and national security (which means certain information on these matters are not publicly accessible). Thus, this article makes assumptions regarding the correctness of certain allegations for academic discussion (especially when the academic focus is on state immunity, not on defamation). No disrespect is intended to any country, organization, entity and person.

² Raymond Zhong, 'Who Owns Huawei? The Company Tried to Explain. It Got Complicated' *The New York Times* (25 April 2019) <<https://www.nytimes.com/2019/04/25/technology/who-owns-huawei.html>> accessed 8 February 2020.

³ Essentially, it is a challenge on the constitutionality of s 889 of the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (H.R.5515), which expressly bans federal agencies from using Huawei's products. It was reported that Huawei argued that the ban amounts to a "bill of attainder", and is therefore unconstitutional: Raymond Zhong and Paul Mozur, 'Huawei Said to Be Preparing to Sue the U.S. Government' *The New York Times* (4 March 2019) <<https://www.nytimes.com/2019/03/04/technology/huawei-lawsuit-us-government.html>> accessed at 8 February 2020. It was argued that the Congress "is effectively adjudicating on its own whether Huawei is influenced and subject to the Chinese government rather than allowing the executive and courts to make that judgment": Yuan Yang, 'Huawei lawsuit accuses US of 'unconstitutional' equipment ban' *Financial Times* (7 March 2019) <<https://www.ft.com/content/35731f8c-4080-11e9-b896-fe36ec32aece>> accessed at 8 February 2020 (quoting Glen Nager, partner at law firm Jones Day, which filed the complaint on behalf of Huawei).

For clarity, that action would not be blocked by (domestic) sovereign immunity, because it is not a tort action (like defamation) against the government, but is merely a constitutional challenge.

This lawsuit illustrates that Huawei is willing to sue the US. Also, it is interesting to note that the previous lawsuit was supported by China's foreign minister, Wang Yi, who commented that "[w]e support the company and individual in question in *seeking legal redress* to protect their own rights and interests, and refusing to be silent lambs": Yuan Yang, 'Chinese foreign minister Wang Yi backs Huawei's US lawsuit' *Financial Times* (8 March 2019) <<https://www.ft.com/content/176e6dda-4174-11e9-b896-fe36ec32aece>> accessed 8 February 2020 (emphasis added).

The allegations made against Huawei

A number of allegations have been made against Huawei. The allegations are made by different entities and people from different countries. Notably the US government has been the notable voice against Huawei, and many others (be they authorized or related to the US government or not) expanded on the allegations. The allegations below are derived from various reputable and quality news sources, and only those made by the US government (or by personnel apparently related to or representing the US government)⁴ are discussed below.

Source of Huawei's funds

For example, it was reported that “the CIA had told spy chiefs that Huawei has taken money from the People's Liberation Army, China's national Security Commission and a third branch of the nation's state intelligence network”.⁵

Allegation on Chinese government's power to influence Huawei

Beijing could use the Chinese group's technology to conduct espionage or cyber sabotage.”⁶ The concern is based on the worry over the Chinese National Intelligence Law of the People's Republic of China (adopted in 2017), where art. 7 provides that (unofficial translation) “[a]ny organization or citizen shall support, assist in and cooperate in national intelligence work in accordance with the law and keep confidential the national intelligence work that it or he knows.”⁷

In Australia, it was concerned about the “risk that it would give Beijing the ability to shut power networks and other critical infrastructure that will soon rely on the technology”.⁸

The security of Huawei's products and services

It was reported that “Huawei's 5G mobile phone networks could be hacked by Chinese spies to eavesdrop on sensitive phone calls, gain access to counter-terrorist operations – and potentially even kill targets by crashing driverless cars”.⁹ Others said that the “equipment could be used for spying or destructive cyber attacks by China”.¹⁰

⁴ One of the practical and evidential challenges in bringing a defamation claim would be to identify the makers of the allegations and to see if the allegations can be attributed to the US government. For example, sometimes the news reports only said something like “US politicians allege...”, but without really identifying who those politicians are. See, e.g., Rupert Neate, “Companies are seldom treated like this”: how Huawei fought back, *The Guardian* (19 April 2019) <<https://www.theguardian.com/technology/2019/apr/19/companies-are-seldom-treated-like-this-how-huawei-fought-back>> accessed 8 February 2020.

