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A King's Word: Pre-1949 Chinese Bonds and a Framework for Pursuing Claims on "Classically" Time-Barred Bonds

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A King’s Word: Pre-1949 Chinese Bonds and a Framework for Pursuing Claims on “Classically” Time-Barred Bonds

Charles C.B. Plambeck[†]

“O kingis word shuld be o kingis bonde[.]”¹

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¹ Describing the duties of a king during the Arthurian era. JOANNA MARTIN & EMILY WINGFIELD, *PREMODERN SCOTLAND: LITERATURE AND GOVERNANCE 1420-1587*, 95 (2017) (quoting *LANCELOT OF THE LAIK* (Margaret M. Gray ed., 1912), a major Arthurian romance, circa 1460-1479). In modern English, this quote reads, “A king’s word should be a king’s bond.” *Id.*

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I. Introduction

As President Donald Trump’s campaign against Chinese trade practices gained momentum in 2018,² multiple news outlets

² On March 31, 2017, President Donald Trump signed executive orders calling for stricter trade policy enforcement and for a comprehensive review of trade deficits. *See* Remarks on Signing Executive Orders on Trade, 2017, DAILY COMP. PRES. DOC. 213 (Mar. 31, 2017); *see also* Exec. Order No. 13,785, 82 Fed. Reg. 16,719 (Apr. 5, 2017); Exec. Order No. 13,786, 82 Fed. Reg. 16,721 (Apr. 5, 2017) (“Free and fair trade is critical to the Nation’s prosperity, national security, and foreign policy. It is in America’s economic and national security interests to promote commerce by strengthening our relationships with our trading partners, vigorously enforcing our Nation’s trade laws, improving the overall conditions for competition and trade, and ensuring the strength of our manufacturing and defense industrial bases The United States must address the challenges to economic growth and employment that may arise from large and chronic trade deficits and the unfair and discriminatory trade practices of some of our trading partners.”). This was followed by the imposition of tariffs against Chinese imports, a probe into alleged Chinese intellectual property theft, and an examination of imports and trade practices that could impair the national security of the United States. Statement on Proposed Additional Tariffs Against China, 2018 DAILY COMP. PRES. DOC. 221 (Apr. 5, 2018); Memorandum on Addressing China’s Laws, Policies, Practices, and Actions Related to Intellectual Property, Innovation, and Technology, 2017 DAILY COMP. PRES. DOC. 572 (Aug. 14, 2017). *See generally* U.S. DEP’T OF COM., BUREAU OF INDUST. & SEC., OFF. OF TECH. EVALUATION, THE EFFECT OF IMPORTS OF STEEL ON THE NATIONAL

reported a curious story. The plot: a group of American citizens petitioned President Donald Trump to press claims against the People's Republic of China ("PRC") dating as far back as the Imperial Qing Dynasty.³ The citizens are holders of unpaid bonds issued by China before 1949, the year the PRC was formally proclaimed by Chairman of the Communist Party of China, Mao Zedong.⁴ These bondholders argue that the PRC, as the legal successor to the governments that issued the bonds, must satisfy the defaulted bonds.⁵ The bondholders met with President Trump in person, and reportedly "he and his financial and economic advisors were almost universally in support of pursuing payment from China, or using it to claim an offset against the U.S. debt obligations to China."⁶ By their estimate, \$750 billion of these bonds are held by Americans.⁷ With China holding over \$1 trillion of the United States' debt,⁸ could reviving the pre-1949 debt claims be a valid offset, or serve as leverage in negotiations with China?⁹

SECURITY: AN INVESTIGATION CONDUCTED UNDER SECTION 232 OF THE TRADE EXPANSION ACT OF 1962, AS AMENDED (2018), <https://www.bis.doc.gov/index.php/documents/steel/2224-the-effect-of-imports-of-steel-on-the-national-security-with-redactions-20180111/file> [<https://perma.cc/37P6-W28T>].

³ See Tracy Alloway, *Trump's New Trade War Tool Might Just Be Antique China Debt*, BLOOMBERG BUSINESSWEEK (Aug. 29, 2019), <https://www.bloomberg.com/news/articles/2019-08-29/trump-s-new-trade-war-weapon-might-just-be-antique-china-debt> [<https://perma.cc/LHZ7-GHS7>].

⁴ See *China Owes America over \$1 Trillion in Sovereign Debt*, AM. BONDHOLDERS FOUND., <http://americanbondholdersfoundation.com/> [<https://perma.cc/55P5-YGL3>] (last visited Oct. 30, 2020) [hereinafter *China Owes America*].

⁵ *A Timeless Argument: American Creditors Say China Should Honour Pre-Communist Debts*, ECONOMIST (Sept. 29, 2018), <https://www.economist.com/finance-and-economics/2018/09/27/american-creditors-say-china-should-honour-pre-communist-debts> [<https://perma.cc/TE7Q-577E>] [hereinafter *China Should Honour Pre-Communist Debts*].

⁶ Steve Gill, *Steve Gill Commentary: Is a Tennessee Foundation a Key to Resolving Debt and Trade Issues with China?*, TENN. STAR (Nov. 27, 2018), <https://tennesseestar.com/2018/11/27/steve-gill-commentary-is-a-tennessee-foundation-a-key-to-resolving-debt-and-trade-issues-with-china/> [<https://perma.cc/2JH6-QPV8>].

⁷ See *China Should Honour Pre-Communist Debts*, *supra* note 5; *China Owes America*, *supra* note 4.

⁸ *Major Foreign Holders of Treasury Securities (in Billions of Dollars)*, U.S. DEP'T OF TREASURY, <https://ticdata.treasury.gov/Publish/mfh.txt> [<https://perma.cc/S6QV-EZHV>] (last updated Dec. 15, 2020); U.S. DEP'T OF TREASURY ET AL., FOREIGN PORTFOLIO HOLDINGS OF U.S. SECURITIES AS OF JUNE 28, 2019, 13 ex. 6, 30 ex. 14 (2020), <https://ticdata.treasury.gov/Publish/shl2019r.pdf> [<https://perma.cc/K9M5-HY7Z>].

⁹ The holders of the Chinese debt are private parties and not the federal government;

Finding a Rembrandt at a flea market is a bewitching dream not easily dispelled.¹⁰ Although the Securities and Exchange Commission (“SEC”) has sought to enjoin the offering and selling of bonds to vulnerable individuals,¹¹ as explained in Part I of this article, the bondholders have a prima facie case for recovery.¹² Imperial and Republican China incurred valid debt for legitimate

however, at minimum, the federal government would benefit from tax revenues of any proceeds recovered by the bondholders. See, e.g., Jonathan Garber, *\$1.6T in Century-Old Chinese Bonds Offer Trump Unique Leverage Against Beijing*, FOX BUS. (May 14, 2020), <https://www.foxbusiness.com/markets/historic-chinese-bonds-trump-leverage-beijing> [<https://perma.cc/E65D-5SZK>]. The possibility that the federal government could legitimize a claim of that magnitude might also provide leverage in other bilateral matters with China. *Id.*

¹⁰ See REGINALD SCOT, THE DISCOVERIE OF WITCHCRAFT 147 (Brinsley Nicholson ed., Elliot Stock 1886) (1584) (“How manie have beene bewitched with dreames, and thereby made to consume themselves with digging and searching for monie & c: whereof they, or some other, have drempt? I my selfe could manifest as having knowne how wise men have beene that waie abused by verie simple persons, even where no dreame hath been met withall, but waking dreames.”).