⁵ Yuan Yang, ‘Huawei fights back against claims it is government-funded’ *Financial Times* (25 April 2019) <<https://www.ft.com/content/ebe8b0c6-6711-11e9-9adc-98bf1d35a056>> accessed 8 February 2020.

⁶ Tobias Buck, ‘German regulator says Huawei can stay in 5G race’ *Financial Times* (14 April 2019) <<https://www.ft.com/content/a7f5eba4-5d02-11e9-9dde-7aedca0a081a>> accessed 8 February 2020.

⁷ See ‘Translation of the National Intelligence Law of the People's Republic of China’ (Beida Fabao) (2018 Amendment) <<https://en.pkulaw.cn/display.aspx?cgid=313975&lib=law>> accessed 8 February 2020. The same translation of Art 7 has been used in official publications: see eg ‘Foreign Ministry Spokesperson Hua Chunying's Regular Press Conference on December 3, 2019’ (Ministry of Foreign Affairs of the People's Republic of China, 3 December 2019) <https://www.fmprc.gov.cn/mfa_eng/xwfw_665399/s2510_665401/t1721187.shtml> accessed 8 February 2020.

⁸ Jamie Smyth, ‘Australia banned Huawei over risks to key infrastructure’ *Financial Times* (27 March 2019) <<https://www.ft.com/content/543621ce-504f-11e9-b401-8d9ef1626294>> accessed 8 February 2020.

⁹ Neate (n 4).

¹⁰ Smyth (n 8).

HUAWEI'S response

Huawei once said that “[m]ost of what the US government says, as we all know, is not true”.¹¹ It is worthwhile to note the replies made by Huawei.

Source of money and Chinese government's control

First, there is no government capital in Huawei.¹² Huawei's bonds are mostly in Hong Kong and overseas capital markets. Huawei claimed that it has not issued bonds in China. For their bank loans, the majority (of about 70%) is in overseas.¹³

Secondly, Huawei averred that it *has never* performed and also promised that it *will never* perform any spying for or handing over any customer data to the Chinese government. Importantly, the Chinese government has *never* made such a request to Huawei.¹⁴

Quality, security and cyberattack

The risk of attack through compromising a 5G network “applies to all equipment vendors, not just Huawei”.¹⁵ Furthermore, it has been suggested that technically, communications that pass through the equipment it supplies for telecoms network are typically encrypted, so it would not be able to read them even if they were intercepted.¹⁶ Other commentators support this view. For example, Michael Howard (senior research director at IHS Markit for carrier networks) commented that the “biggest issue is that any and all equipment from any vendor can be compromised by any knowledgeable rogue person”.¹⁷ Others said that it is “about basic engineering competence and cyber security hygiene that give rise to vulnerabilities”.¹⁸

Are the allegations defamatory?

Once again, it must be stressed that it would be difficult for the ordinary public to examine the correctness of the allegations with certainty because the allegations concern complex technological and national security questions. This part will analyze how certain allegations can be framed as potentially defamatory, based on publicly available information.

Certain allegations may be supportable

In terms of the quality of Huawei's products, it may be true that there is room for technological development and betterment. For example, it has been reported that a British report did find design flaws in Huawei's products, and is capable of being exploited.¹⁹

¹¹ Yang (n 5).

¹² *ibid.*

¹³ *ibid.*

¹⁴ Arjun Kharpal, 'Huawei says it would never hand data to China's government. Experts say it wouldn't have a choice' *CNBC* (4 March 2019) <<https://www.cnbc.com/2019/03/05/huawei-would-have-to-give-data-to-china-government-if-asked-experts.html>> accessed 8 February 2020.

¹⁵ Yuan Yang, 'What are the main security risks of using Huawei for 5G?' *Financial Times* (25 April 2019) <<https://www.ft.com/content/8b48f460-50af-11e9-9c76-bf4a0ce37d49>> accessed 8 February 2020.

¹⁶ *ibid.*

¹⁷ *ibid.*

¹⁸ Smyth (n 8).

¹⁹ Adam Satariano, 'Huawei Security 'Defects' Are Found by British Authorities' *The New York Times* (28 March 2019) <<https://www.nytimes.com/2019/03/28/technology/huawei-security-british-report.html>> accessed 8 February 2020.

Certain allegations may not be supportable (and difficult to be proved)

Some allegations against Huawei are clearly direct or indirect criticisms of Huawei's business ethics. Legally, defamation by implication is a recognized ground of action.²⁰ For example, allegations, such as "Huawei's gear would open a backdoor for Chinese spies"²¹ and Huawei will subsume to Chinese government's demand for spying, clearly implies two matters.

First, the allegations imply that Huawei *will* and *can* put national interest over client's interest. It would be evidentially difficult to prove and support this implication. Even if the law requires Huawei to do so, it does not mean Huawei *will* and *can* do so. Regarding Huawei's *willingness* and *tendency* to do so, there is simply not enough evidence. Huawei itself affirmed that it will not create any backdoor. Any allegations would then be unsupported suggestions of Huawei having low business ethics. Regarding Huawei's *capability* to spy, as suggested above, it has been doubted whether Huawei *can* realistically have access to and maintain control over encrypted data and products *after* they are sold to clients (i.e. a question of technology regarding whether it is technologically possible to do something to sold and encrypted products and services).²² The allegations also illogically assume the purchasers of the Huawei's products would passively keep any natural design flaws open (assuming the flaws can be remedied and this point is talking about the potential flaws that have already been highlighted, such as those outlined in Section II, or those that can be uncovered with reasonable ease).

The second implication is that Huawei *will* betray its clients by exploiting the loopholes in the engineering functioning of its products. Again, this may be very difficult to prove by the US government, because even if there are flaws in the products out of quality reason, it does not necessarily mean Huawei *know* about the flaws and *will* and *can* exploit the flaws. It would be difficult to prove the intention and minds of a company.

Similarly, the allegations on Huawei's source of money are likely to be false when Huawei affirmatively denied it. It is noteworthy that the allegations are also implying the Chinese government *will* hack the 5G infrastructure through Huawei (which is out of the scope of this article, but surely is a relevant consideration).

Will the allegations affect Huawei's business (losses resulting from the defamation)?

The impact of the allegations of the US government extends to all members of the Five Eyes.²³ For example, Australia, one of the Five Eyes members, follows the US entreaty to ban Huawei.²⁴ The allegations do have actual influence. It was reported that "Canada, the U.K. and New Zealand -- are deliberating what to do about Huawei", though the UK starts to have a looser stance towards Huawei and allows to compete for 5G contracts, such as England (but only for non-core technology²⁵).

²⁰ Canada: See, e.g., *Miller v. Squires & Pro-Dive Marine Services et al*, 2008 NLTD 25 [15]; *Laufer v. Bucklaschuk* [1999] 181 DLR (4th) 83 [26]; *Novus Entertainment Inc. v. Shaw Cablesystems Ltd.*, 2010 BCSC 1030 [45]. England and Wales: *McAlpine v Bercow* [2013] EWHC 1342 (QB) [48]-[49]; *Jones v Skelton* [1963] 1 WLR 1362, 1370. Australia: See, e.g., *Rush v Nationwide News Pty Ltd (No 7)* [2019] FCA 496 [94]; *O'Reilly v Edgar* [2019] QSC 24 [32].

²¹ Stefan Nicola, 'Trump Blockade of Huawei Fizzles in European 5G Rollout' *Bloomberg* (19 March 2019) <<https://www.bloomberg.com/news/articles/2019-03-19/trump-blockade-of-huawei-fizzles-in-european-5g-rollout>> accessed 8 February 2020.

²² Yang (n 15): "Huawei has responded that communications that pass through the equipment it supplies for telecoms network are typically encrypted, so it would not be able to read them even if they were intercepted."