¹¹ See Complaint at 1, SEC v. Caldwell, No. 5:18-cv-00434 (W.D. La. Mar. 29, 2018) (alleging that the pastor of one of the largest Protestant churches in the country defrauded elderly investors by selling them pre-Revolutionary Chinese Bonds that were “mere collectible memorabilia with no meaningful investment value”); Complaint at 4-5, SEC v. Harper, No. 5:18-cv-00436 (W.D. La. Mar. 29, 2018) (explaining that the “bonds have been in default since 1939 and the current Chinese government refuses to recognize the debt” and that the defendants misrepresented the bonds as, *inter alia*, “risk free” and omitted facts indicating that the bonds are in default and no liquid market exists). Press Release, U.S. Sec. & Exch. Comm’n, SEC Charges Prominent Pastor, Financial Planner in Scheme to Defraud Elderly Investors (Mar. 30, 2018), <https://www.sec.gov/news/press-release/2018-51> [<https://perma.cc/7TX2-LA6M>].

¹² Professor Mark Weidemaier of the University of North Carolina School of Law and Professor Mitu Gulati of Duke University School of Law argue that “at least in theory, the holder of one of these instruments could sue the current Chinese government for non-payment.” Mark Weidemaier & Mitu Gulati, *Pre-Revolutionary Chinese Debt: An Investment for the Truly Stable Genius*, CREDIT SLIPS (July 21, 2019), <https://www.creditslips.org/creditslips/2019/07/pre-revolutionary-chinese-debt-an-investment-for-the-truly-stable-genius.html> [<https://perma.cc/J6F3-5CCJ>]. They hasten to clarify that certain avenues of using these old bonds to offset current debt owed to the PRC are impossible at worst, incredibly unlikely at best, and the only realistic path “is for the U.S. government to intervene politically [by] try[ing] to pressure the PRC to pay some kind of compensation.” Mark Weidemaier & Mitu Gulati, *Enough with the Old Chinese Debt Already*, CREDIT SLIPS (Sept. 10, 2019) <https://www.creditslips.org/creditslips/2019/09/enough-with-the-old-chinese-debt-already.html> [<https://perma.cc/RSJ7-XQ55>] [hereinafter Weidemaier & Gulati, *Enough with the Old Chinese Debt Already*] (discussing the theory that bondholders might assign their claims to the United States, which, under 28 U.S.C. § 2415, could use these otherwise time-barred claims to reduce U.S. debt against China if China tried to enforce its own claims against the United States).

governmental purposes.¹³ As their successor government, the PRC is liable for that debt, and¹⁴ as of the writing of this article, the PRC has not paid the debt.¹⁵ Part II reveals that U.S. federal courts have jurisdiction to hear claims against the PRC because a foreign sovereign is not immune from suits involving commercial activities such as raising capital.¹⁶ However, many prospective plaintiffs may be turned away if the “direct effects” in the United States are too remote.¹⁷ As set out in Part III, those plaintiffs that survive the “direct effects” bar are likely to prevail against the defenses that the PRC is not the successor to the debt and that the debt is so odious as to be unenforceable.¹⁸ Another hurdle that may be insurmountable to many plaintiffs is the statute of limitations: the time to enforce claims for non-payment of interest and principal has passed.¹⁹ The argument that the statute of limitations has been tolled by lack of an adequate forum is not likely to prevail.²⁰ Plaintiffs whose bonds have a perpetual *pari passu* clause have a glimmer of hope, but this can easily be extinguished by a court interested in quieting matters. In short, the time for digging for treasure seems to have passed.²¹

II. The Bondholders’ Prima Facie Case

A. Imperial and Republican Chinese Bond Issuances

The history of China from the late 19th century to the fall of the Republic of China on the mainland is reflected in its bond

¹³ See PAUL E. ECKEL, *THE FAR EAST SINCE 1500*, 272–80 (Harcourt, Brace & Co. 1947). Most of the bonds issued during this period either funded the First Sino-Japanese War, funded reparation afterward owed to Japan, or funded the construction of railroads. See *id.* at 194, 273, 465–66.

¹⁴ See *infra* Section III.A.

¹⁵ See *infra* Section II.B.

¹⁶ See *infra* Part II.

¹⁷ See *infra* Section III.B.3.

¹⁸ See *infra* Part III.

¹⁹ See *infra* Section IV.C.1.

²⁰ See *infra* Section IV.C.2.

²¹ SCOT, *supra* note 10, at 147 (“And if the time of digging be neglected, the devil will carry all the treasure away.”). The inter-governmental aspects of the claims are a separate but intertwined matter. As mentioned, there is a U.S. statute—28 U.S.C. § 2415—that allows the United States to bring stale counterclaims against its creditors. See Weidemaier & Gulati, *Enough with Old Chinese Debt Already*, *supra* note 12.

issuances.²² Broadly, the bonds provided capital to fund the construction and operation of telegraphs, railways, roads and other projects essential to the economic development of China.²³ These bonds also funded war efforts, and, when unsuccessful, indemnity payments to the victors.²⁴ China's debt resulted in an unsustainably high debt service burden, reflecting either fair risk premiums for a turbulent emerging economy, exploitative rates coerced by power imbalances, or a combination of both, depending on one's perspective.²⁵

1. *Qing Era Bonds*

By the late 19th century, China had been under the rule of the Qing dynasty for over two centuries.²⁶ European interest in China rose at the end of the 18th century, when European countries grew into maritime trading powers and European consumers sought Chinese goods.²⁷ European silver flowed to China to pay for the goods, which resulted in trade imbalances and the depletion of European silver reserves.²⁸ The British, seeking to stem this silver hemorrhage, took advantage of the popularity of opium in China: Britain began growing opium in British-controlled India and selling it to China.²⁹ China and Britain went to war in the First Opium War

22 For a longer survey of older Chinese bonds, see generally, 1 TREATIES AND AGREEMENTS WITH AND CONCERNING CHINA, 1894-1919: MANCHU PERIOD (1894-1911) (John V. A. MacMurray ed., 1921) [hereinafter TREATIES 1] (containing a variety of bond treaties made by China between 1894 and 1911); and 2 TREATIES AND AGREEMENTS WITH AND CONCERNING CHINA, 1894-1919: REPUBLICAN PERIOD (1912-1919) (John V. A. MacMurray ed., 1921) [hereinafter TREATIES 2] (containing a variety of bond treaties made by China between 1912 and 1919).

23 See ECKEL, *supra* note 13, at 279.

24 See TREATIES 1, *supra* note 22, at 110; ECKEL, *supra* note 13, at 272-80, 465-66.

25 See, e.g., ECKEL, *supra* note 13, at 272-80, 465-66.

26 See generally 1 FREDERIC E. WAKEMAN, THE GREAT ENTERPRISE: THE MANCHU RECONSTRUCTION OF IMPERIAL ORDER IN SEVENTEENTH-CENTURY CHINA (1985).

27 See *id.* at 11-24, 34-45, 54-59; Anthony Reid, *Preface* to SOUTHEAST ASIA IN THE EARLY MODERN ERA: TRADE, POWER, AND BELIEF, at xxiii-xxviii (Anthony J. Reid ed., 1993).