²³ Josh Wingrove, 'Canada Puts Huawei 5G Decision on Back Burner With Allies Split' *Bloomberg* (8 May 2019) <<https://www.bloomberg.com/news/articles/2019-05-08/canada-puts-huawei-5g-decision-on-back-burner-with-allies-split>> accessed 8 February 2020.

²⁴ Smyth (n 8).

²⁵ Dan Sabbagh, 'May to ban Huawei from providing 'core' parts of UK 5G network' *The Guardian* (24 April 2019) <<https://www.theguardian.com/technology/2019/apr/24/may-to-ban-huawei-from-supplying-core-parts-of-uk-5g-network>> accessed 8 February 2020.

Outside the Five Eyes, the impact was lesser. For example, in March, it was reported that “not a single European country has banned Huawei”. Germany has even said it will allow Huawei to compete for contracts.²⁶

However, logically and inevitably, the severe allegations from the US government would have some negative impact on the business image of Huawei all over the globe, especially when the allegations are widely reported everywhere. The impact would not be limited to Huawei’s business image in the eyes of the governments, but may also affect the sales of other services and products (e.g. phones) to the general public.

Does Huawei have a legal recourse against the US?

In summary of the analysis below, it is possible to bring a defamation claim against the US government in Canada. It would be extremely difficult to lift the foreign state immunity in England and Wales (and this article offers insights on how Huawei could formulate its case in English courts). It is impossible to sue in Australia. Legally, the US government cannot be sued in the US, because it is protected by sovereign immunity.²⁷

To be absolutely clear, one should not mix up (domestic) sovereign immunity with foreign state immunity. The former is about whether a government can be sued in its own jurisdiction; whereas the latter is about whether a foreign country can be sued in a different jurisdiction. For example, suing the US in the US would be the former; whereas suing the US in Canada would be the latter. It is also helpful to note that both sovereign and foreign state immunities extend to the government of a country.²⁸

Foreign State immunity

The biggest obstacle²⁹ would be the doctrine of foreign state immunity³⁰, which provides that a foreign state cannot be sued.³¹ However, state immunity is no longer absolute in most common law jurisdictions, and exceptions lifting the state immunity are applicable when (1) a country is acting in the commercial capacity³², or (2) injury or property damage³³ is involved.³⁴ Only the “commercial activity”

²⁶ Buck (n 6). The European Union has not imposed a blanket ban on Huawei. Instead, the EU issued guidelines to its members to take measures to deal with any potential security risk: Julia Horowitz, ‘Europe moves to secure 5G networks but won’t ban Huawei’ *CNN* (29 January 2020) <<https://edition.cnn.com/2020/01/29/tech/european-union-5g-huawei/index.html>> accessed 8 February 2020.

²⁷ In particular, 28 U.S.C § 2680(h) expressly carve out the waiver of sovereign immunity under 28 U.S.C § 2674 for libel and slander actions. Thus, the US government cannot be sued.

²⁸ For foreign state immunity, England and Wales: section 14 of the State Immunity Act 1978 expressly included government in the definition of “State”. Canada: State Immunity Act R.S.C., 1985, c. S-18, s 2. Australia: Foreign States Immunities Act 1985, s 3(3). For domestic sovereign immunity, see n 25.

²⁹ The doctrine of non-justifiability is not relevant (because it asks whether a political question, e.g., whether a part belongs to which country). The “act of state” doctrine concerns its validity, so it is also irrelevant.

³⁰ Canada: State Immunity Act, R.S.C., 1985, c. S-18. England and Wales: State Immunity Act 1978. Australia: Foreign States Immunities Act 1985.

³¹ *Holland v Lampen-Wolfe* [2000] UKHL 40; [2000] 1 WLR 1573, 1583, where Lord Millett said it is “an established rule of customary international law that one state cannot be sued in the courts of another for acts performed *jure imperii*”.