28 China accepted silver as currency. See WAKEMAN, *supra* note 26, at 144.

29 PETER W. FAY, THE OPIUM WAR, 1840-1842, 73, 180-81, 185-89 (1997). The Chinese paid for the opium in silver: consequently, silver flowed out of Britain to China to buy Chinese goods, but out of China back to Britain in exchange for opium, evening Britain's silver levels. See *id.* at 180-81, 185-89.

after China sought to end the opium trade.³⁰ The war ended in British victory and the signing of the first “unequal treaty” between China and a Westernized power.³¹ The subsequent series of treaties required China to give territory to Western powers for trading ports; pay financial reparations; and eliminate any Chinese-owned monopolies in favor of either free trade or European monopolies.³²

This new domination of China by European powers weakened the Qing government, and allowed rebellions to foment, including the catastrophic Taiping Rebellion, the Boxer Rebellion, and the Second Opium War.³³ The Qing dynasty attempted to reform, as well as pay off its reparations and war debt, during this late period.³⁴ This is the backdrop to bonds such as the ‘4½% Gold Loan of 1898’, which were issued to pay Chinese reparations to Japan following the First Sino-Japanese War.³⁵ The 1898 4½% Gold Loan has a 45 year maturity, with interest paid monthly at 4.5% per year.³⁶ The coupons are redeemable at either the Hong Kong and Shanghai Banking Corporation office in London, or the Deutsch-Asiatische Bank in Berlin, Hamburg, Frankfurt-am-Maine, and Cologne.³⁷

³⁰ *See id.* at 196–210.

³¹ *See* DONG WANG, CHINA’S UNEQUAL TREATIES: NARRATING NATIONAL HISTORY 1–2 (2005).

³² This is how Hong Kong became a British territory. *See id.*

³³ The Taiping Rebellion alone resulted in an estimated 30 million deaths. *See* STEPHEN R. PLATT, AUTUMN IN THE HEAVENLY KINGDOM: CHINA, THE WEST, AND THE EPIC STORY OF THE TAIPING CIVIL WAR (2012).

³⁴ *See* ECKEL, *supra* note 13, at 272–80.

³⁵ *See* Bond. No. 1898/3, Ger. (Deutsch-Asiatische Bank)-Gr. Brit. (Hongkong and Shanghai Banking Corp.)-China, art. 9, *Agreement for the Chinese Imperial Government 4½% Gold Loan of 1898* (Mar. 1, 1898), *reprinted in* TREATIES 1, *supra* note 22, at 110 (“The Chinese Imperial Government hereby undertakes to pay the entire balance of the Indemnity due on the eighth day of May next to the Imperial Japanese Government out of the proceeds of this loan.”); Charles Denby, *The National Debt of China—Its Origin and Its Security*, 68 ANNALS AM. ACAD. POL. & SOC. SCI. 55, 58 (1916).

³⁶ *See* Bond No. 1898/3, TREATIES 1, *supra* note 22, at 107–11 (describing the terms of the bond).

³⁷ *E.g.*, Deutsche-Asiatische Bank, Chinese Imperial Government 4½% Gold Loan of 1898 1 (Mar. 1, 1898) (bond contract) (on file with note author) [hereinafter 4½% Gold Loan of 1898]. The Deutsche-Asiatische Bank was founded in Shanghai by Deutsche Bank and twelve other German banks in 1889 to take advantage of Germany’s large excess capital from both “a war indemnity of 5 billion francs from France” after the Franco-Prussian War and from rapid domestic industrial growth, and to finance “Chinese imperial loans and industries, especially mines and railways in the German concessions of China” such as Tsingtao, Hankou, and Tianjin. ZHAOJIN JI, A HISTORY OF MODERN SHANGHAI

These bonds are secured by revenues from general lekins and salt lekins from seven different provinces (lekin or likin is a “Chinese provincial tax at inland stations on imports or articles in transit”).³⁸ As evidence of the “unequal treaties,” these revenues were collected by the Chinese Imperial Maritime Customs service, which was primarily operated by foreigners.³⁹ Lastly, this bond had “priority, both as regards principal and interest, over all future loans, charges or mortgages, so long as this loan or any part thereof shall be unredeemed.”⁴⁰

Similar bonds are the ‘7% Silver Loan of 1894’ and ‘6% Sterling Loan of 1895’,⁴¹ also taken out to fund the war effort in the First Sino-Japanese War.⁴² The Silver Loan was paid through the Hongkong and Shanghai Banking Corporation (the modern bank “HSBC”) by having the Imperial Government issue ‘Customs

BANKING: THE RISE AND DECLINE OF CHINA’S FINANCIAL CAPITALISM 50 (2003). Bank lending turned to focus on trade finance, which meant the bank suffered during the First World War as trade between Europe and Asia declined. Ghassan Moazzin, *From Globalization to Liquidation: The Deutsch-Asiatische Bank and the First World War in China*, 16 CROSS-CURRENTS: E. ASIAN HIST. & CULTURAL REV. 52, 54 (2015). When China joined the war effort on the side of the Allies against Germany and the Central Powers, Britain convinced China to liquidate the bank both as part of the war effort against Germany, and to cripple Germany’s growing threat to Britain’s future global economic dominance by ensuring “that the bank would be unable to resume business after the war.” *Id.* at 58. All German businesses in China held their deposits at the Bank, and this blow to the Bank affected all German industry in China. *Id.* at 68. The Bank never fully recovered, and was quietly absorbed by Deutsche Bank in 1987. *Id.* at 67; *see also* *Deutsche Bank in East Asia*, WAYBACK MACH.: INTERNET ARCHIVE (Dec. 29, 2008), https://web.archive.org/web/20081229232913/http://www.bankgeschichte.de/e/04_01_01_01.html [<https://perma.cc/BN43-GL5H>].

³⁸ Bond No. 1989/3, art. 6(2), TREATIES 1, *supra* note 22, at 109; *Likin*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/likin> [<https://perma.cc/4AZ7-YGM9>] (last visited Nov. 9, 2020).

³⁹ Chihyun Chang, *Modern China’s Customs Services: A Brief Introduction*, 地理資訊科學研究專題中心 [CTR. FOR GIS, RCHSS, ACADEMIA SINICA], <http://gis.rchss.sinica.edu.tw/cmcs/modern-china%E2%80%99s-customs-services-a-brief-introduction#p7> [<https://perma.cc/LQ9Y-FYM4>] (last visited Nov. 9, 2020).

⁴⁰ Bond No. 1989/3, art. 6(2), TREATIES 1, *supra* note 22, at 109.

⁴¹ *See generally* Bond No. 1895/1, Gr. Brit. (Hongkong and Shanghai Banking Corp.)-China, *Final Agreement for the Chinese Imperial Government Seven per Cent Silver Loan of 1894* (Jan. 26, 1895), *reprinted in* TREATIES 1, *supra* note 22, at 11–14; Bond No. 1895/2, Gr. Brit. (Hongkong and Shanghai Banking Corp.)-China, *Final Agreement for the Chinese Imperial Government Six per Cent Sterling Loan of 1895* (Jan. 26, 1895), *reprinted in* TREATIES 1, *supra* note 22, at 15–17.

⁴² Denby, *supra* note 35, at 56–58.

Bonds' to HSBC, which "assigns to and charges in favor of [HSBC] sufficient of the Customs Revenue at all or any [] ports . . . to meet and pay off all the Customs Bonds which have been handed to [HSBC]", who would in turn pay the bondholders from the Customs revenue.⁴³ This Silver Loan had no priority clause.⁴⁴ However, the Sterling Loan had a priority clause with similar language to the Gold Loan of 1898.⁴⁵

On the eve of its collapse, the last imperial government in China, the Qing Dynasty, issued bonds to finance railway expansion and nationalization projects.⁴⁶ The bonds were underwritten by a consortium of French, German, British and American banks.⁴⁷ In a roughly contemporaneous assessment, the debt incurred was the first capital attracted for internal development.⁴⁸ The railway bonds of this period generally did not share the same level of bondholder protection as the bonds discussed above. For example, the 'Chinese Imperial Railway 5% Gold Loan' of 1911 for the construction of the Shanghai to Nanking railroad was secured by the railway, and any "land, materials, rolling-stock, buildings, property, and premises of every description purchased . . . by the railway[] hereinafter referred to, and on the last-mentioned railways themselves as and when constructed and on the revenue of all descriptions derivable therefrom."⁴⁹ The bond contains priority only over the security: "until [redemption], no part of the land comprised in the mortgage security or the railway and its appurtenances shall be transferred or given to another party, and that the rights of the first mortgage shall not in any way be impaired[.]"⁵⁰

⁴³ Bond No. 1895/1, art. 15, TREATIES 1, *supra* note 22, at 13.

⁴⁴ *See id.* at 11–14.

⁴⁵ Bond No. 1895/2, art. 9, TREATIES 1, *supra* note 22, at 16.

⁴⁶ *See* Manman Huang, *Hukuang Railway Bonds of 1911*, FIN. HIST., Fall 2013, at 8–9.

⁴⁷ *See, e.g.*, British & Chinese Corp., Ltd., Chinese Imperial Railway 5% Gold Loan for £3,250,000 Sterling 1 (Dec. 2, 1904) (bond contract) (on file with note author) [hereinafter 5% Gold Loan of 1911].

⁴⁸ Denby, *supra* note 35.

⁴⁹ Bond No. 1903/2, Gr. Brit. (Brit. & Chinese Corp., Ltd.)-China, art. 3, *Agreement for a Loan for the Construction of a Railway from Shanghai to Nanking* (July 9, 1903), reprinted in TREATIES 1, *supra* note 22, at 389.

⁵⁰ 5% Gold Loan of 1911, *supra* note 47.

2. *Republican Era Bonds*

Within months of the 1911 railway bond issue, a successful revolt against Qing rule was launched, culminating on January 1, 1912, with the declaration of the Republic of China.⁵¹ In this turbulent period from 1912 to 1949, successive governments required foreign borrowing to manage perennial fiscal problems.⁵² The Qing government was decisively overthrown on February 12, 1912, during the Xinhai Revolution through an alliance between Sun Yat-sen's Nationalist Party (the Kuomintang) and the de facto leader of the Beiyang army (the major Qing military force) Yuan Shikai.⁵³ Shikai became a de facto dictator, even declaring himself emperor, from 1912 until his death in 1916.⁵⁴ Many provinces declared their independence, until the establishment of the Nationalist government in Nanking in 1926, which had control over most of the country by 1928.⁵⁵ The Nationalists achieved this degree of unification through the military venture known as the Northern Expedition.⁵⁶ This period saw a degree of relative stability under the Nationalists, despite a war with the Communist party, up until the beginning of World War II, when Japan invaded China.⁵⁷

⁵¹ The emperor and the royal family abdicated the throne in February of 1912. *The Chinese Revolution of 1911*, U.S. DEP'T. OF STATE ARCHIVE, <https://2001-2009.state.gov/r/pa/ho/time/ip/88116.htm> [<https://perma.cc/4E9T-LWKH>] (last visited Nov. 9, 2020).

⁵² Governments in the period of Republican China struggled fiscally with chronic military and police expenditures, heavy debt service and indemnity payments, and inconsistent revenue sources. Albert Feuerwerker, *Economic Trends, 1912-49*, in 12 THE CAMBRIDGE HISTORY OF CHINA: REPUBLICAN CHINA 1912-1949, PART 1 28, 100-05 (Denis Twitchett & John K. Fairbank eds., 1983) ("Between 1912 and 1926, 27 domestic bond issuances were floated by the Ministry of Finance . . .").

⁵³ See Joseph W. Esherick, *Introduction to CHINA: HOW THE EMPIRE FELL* 1, 2-14 (Joseph W. Esherick & C. Z. George Wei eds., Routledge 2014); Li Xizhu, *Provincial Officials in 1911-12: Their Backgrounds and Reactions to Revolution—An Inquiry into the Structure of "Weak Center, Weak Regions" in the Late Qing*, in CHINA: HOW THE EMPIRE FELL, *supra*, at 159-76.

⁵⁴ See, e.g., Esherick, *supra* note 53, at 3-4, 6.

⁵⁵ See THE GENERALISSIMO: CHIANG KAI-SHEK AND THE STRUGGLE FOR MODERN CHINA 54-63, 77-105 (Jay Taylor ed., Harvard Univ. Press 2009) (1931).

⁵⁶ See *id.* at 49-96.

⁵⁷ See, e.g., *Introduction to 9 THE STRENUOUS DECADE: CHINA'S NATION-BUILDING EFFORTS, 1927-1937* ix, x-xvii (Paul K. T. Sih ed., St. John's Univ. Press 1970); Dison H. Poe, *Political Reconstruction, 1927-1937*, in 9 THE STRENUOUS DECADE: CHINA'S NATION-BUILDING EFFORTS, 1927-1937, *supra*, at 33, 73-79; Arthur N. Young, *China's Fiscal Transformation, 1927-1937*, in 9 THE STRENUOUS DECADE: CHINA'S NATION-

In the last month of the Xinhai Revolution, the Provisional Government issued the “8% Military Loan of the Republic of China.”⁵⁸ The purpose of the bond was “for military emergencies and the preservation of peace and order[,]” and all proceeds from the issuance were limited to that use.⁵⁹ This bond was secured by tax revenues on grain.⁶⁰ The bond matured in six years, but required redemption within two years after maturity or the bond expired.⁶¹ The coupons expired within six months.⁶²

As the situation settled, the new government issued bonds in Belgium⁶³ and Great Britain.⁶⁴ These issuances were “designed to provide funds . . . to consolidate the Central and Local Governments, to assure the satisfactory administration of the State and Provinces and/or to relieve the distress prevailing among the people and in commercial circles.”⁶⁵ The issuances have some different terms: for instance, the British issue granted the bondholder priority only over any bond “charged on the [same] revenue[,]” which was revenues from the Salt Tax.⁶⁶ The Belgian bond was not protected by such explicit guarantees.⁶⁷

BUILDING EFFORTS, 1927-1937, *supra*, at 83, 120–21; Theodore H. Chen, *Education in China, 1927-1937*, in 9 THE STRENUOUS DECADE: CHINA’S NATION-BUILDING EFFORTS, 1927-1937, *supra*, at 289, 291–94.

⁵⁸ Bond No. 1912/1, China, *Regulations for the 8% Military Loan of the Republic of China* (Jan. 8, 1912), reprinted in TREATIES 2, *supra* note 22, at 929-31.

⁵⁹ *Id.* at 929 (quoting Article 5).

⁶⁰ *Id.* at 930 (referring to Article 16, which states “The security for this loan shall be the grain tax of the nation”).

⁶¹ *Id.*

⁶² *Id.* (referring to Article 18).

⁶³ Bond No. 1912/4, Belg. (Banque Sino-Belge)-China, *Agreement for the Chinese Government Five per Cent Gold Loan of 1912* (Mar. 14, 1912), reprinted in TREATIES 2, *supra* note 22, at 947-50.

⁶⁴ Bond No. 1912/9, Gr. Brit. (G. Birch Crisp & Co.)-China, *Agreement for the Chinese Government Five per Cent Gold Loan of 1912*, reprinted in TREATIES 2, *supra* note 22, at 967-73.

⁶⁵ Bond No. 1912/4, art. 2, TREATIES 2, *supra* note 22, at 948; see also Bond No. 1912/9, art. 2, TREATIES 2, *supra* note 22, at 968 (“The Loan [with Great Britain] [wa]s designed to provide capital for the repayment of existing loans and for the reorganization of the Government and for productive works.”).

⁶⁶ Bond No. 1912/9, art. 4(5), TREATIES 2, *supra* note 22, at 968-69.

⁶⁷ Bond No. 1912/4, Belg. (Banque Sino-Belge)-China, *Agreement for the Chinese Government Five per Cent Gold Loan of 1912* (Mar. 14, 1912), reprinted in TREATIES 2, *supra* note 22, at 947-50.