³² Canada: State Immunity Act, s 5 (“A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to *any commercial activity* of the foreign state”). England and Wales: State Immunity Act 1978, s 3 (“A State is not immune as respects proceedings relating to a commercial transaction entered into by the State”. “Commercial transaction” includes “any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages”). Australia: Foreign States Immunities Act 1985, s 11.

³³ See, e.g., Canada: State Immunity Act, s 6.

³⁴ *Bedessee Imports Ltd. v. Guyana Sugar Corporation, Inc.*, 2010 ONSC 3388; *Re Canada Labour Code*, [1992] 2 SCR 50. Both cases quoted Lord Wilberforce in *I Congreso del Partido* [1983] A.C. 244 (H.L.), who said:

Over time, however, as governments increasingly entered into the commercial arena, the doctrine of absolute immunity was viewed as an unfair shield for commercial traders operating under the umbrella of state ownership or control. The common law responded by developing a new theory of restrictive immunity. Under this approach, courts extended immunity only to acts *jure imperii* [public acts], and not to acts *jure gestionis* [private acts].

exception is relevant here, but not the latter.³⁵ It will be seen below that although the commercial activity exception is present in Canada, Australia and England and Wales, their exact scope is different.

Huawei could choose to sue in various jurisdictions (of course depending on the private international law rules³⁶). The guiding principle for classifying whether an act is sovereign or commercial would typically ask:

*whether the defendant's conduct was properly characterized as jure imperii (sovereign or public conduct), in which case the immunity would apply, or jure gestionis (commercial or private conduct), in which case it would not.*³⁷

“In order for the exception to apply, it is necessary to investigate the *fundamental nature* of the activities entered into by the foreign power.”³⁸ It requires “the court to consider the entire context and adopt a contextual approach and explained that [r]igid adherence to the nature of an act to the exclusion of purpose would render innumerable government activities *jure gestionis*.”³⁹ The test is more or less the same under English law.⁴⁰ It does not matter that often a state activity possess a hybrid nature, namely it is both public and commercial in nature.⁴¹ The court would also consider the purpose of the activity.⁴²

Thus, it would depend on whether the allegations were made in the sovereign capacity, or in a commercial capacity. Some of the allegations belong clearly to the former category (and hence subject to state immunity), because they involve issues on national security, privacy and spying.

However, other allegations, regarding the quality and security of Huawei's services and products, can be argued as being made in a commercial capacity. This is because, in terms of the context, there may be considerations regarding trade war, 5G technology competition and patent rivalry. From this perspective, the comments are made in the context of a commercial race, and they can be arguably analogized as something like ‘my 5G services and products are better, and customers should not use our competitors’ ones (i.e. Huawei) as they are not good enough or are faulty’. Therefore, it is more arguable that both the *nature* and *purpose* indicate that the allegations are commercial.

This argument is particularly reinforced by the British government's recent approach in framing the concern against Huawei as merely concerning the quality and security of its products (as opposed to any political concerns or any governmental attempt to spy).⁴³ Thus, it supports the argument that the allegations are about commercial quality, and are not about sovereign matters.

See also Marek Martyniszyn, ‘Avoidance Techniques: State Related Defences in International Antitrust Cases’ (2011) CCP Working Paper No. 11-2 <<http://competitionpolicy.ac.uk/documents/8158338/8253131/CCP+Working+Paper+11-2.pdf/19c82b30-4fe0-458f-a901-a62e32d5d225>> accessed 8 February 2020.

³⁵ In Canada, it was held in *United States of America v. Freidland*, [1999] O.J. No. 4919, 46 O.R. (3d) 321, (C.A.) [24]-[25] that an action for defamation was not a proceeding that related to “any death or personal injury”.

³⁶ The legal rules determining the place of the tort of defamation are more or less the same in Canada, Australia and England and Wales. It is the place where the defamation is heard, read or downloaded that is relevant, but not the place where the defamation is “composed, posted on the Internet, or stored, or where the damage to the plaintiff's reputation occurred”. See Matthew Castel, ‘Jurisdiction and Choice of Law Issues in Multistate Defamation on the Internet’ (2013) 51(1) *Alberta Law Review* 153 at 155 (quoting authorities such as *Ecosociété Inc v Banro Corp*, 2012 SCC 18; [2012] 1 SCR 636 [34] and *Dow Jones & Co Inc v Gutnick*, [2002] HCA 56; 210 CLR 575 [25]-[27] as support).

³⁷ *United Mexican States v. British Columbia (Labour Relations Board)*, 2014 BCSC 54 (Canada).

³⁸ *Bedessee* (n 34).

³⁹ Original quotation marks omitted.

⁴⁰ *Holland* (n 31) 1577: Lord Hope held that “it is the nature of the act that determines whether it is to be characterized as *jure imperii* or *jure gestionis*. The process of characterization requires that the act must be considered in its context”.

⁴¹ *Re Canada Labour Code* (n 34). *Holland* (n 31) 1580: Lord Clyde held that “[t]he line between sovereign and non-sovereign state activities may sometimes be clear, but in other cases may well be difficult to draw”. Lord Clyde further observed that “[i]n some cases, as was noticed in *United States v. Public Service Alliance of Canada* 94 I.L.R. 264 at 283, even when the relevant activity has been identified it may have a double aspect, being at once sovereign and commercial, so that it may then have to be determined precisely to which aspect the proceedings in question relate”. See also Edward Chukwuemeke Okeke, *Jurisdictional Immunities of States and International Organizations* (OUP 2018) 99.

⁴² Canada: *Re Canada Labour Code* (n 34); *Homburg v Stichting Autoriteit Financiële Markten*, 2017 NSCA 62. England and Wales: *Congreso del Partido* [1983] A.C. 244, 267 (per Lord Wilberforce). However, note that the US law does not allow the purpose to be taken into account (and the focus has to be on the nature). See Foreign Sovereign Immunities Act 1976 (US), s 1603(d): “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”. See also *Texas Trading & Mill. Corp. v. Federal Republic of Nigeria*, 647 F.2d 300 (1981).

⁴³ *Satariano* (n 19).

Besides, the allegations regarding the willingness and tendency to spy for the Chinese government can be argued as commercial. Whilst they surely can be argued as about national security (and hence subject to state immunity), however, equally, they can be argued as unsupported criticisms of Huawei's business ethics. See the discussion at Part IV (B) above. By analogy to the Canadian case of *Bedessee Imports* (which will be discussed below), the US allegations can be seen as intentionally undermining the competitiveness of Huawei for commercial reasons.

The exact scope of “commercial activity”: Canada, England and Wales and Australia

To lift the state immunity, it is not enough for the allegations to be commercial in nature. It is still necessary to see if the allegations fit within the scope of “commercial activity” as defined by the statutes of various jurisdictions.

In Canada, the statute provides for a broad exception covering “any commercial activity”.⁴⁴ Thus, there is more scope for Huawei to frame its claim in Canada. A case law will be discussed below to reinforce the feasibility of suing the US government in Canada.

By contrast, in England and Wales, the exception for lifting state immunity will only apply if there is a “commercial transaction” with the US government. There is no contractual arrangement between Huawei and the US government that is related to the allegations.

Even though the definition of “commercial transaction” under English law extends to commercial “activity” engaged by the US government, this exception is still unlikely to be applicable. Lord Millett (in obiter) took a restrictive reading of the term “activity” under s.3(3)(c) State Immunity Act 1978. He commented that for there to be a “commercial activity”, there must be “a commercial relationship akin to but falling short of contract (perhaps because gratuitous) rather than a unilateral tortious act”.⁴⁵ If there must be a “relationship” akin to a contract, it would be difficult for Huawei to formulate a claim, when there is nothing contractual or quasi-contractual with the US government.

It is noteworthy that Lord Millett's obiter is the only available guidance on s.3(3)(c), and thus it is unknown if a broader interpretation of s.3(3)(c) is possible. If Huawei insists on suing in English courts, it may try to argue that Lord Millett's interpretation is too restrictive. Instead, the US government has “engaged” in “commercial activity” through downplaying the quality of the Huawei's products (and securing commercial and competitive advantage for companies from other countries). However, two English cases will be explored below and it can be seen that English courts maintain a very restrictive stance against the commercial exception in defamation cases.