The new government also issued bonds to help fund infrastructure projects like railroads and canals.⁶⁸ The author of this work was unable to find any bond contract terms for post-1919 bonds. However, this paper is still relevant to those bonds. The Concluding Framework outlines the type of bond terms required that are more amenable to suit, and post-1919 bond terms can be compared with the terms amenable to suit.⁶⁹

B. The PRC Succession to Power, Default and Non-Payment

On September 21, 1949, after a revolutionary struggle lasting dozens of years, Chairman Mao proclaimed the PRC, whereupon his new government defaulted on all bonds issued during the Imperial and Nationalist eras.⁷⁰ To announce the rejection of any obligations incurred by the Imperial or Nationalist governments, the new government issued a communique in 1955 to foreign governments that “the PRC had not the ability to pay [the pre-1949] debt burden[.]”⁷¹ The PRC wrote an aide memoire to the U.S. State Department “asserting that the PRC should have no obligation to pay th[ose] debts[.]”⁷² Unsurprisingly, the government of Taiwan, who claims to be the legitimate continuation of the Republic of China, believes the PRC is liable for the debt.⁷³

C. Foreign Claims Settlement Commission

American bondholders sought to collect on this debt under the International Claims Settlement Act of 1949 (“ICSA”).⁷⁴ In 1970, the Foreign Claims Settlement Commission (“FCSC”) considered a

⁶⁸ See, e.g., *id*; Bond No. 1912/9, TREATIES 2, *supra* note 22, at 967-73.

⁶⁹ See *infra* Parts II & III.

⁷⁰ RADHEY S. CHAURASIA, HISTORY OF MODERN CHINA 197-98, 314 (Atlantic Publishers & Distribs. 2004); *China, Britain Settle Claims*, N.Y. TIMES, June 8, 1987, at D9, <https://www.nytimes.com/1987/06/08/business/china-britain-settle-claims.html> [<https://perma.cc/8Z4L-AV79>].

⁷¹ See H.R. Con. Res. 160, 110th Cong. (2007) (recommending that the PRC be denied access to U.S. capital markets until it complies with the WTO Agreement terms and conditions and honors its outstanding defaulted public debts owed to U.S. citizens).

⁷² See *id*.

⁷³ Keoni Everington, *Taiwan Not Required to Pay Qing Dynasty Bonds, China Is: Former Premier*, TAIWAN NEWS (Sept. 10, 2019), <https://www.taiwannews.com.tw/en/news/3773698> [<https://perma.cc/B42B-XLXG>].

⁷⁴ See generally 22 U.S.C. § 1621 *et seq.* (codified text of the International Claims Settlement Act of 1949 (“ICSA”)).

claim to recuperate the pre-1949 debt using the ICSA.⁷⁵ However, the FCSC concluded in Decision No. CN-147 that the Act only covered claims for losses suffered against the Government of the PRC, and because the bonds had been in default ten years prior to the Communist assumption of power, the claims were not covered.⁷⁶ The ICSA granted the FCSC the ‘final word’ on claims: “[t]he action of the Commission in allowing or denying any claim . . . shall be final and conclusive on all questions of law and fact and not subject to review by . . . any court[.]”⁷⁷ Because the pre-1949 bond claims were not covered by the ICSA, the legal obligations owed on those bonds were not extinguished under U.S. law.

D. China Enters the Global Capital Market

Because the bonds were not extinguished by the FCSC and ICSA, the PRC was constrained by bondholders when it attempted to gain access to Western capital markets. As China pursued market reforms in the late 1970s, it was desperate for foreign capital to fund development.⁷⁸ China first opened up Special Economic Zones to encourage foreign investment on the Chinese mainland.⁷⁹ To access the British bond market, China negotiated a deal with the British government in 1986 to settle with British bondholders of old Chinese bonds.⁸⁰ In March of 1987, the U.S. Supreme Court denied certiorari in *Jackson v. People’s Republic of China*,⁸¹ an Eleventh Circuit decision which dismissed a suit by an American holder of pre-1949 Chinese bonds.⁸² The same month, the Bank of China was able to borrow \$150 million from a U.S. lender.⁸³ To China, the old

⁷⁵ See generally Complaint, *Harper*, No. 5:18-cv-00436.

⁷⁶ *Id.* at 4.

⁷⁷ 22 U.S.C. § 1623(h).

⁷⁸ See IMF, CHINA’S GROWTH AND INTEGRATION INTO THE WORLD ECONOMY: PROSPECTS AND CHALLENGES 1 (2004), <https://www.imf.org/external/pubs/ft/op/232/op232.pdf> [<https://perma.cc/AZA2-6PXA>].

⁷⁹ See *id.* at 2, 52.

⁸⁰ *China, Britain Settle Claims*, *supra* note 70.

⁸¹ 794 F.2d 1490 (11th Cir. 1986), *cert. denied*, 480 U.S. 917 (1987).

⁸² See generally *id.* (dismissing on the argument that the Foreign Sovereign Immunities Act of 1976 did not apply retroactively; the U.S. Supreme Court reversed this in *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), discussed *infra*); *China, Britain Settle Claims*, *supra* note 70.

⁸³ *Settlement of Bond Issue Clears Way: China Again Borrowing Money in U.S. After 38 Years*, L.A. TIMES (May 26, 1987) <https://www.latimes.com/archives/la-xpm-1987-05->

debt was where it belonged: in history.

III. Jurisdiction in United States Federal Courts

In *Jackson v. People's Republic of China*, the Eleventh Circuit dismissed the claims against the PRC based on lack of jurisdiction.⁸⁴ This Section explains how this decision was incorrect and that a district court could have jurisdiction over the PRC in a pre-1949 bond case.

A. Subject Matter Jurisdiction over Foreign Sovereigns

A threshold question for a plaintiff seeking to recover on pre-1949 bonds is whether federal courts have subject matter jurisdiction over China.⁸⁵ The Foreign Sovereign Immunities Act of 1976 ("FSIA") confers jurisdiction over a foreign sovereign.⁸⁶ The law has evolved over time to favor bondholders.

1. Schooner Exchange and Absolute Immunity

The U.S. Supreme Court first considered the doctrine of foreign sovereign immunity in 1812 in the case of *The Schooner Exchange v. McFaddon*.⁸⁷ The Schooner Exchange (the "Exchange") was a merchant schooner owned by two Marylanders, who in 1809 sent the ship on a voyage to Spain.⁸⁸ A year later the ship was seized by Napoleon and converted into a French warship.⁸⁹ When the ship was required to put in for repairs in Philadelphia, the Maryland owners tried to reclaim the ship.⁹⁰ The district court dismissed on jurisdictional grounds and the circuit court reversed.⁹¹ On appeal to the Supreme Court, the Court considered "whether an American citizen can assert, in an American court, a title to [property of a foreign sovereign]."⁹²

26-fi-2786-story.html [https://perma.cc/9GB8-K2JN].

⁸⁴ *See id.*

⁸⁵ *See, e.g., Jackson*, 794 F.2d at 1491–92.

⁸⁶ Foreign Sovereign Immunities Act of 1976 ("FSIA"), 28 U.S.C. §§ 1330, 1332, 1391(f), 1441(d), 1602-1611.

⁸⁷ 11 U.S. 116 (1812).

⁸⁸ *Id.* at 117.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 119–20.

⁹² *Id.* at 136.