State immunity cannot be lifted in Australia, as the exception was expressly and clearly restrictive. Section 11 of the Foreign States Immunities Act 1985 provides only for a “commercial *transaction*” exception (as opposed to the Canadian broad “activity”-based exception). Although “commercial transaction” is defined to include “like activity” under s.11(3), it is similar to (and arguably even stricter than) the position in English law.

Has there been incidents that common law courts allow defamation actions?

There were litigations at various common law courts on defamation actions against state. The results are mixed. Some held that state immunity was inapplicable; some did not.

⁴⁴ State Immunity Act (Can.), s 5.

⁴⁵ *Holland* (n 31) 1587. See also Hazel Fox and Philippa Webb, *The Law of State Immunity* (3rd edn, OUP 2013) 194; Martin Dixon, *Textbook on International Law* (7th edn, OUP 2013) 199.

The case law in Canada

In the Canadian case of *Bedessee Imports Ltd. v. Guyana Sugar Corporation, Inc.*, the government of Guyana made statements that promoted the interests of its wholly-owned state company Guysuco.⁴⁶ It was held that the “statements promoted Guyana’s ‘brand’ and disparaged the brand of a competitor. To permit a lawsuit by Bedessee in relation to such activity is neither an affront to the dignity of the Guyanese state nor an interference with its sovereign functions”. “The statements were directed at activities undertaken by a commercial competitor and had to do with the protection of Guysuco’s brand – a plainly commercial activity”.⁴⁷

Whilst certainly this case has distinguishing features from our present analysis, the key is that in *Bedessee*, it was seen that disparaging the brand of a competitor is capable of amounting to a commercial activity of the state. Thus, by analogy, it can be argued that the US government is making the statements against Huawei for disparaging its commercial competitiveness.

The case law in England and Wales

For Huawei to lift the state immunity in English courts, it has two considerable hurdles. First, it has to argue against Lord Millett’s restrictive interpretation of “commercial activities” under s.3(3)(c) (which would be very difficult as already discussed above). Secondly, even if it passes the first hurdle, it would still face considerable difficulty in establishing that the US allegations are not sovereign but commercial in nature, when the English courts are demonstrably restrictive.

In *Holland v. Lampen-Wolfe*, the claimant-professor provided education to the US military.⁴⁸ The government employee (the defendant) was from the US Department of Defense and he sent memorandum headed “Unacceptable Instructor Performance” to the claimant’s home university complaining about the claimant’s quality of teaching. The claimant sued for defamation. It was held that “the standard of education which the United States affords its own servicemen and their families is as much a matter within its own sovereign authority as is the standard of medical care which it affords them.” Therefore, state immunity was applicable.

The lesson from *Holland* is that just because an allegation is about *quality* of service, it does not mean the English courts will see it as *jure gestionis* (commercial or private conduct). In the words of the English court:

*At first sight, the writing of a memorandum by a civilian educational services officer in relation to an educational programme provided by civilian staff employed by a university seems far removed from the kind of act that would ordinarily be characterised as something done iure imperii. But regard must be had to the place where the programme was being provided and to the persons by whom it was being provided and who it was designed to benefit - where did it happen and whom did it involve?*⁴⁹

Huawei can try to distinguish its case from *Holland*. The English court was heavily influenced by the fact it concerned the US military. But for the involvement of the military, the English court may have reached the opposite decision. Therefore, Huawei could argue for two distinctions. First, Huawei’s action did not concern the military. Secondly, Huawei’s 5G services and products presumably would not be specifically serving the government departments only, but would also serve the general public (so it would be more commercial and less sovereign in nature).

Nevertheless, in another English case *Grovit v De Nederlandsche Bank & Ors*, the claimant sued the Dutch Central Bank and its officers for defamation.⁵⁰ The claimants applied to the Bank for registration

⁴⁶ *Bedessee* (n 34). Application for leave to appeal to the Supreme Court of Canada denied: 2011 CanLII 20808 (SCC).

⁴⁷ *Bedessee* (n 34) [57] (not disputed on appeal).

⁴⁸ *Holland* (n 31).

⁴⁹ *ibid* 1577 (Lord Hope).

⁵⁰ [2007] EWCA Civ 953.

in the Netherlands. The registration was refused and the letter “included assertions that the directors and executives [related to the claimant] were untrustworthy in a number of respects”.⁵¹ It was held that state immunity applied, because the defendants “were performing the role of an administrative authority carrying out governmental supervisory functions which had been delegated to the Bank by the Dutch Government to protect the integrity of the financial system in the Netherlands”.⁵² “The fact that incidentally the letter contained libelous material did not deprive it of its essentially public law character.”⁵³

Grovit is a demonstration that when the defamation is only an incident part of a sovereign public act, state immunity is applicable. However, *Grovit* can be distinguished from our Huawei situation. This is because in *Grovit*, the defamation and the sovereign act of supervising the banking system are inseparable (the defamation arose out of the process of screening registration applications); whereas in our Huawei situation, the allegations against Huawei were made separately. Some were about national security; but some were separately about the quality of Huawei’s services and products.

Suing in China?

It is interesting and helpful to consider the position on foreign immunity in China. In China, there is not a specific state immunity law. However, the Chinese government is in support of *absolute* immunity (i.e. with no exceptions at all).⁵⁴ In *Democratic Republic of Congo v FG Hemisphere Associates LLC*, Congo was sued in Hong Kong and the Office of the Commissioner of the Ministry of Foreign Affairs of China in Hong Kong (hereinafter OCMFA) reiterated the approach taken by China.⁵⁵ OCMFA said:

*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, and has never applied the so-called principle or theory of ‘restrictive immunity’. The courts in China have no jurisdiction over, nor in practice have they ever entertained, any case in which a foreign state or government is sued as a defendant or any claim involving the property of any foreign state or government, irrespective of the nature or purpose of the relevant act of the foreign state or government and also irrespective of the nature, purpose or use of the relevant property of the foreign state or government. At the same time, China has never accepted any foreign courts having jurisdiction over cases in which the State or Government of China is sued as a defendant, or over cases involving the property of the State or Government of China. This principled position held by the Government of China is unequivocal and consistent.*⁵⁶

OCMFA further added that despite China is a signatory to the non-binding *United Nations Convention on Jurisdictional Immunities of States and Their Property* (which supports restrictive immunity), “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’”.⁵⁷

Thus, Huawei cannot sue the US government in China (though it may not be serve any useful purpose to sue in China when the aim of a defamation action is to protect the reputation of Huawei overseas).

⁵¹ *ibid* [4]-[5].

⁵² *ibid* [16].

⁵³ *ibid* [17].

⁵⁴ See, e.g., JS Mo, ‘Issues of Sovereign Immunity in the Australia-China Trade and Investment’ (1991) 7 QUT Law Review 57, 59-61; Dahai Qi, ‘State Immunity, China and Its Shifting Position’ (2008) 7(2) Chinese Journal of International Law 307. See also *Jackson v China*, 794 F.2d 1490, 1494 (11th Cir. 1986).

⁵⁵ [2011] HKCFA 42; (2011) 14 HKCFAR 95; [2011] 4 HKC 151.

⁵⁶ *ibid* [44].

⁵⁷ *ibid* [45]-[46].

Conclusion

It is interesting to note that different countries have different scope of foreign state immunity law. It has been concluded that it is possible to sue the US government for defamation in Canada, but a claim is very likely to be defeated by foreign state immunity in England and Wales. It is also impossible to sue in Australia, China and the US. Thus, despite the allegations having worldwide impact; Huawei has limited legal protection and recourse.

Thus, the commercial implication is that a government from any country can make allegations to undermine the commercial competitiveness from competing countries, whilst it may not have any legal consequence. Thus, foreign state immunity could be used as a strategic tool for competition purposes.

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