U.S. Attorney General William Pinkney⁹³ argued that complete sovereign immunity was a long-standing convention of international law, stretching as far back as the Iron Age Phoenician merchant-cities of Tyre and Sidon.⁹⁴ Chief Justice John Marshall, using his characteristic syllogistic reasoning, determined that: (1) “[t]he jurisdiction of courts is a branch of . . . a nation[’s] independent sovereign power”; (2) any exception “to the full and complete power of a nation within its own territories, must be traced to the [explicit or implicit] consent of the nation itself”; (3) the world consists of “distinct sovereignties, possessing equal rights and equal independence”; and (4) to further the “common interest [of] mutual intercourse, and an interchange of good offices with each other[,]” sovereigns consent to waive their exclusive jurisdiction in favor of another.⁹⁵ Chief Justice Marshall thus found that the Court did not have jurisdiction over the French warship because the international convention was for sovereigns to waive jurisdiction over entities of other sovereigns (e.g., ambassadors, armies, and ships in the service of the sovereign power) to promote comity between the two sovereigns, and the political branches had not acted contrariwise.⁹⁶

While the *Schooner Exchange* case was narrowly about foreign warships, “that opinion came to be regarded as extending virtually absolute immunity to foreign sovereigns.”⁹⁷ For example, in *Berizzi Bros. Co. v. The Pesaro*,⁹⁸ the U.S. Supreme Court held that *Schooner Exchange* also applied to merchant ships owned and operated by a foreign sovereign.⁹⁹ An important component of this precedent was that the grant of immunity to foreign sovereigns was itself an act of the sovereign,¹⁰⁰ and the sovereign was free to

⁹³ William Pinkney ratified the U.S. Constitution as an elected delegate of the Maryland Constitutional Convention. WILLIAM PINKNEY, THE LIFE OF WILLIAM PINKNEY, BY HIS NEPHEW 17 (Adamant Media Corp. 2005) (1853).

⁹⁴ *Schooner Exchange*, 11 U.S. at 134.

⁹⁵ *Id.* at 136–37 (clarifying that a nation’s consent could be implicit).

⁹⁶ *Id.* at 137–43.

⁹⁷ *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983) (citing *Berizzi Bros. Co. v. S.S. Pesaro*, 271 U.S. 562 (1926)).

⁹⁸ 271 U.S. 562 (1926).

⁹⁹ *See id.* at 573–74, 576.

¹⁰⁰ Only a sovereign can waive the right to enforce sovereign power on the sovereign’s territory. *See Berizzi Bros. Co.*, 271 U.S. at 573–74.

enforce its sovereign prerogative if it so chose.¹⁰¹ Chief Justice Burger explained this in *Verlinden B.V. v. Central Bank of Nigeria*:

The Schooner Exchange made clear[] [that] foreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution. Accordingly, [the U.S. Supreme] Court consistently has deferred to the decisions of the political branches—in particular, those of the Executive Branch—on whether to take jurisdiction over actions against foreign sovereigns and their instrumentalities.¹⁰²

2. *Tate Letter and Restrictive Immunity*

On May 19, 1952, the Acting Legal Adviser to the State Department, Jack B. Tate, signed a letter (the “Tate Letter” or the “Letter”) addressed to the Acting Attorney General, Philip B. Perlman,¹⁰³ with a self-explanatory title: “Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Governments.”¹⁰⁴ The Tate Letter reveals that the State Department had “for sometime [been] consider[ing] the question [of] whether the practice of the Government[,] in granting immunity from suit to foreign governments made [] defendant[s] without their consent[,] should not be changed.”¹⁰⁵ According to Tate’s research, there were two competing theories of sovereign immunity: (1) absolute sovereign immunity, in which “a sovereign cannot, without his consent, be made a respondent in the courts of another sovereign” and (2) restrictive sovereign immunity, where “immunity is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*).”¹⁰⁶ At the time it was written, the Tate Letter estimated that the United States, the British Empire, Czechoslovakia, Estonia, Poland, Brazil, Chile, Hungary, Japan, Luxembourg, Norway, and Portugal subscribed to absolute immunity; the Netherlands, Sweden, and Argentina had begun to transition towards restrictive immunity; the

¹⁰¹ *See id.*; *see also Verlinden B.V.*, 461 U.S. at 486, 488.

¹⁰² *Verlinden B.V.*, 461 U.S. at 486.

¹⁰³ *See generally* Letter from Jack B. Tate, Acting Legal Adviser, Dep’t of State, to Philip B. Perlman, Acting Att’y Gen., Dep’t of Just., Changed Policy Concerning the Granting of Sovereign Immunity to Foreign Governments (May 19, 1952), *reprinted in* 26 DEPT. ST. BULL. 984 [hereinafter Tate Letter].

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

German Supreme Court was waiting for the doctrine of restrictive immunity to develop further; and Belgium, Italy, Egypt, Switzerland, France, Austria, Greece, Romania, Peru, and Denmark had adopted the restrictive immunity theory.¹⁰⁷

Only a few years after the 1926 *Berizzi Bros.* decision, ten of the absolute immunity countries “ratified the Brussels Convention of 1926 under which immunity for government owned merchant vessels is waived.”¹⁰⁸ Indeed, by the time of the Tate letter, the United States, while not a signatory to the Brussels convention, had adopted “a policy of not claiming immunity for its public owned or operated merchant vessels.”¹⁰⁹ Tate’s research indicated to him that the global trend was leaning towards restrictive immunity, with the Soviet Union being the only great power fighting against the move, protesting lawsuits over Tsarist-era bonds and contracts.¹¹⁰ The Letter concludes that “the widespread and increasing practice on the part of governments of engaging in commercial activities” and “the granting of sovereign immunity to foreign governments in the [United States] courts . . . is [] inconsistent with the action of the Government of the United States in subjecting itself to suit in these same courts in both contract and tort and with its long established policy of not claiming immunity in foreign jurisdictions for its merchant vessels.”¹¹¹ Tate acknowledged that the Letter itself had no direct legal impact, but understood that “the courts are less likely to allow a plea of sovereign immunity where the executive has declined to do so.”¹¹²

Regarding sovereign immunity in domestic matters, John Marshall once held “that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that country, of its sovereign character, and takes that of a private citizen.”¹¹³ In practice, the Tate Letter meant the United States had withdrawn its consent from exempting commercial

¹⁰⁷ China in this case is likely meant to refer to the Republic of China. *See id.*

¹⁰⁸ *Id.* at 985.

¹⁰⁹ Tate Letter, *supra* note 103, at 985.

¹¹⁰ Tate mentions that the United Kingdom is still in support of absolute sovereignty, but that there “are evidences that British authorities are aware of its deficiencies and ready for a change.” *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Bank of the U.S. v. Planters’ Bank of Ga.*, 22 U.S. 904, 907 (1824).

activities of foreign sovereigns from American territorial jurisdiction and began treating them as “a private citizen.”

3. *Lead Up to the Foreign Sovereign Immunities Act of 1976*

Even though the Tate Letter indicated that the executive branch had shifted to the restrictive theory of sovereign immunity, there was no legislative action to codify the decision: courts facing foreign sovereign immunity questions had to look for guidance from the State Department.¹¹⁴ Monroe Leigh, a legal adviser to the U.S. State Department, described the result as a “peculiar and, in my view, outdated practice of having a political institution, namely, the State Department, decide many of these questions of law.”¹¹⁵ In his testimony before the Subcommittee on Administrative Law and Governmental Relations of the House Judiciary Committee, Leigh described the process of suing a foreign sovereign:

Under our current system, after a foreign-state defendant raises the defense of sovereign immunity, it has an option: either the foreign state can litigate this legal defense entirely in court, or, as is more usually the case, it can make a formal diplomatic request to have the State Department decide the issue.

If it does the latter, and if the State Department believes that immunity is appropriate, the State Department asks the Department of Justice to file a “suggestion of immunity” with the court hearing the case.¹¹⁶

In 1943, the Supreme Court held that once a court received this “suggestion of immunity” from the State Department, the court must accept such “as a conclusive determination by the political arm of the Government that the continued [legal action] interferes with the proper conduct of our foreign relations.”¹¹⁷ After the State

¹¹⁴ See *Verlinden B.V.*, 461 U.S. at 487.

¹¹⁵ *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearings Before the Subcomm. on Admin. L. and Governmental Rels. of the H.R. Comm. on the Judiciary on H.R. 11315*, 94th Cong. 24–29 (1976) (statement of Monroe Leigh, Legal Adviser, Dep’t of State, accompanied by Michael Sandler, Legal Adviser’s Officer, Dep’t of State) [hereinafter *FSIA Hearings*].

¹¹⁶ *Id.* at 26.

¹¹⁷ *Ex parte Republic of Peru*, 318 U.S. 578, 589 (1943); see also *FSIA Hearings*, *supra* note 115, at 26 (“Under the Supreme Court’s decision in *Ex Parte Peru*, which was decided in 1943, U.S. courts to automatically defer to such suggestions of immunity from the executive branch.”).

Department adopted the restrictive immunity theory in the Tate Letter, it had to determine whether specific actions of a foreign sovereign brought in district courts were *jure imperii* or *jure gestionis*.

By the 1970s, the majority of countries had adopted the restrictive theory of immunity in full, where international sovereign immunity defenses were “decided exclusively by the courts and not by institutions concerned with foreign affairs.”¹¹⁸ This asymmetry between U.S. courts and foreign courts created a competitive disadvantage for the United States and for Americans engaged in commercial endeavors with foreign sovereigns.¹¹⁹ The United States would always be liable for suit under the restrictive theory in foreign courts, whereas foreign powers could have an “ordinary legal dispute . . . artificially raised to the level of a diplomatic problem through the [foreign] government’s intercession with the State Department.”¹²⁰ Similarly, there was market certainty in contracting with foreign governments for individuals living in countries with restrictive immunity, whereas U.S. citizens risked having a foreign sovereign violate a contract and escape liability by lobbying the State Department.¹²¹

4. *The FSIA*

On October 21, 1976, President Gerald Ford signed the FSIA into law.¹²² The FSIA officially codified the restrictive theory of sovereign immunity into U.S. law.¹²³ Congress passed the law “in order to free the Government from the case-by-case diplomatic pressures, to clarify the governing standards, and to ‘assur[e] litigants that . . . decisions are made on purely legal grounds and under procedures that insure due process[.]’”¹²⁴

Broadly, the FSIA extends a blanket immunity from the

¹¹⁸ *FSIA Hearings*, *supra* note 115, at 27.

¹¹⁹ *See id.*

¹²⁰ *Id.*

¹²¹ *See id.*

¹²² *See* 28 U.S.C. §§ 1330, 1332, 1391(f), 1441(d), 1602-1611; *see also Actions Overview: H.R. 11315 – 94th Congress (1975-1976)*, CONGRESS.GOV, <https://www.congress.gov/bill/94th-congress/house-bill/11315/actions> [<https://perma.cc/ZS25-QR7H>] (last visited Jan. 17, 2021).

¹²³ *See* 28 U.S.C. § 1605.

¹²⁴ *Verlinden B.V.*, 461 U.S. at 488 (quoting H.R. REP. NO. 94-1487, at 7 (1976)) (alteration and omission in original).

jurisdiction of federal and state courts.¹²⁵ But the statute lists a number of exceptions.¹²⁶ Pre-1949 bondholders can avail themselves of one of these exceptions, such as the “commercial activity exception” for actions based “upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States[.]”¹²⁷ Any claim which can be brought under FSIA § 1605 (the FSIA’s exceptions to sovereign immunity) can also be brought as a counterclaim.¹²⁸ If an exception applies, then “the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstances[.]”¹²⁹ While foreign sovereigns can be brought into either state or federal court,¹³⁰ foreign states have the right to remove any civil action to federal court.¹³¹

B. The Applicability of the FSIA Commercial Activity Exception to Pre-1949 Bonds

The commercial activity exception lists three acts which grant federal and state courts jurisdiction over a foreign sovereign: (1) an act that “is based upon a commercial activity carried on in the United States by the foreign state;” (2) “an act performed in the United States in connection with a commercial activity of the foreign state elsewhere;” and (3) “an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States[.]”¹³² For sovereign bonds, the commercial activity is the issuance of the bonds.¹³³ For holders of pre-1949 bonds, the act which causes injury is breach of the bond contract.¹³⁴ As will be

¹²⁵ See 28 U.S.C. § 1604.

¹²⁶ See *id.* § 1605.

¹²⁷ Two other clauses in § 1605(a)(2) seem less likely to apply: where “the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere. . . .” *Id.* § 1605(a)(2).

¹²⁸ See *id.* § 1607.

¹²⁹ *Id.* § 1606.

¹³⁰ See *id.* § 1604.

¹³¹ See 28 U.S.C. § 1441(d).

¹³² *Id.* § 1605(a)(2).

¹³³ See *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 615–16 (1992).

¹³⁴ See, e.g., *id.* at 620.

discussed further in this Part, the determination of which of the three exceptions apply to pre-1949 bondholders depends on where the bonds were issued and the nature of the breach of contract.¹³⁵ Each of the elements of this statutory requirement is considered below, as well as the question of whether the FSIA applies to claims arising before the Act was passed in 1976.

1. What is a “Foreign State”?

The PRC should be considered a “foreign state” for the purposes of the FSIA. However, the Act does not define the term “foreign state.”¹³⁶ The legislative history of the FSIA shows that Congress intended to “transfer the determination of sovereign immunity from the executive branch to the judicial branch[.]”¹³⁷ The “decisions on claims by foreign states to sovereign immunity are best made by the judiciary . . . incorporat[ing] standards recognized under international law.”¹³⁸ Thus, U.S. courts have the discretion to make the determination of whether a state is a “foreign state” for the purposes of the Act, as long as the decision tracks international law.¹³⁹

The *Restatement (Second) of Foreign Relations Law of the United States* defines a “state” as “an entity that has a defined territory and population under the control of a government and that engages in foreign relations.”¹⁴⁰ The Second Circuit, combining Supreme Court precedents and the *Restatement (Third) of Foreign Relations Law of the United States*, adopted the following

¹³⁵ See *infra* Section II.B.

¹³⁶ The Act states that “foreign state” “includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state” yet does not define “foreign state.” See 28 U.S.C. § 1603.

¹³⁷ H.R. REP. NO. 94-1487, at 7 (1976).

¹³⁸ *Id.* at 14.

¹³⁹ See RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 452 n.1 (A. L. I. 2018).

¹⁴⁰ RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 4 (A.L.I. 1965); see also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (A.L.I. 1987) (“[A] state is an entity that has a defined territory and a permanent population under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities.”); RESTATEMENT (FOURTH) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 452 cmt. a (A.L.I. 2018) (“[S]tates are generally understood as sovereign independent entities that have a permanent population, a defined territory, a government, and the capacity to enter into relations with other states.”).

definitions:

[S]overeign statehood [includes] the power to declare and wage war; to conclude peace; to maintain diplomatic ties with other sovereigns; to acquire territory by discovery and occupation; and to make international agreements and treaties. Under international law, a state is said to be an entity possessed of a defined territory and a permanent population, controlled by its own government, and engaged in or capable of engaging in relations with other such entities.¹⁴¹

Based on the above definitions, it seems evident that the PRC is a “state” for purposes of the FSIA. What if a state meets these requirements, but is not recognized as a state by the political branches of the government, as was the case with the PRC until 1970? The Restatement (Third) states that “an entity not recognized as a state, or a regime not recognized as the government of a state, is ordinarily denied access to courts in the United States[.]”¹⁴² However, this only prohibits an unrecognized state from being a plaintiff in U.S. courts, and even this prohibition can be lifted (without recognition of the state by the government) at the behest of the political branches.¹⁴³

Pre-Tate Letter, courts granted sovereign immunity to unrecognized states as defendants.¹⁴⁴ The Court of Appeals of New York held that, even though unrecognized as a state, the Russian Socialist Federative Soviet Republic was “an existing government sovereign within its own territories.”¹⁴⁵ The court reasoned that “[t]o cite a foreign potentate into a municipal court for any complaint against him in his public capacity is contrary to the law of nations and an insult which he is entitled to resent[.]”¹⁴⁶ and that “[s]uch is not the proper method of redress if a citizen of the United

¹⁴¹ *Morgan Guar. Tr. Co. of N.Y. v. Republic of Palau*, 924 F.2d 1237, 1243 (2d Cir. 1991) (citing *United States v. Curitts-Wright Exp. Corp.*, 299 U.S. 304, 318–19 (1936); RESTATEMENT (THIRD), THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (A.L.I. 1987).

¹⁴² RESTATEMENT (THIRD), THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 205(1) (A.L.I. 1987).

¹⁴³ *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 408–12 (1964); *Nat'l Petrochemical Co. v. M/T Stolt Sheaf*, 860 F.2d 551, 553–54 (2d Cir. 1988).

¹⁴⁴ *Wulfsohn v. Russ. Socialist Federated Soviet Republic*, 234 N.Y. 372, 374–76 (1923).

¹⁴⁵ *Id.* at 376.

¹⁴⁶ *Id.* (quoting *De Haber v. Queen of Portugal* (1851) 117 Eng. Rep. 1255).

States is wronged. The question is a political one, not confided to the courts, but to another department of government.”¹⁴⁷

It is unclear how a court would have dealt with an unrecognized state defendant after the Tate Letter or after the passage of the FSIA. It seems altogether easier for a court and the government to dismiss a case against an unrecognized state when the law of the land is absolute sovereign immunity; but when an unrecognized foreign sovereign is liable for commercial actions, it puts the court and the government in a trickier situation regarding service of process, execution of court orders, etc.

The United States has by statute granted certain unrecognized states the same legal rights and liabilities as a recognized sovereign: for instance, the Taiwan Relations Act allows Taiwan to sue and be sued in domestic courts.¹⁴⁸

2. *What is a “Commercial Activity”?*

China’s bond issuances constitute a “commercial activity.” “Commercial activity” is defined as “either a regular course of commercial conduct or a particular commercial transaction or act.”¹⁴⁹ “[C]ommercial activity carried on in the United States by a foreign state” is defined as “commercial activity carried on by such state and having substantial contact with the United States.”¹⁵⁰ An evaluating court determines whether an activity is commercial by “reference to the nature of the . . . act, rather than by reference to its purpose.”¹⁵¹

For the purposes of the FSIA, courts have consistently determined that sovereign bond issuances are a commercial activity.¹⁵² The Supreme Court examines whether an activity is “commercial” based on the “nature” of the activity.¹⁵³ Because private parties, as well as governments, issue bonds “to raise capital[,] finance purchases, [or] refinance debt[,]”¹⁵⁴ the activity is the “type of action[] by which a private party engages in ‘trade and

¹⁴⁷ *Id.*

¹⁴⁸ 22 U.S.C. §§ 3301–3316.

¹⁴⁹ 28 U.S.C. § 1603(d).

¹⁵⁰ *Id.* § 1603(e).

¹⁵¹ *Id.* § 1603(d).

¹⁵² *E.g., Weltover*, 504 U.S. at 615–17.

¹⁵³ *Id.* at 615.

¹⁵⁴ *Id.* at 616.

traffic or commerce[.]”¹⁵⁵ The Supreme Court has thus concluded that “issuance of [bonds is] a ‘commercial activity’ under the FSIA.”¹⁵⁶

3. *What is a “Direct Effect”?*

The “direct effect” requirement is the most nuanced and difficult challenge a plaintiff is likely to face.¹⁵⁷ The Act does not define the term “direct effect.”¹⁵⁸ If an action by a foreign state upon which a claim is brought happens outside the United States, the “commercial activity” exception to sovereign immunity will only apply where the act is “in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States[.]”¹⁵⁹

Similar to how “*United States v. Aluminum Co. of America (Alcoa)*”¹⁶⁰ extended the territorial jurisdiction principle to include effects within the United States, regardless of origin” by allowing American antitrust laws to reach foreign nationals when there were “‘substantial,’ ‘material,’ or ‘direct’ effects” on the United States,¹⁶¹ this “direct effect” clause of the FSIA commercial activity exception allows plaintiffs to sue foreign sovereigns in United States courts when “direct effects” from foreign actions is found.¹⁶² Unlike federal antitrust law, however, the commercial exception in the FSIA does not “contain[] any unexpressed requirement of ‘substantiality’ or ‘foreseeability.’”¹⁶³

In *Republic of Argentina v. Weltover, Inc.*,¹⁶⁴ Argentina had “unilateral[ly] rescheduled the] maturity dates” on bonds held by

¹⁵⁵ *Id.* at 614 (quoting BLACK’S LAW DICTIONARY (6th ed. 1990)).

¹⁵⁶ *Id.* at 617.

¹⁵⁷ “Fourteen years after the FSIA was enacted, the circuits remain divided on how to interpret the direct effects clause.” Hadwin A. Card III, *Interpreting the Direct Effects Clause of the FSIA’s Commercial Activity Exception*, 59 FORDHAM L. REV. 91, 91 (1990).

¹⁵⁸ See 28 U.S.C. § 1605(a)(2). The Act mentions that a foreign state “includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state[.]” but does not define “foreign state.” *Id.* § 1603.

¹⁵⁹ *Id.* § 1605(a)(2).

¹⁶⁰ 148 F.2d 416 (2d Cir. 1945).

¹⁶¹ Charles T. Plambeck, *Holding the Antitrust Line: Laker Airways v. Sabena, Belgian World Airlines*, 10 N.C. J. INT’L L. & COM. REG. 251, 256, 257 n.41 (1985).

¹⁶² See *id.*

¹⁶³ *Weltover*, 504 U.S. at 618; see also Plambeck, *supra* note 161, at 257 n.41.

¹⁶⁴ 504 U.S. 607 (1992).

the plaintiffs.¹⁶⁵ The plaintiffs were two Panamanian corporations and a Swiss bank who had “declined to accept the rescheduling and insisted on repayment in New York.”¹⁶⁶ The plaintiffs sued for breach of contract.¹⁶⁷ The Supreme Court “reject[ed] Argentina’s suggestion that the ‘direct effect’ requirement cannot be satisfied where the plaintiffs are all foreign corporations with no other connections to the United States[,]” and that because the plaintiffs “had designated their accounts in New York as the place of payment, and Argentina made some interest payments into those accounts before announcing that it was rescheduling the payments[,] the rescheduling of those obligations necessarily had a ‘direct effect’ in [the United States.]”¹⁶⁸ Quite simply, “[m]oney that was supposed to have been delivered to a New York bank for deposit was not forthcoming.”¹⁶⁹

*Hanil Bank v. PT. Bank Negara Indonesia (Persero)*¹⁷⁰ further emphasized that even where “the letter of credit did not itself specify New York as the place of payment . . . when [plaintiff] specified New York in its correspondence, [defendant] had already impliedly agreed to New York as place of payment.”¹⁷¹ The Second Circuit summarized the direct effect requirement regarding breaches of contract: “[e]very circuit court of which we are aware that has addressed this issue has held . . . that an anticipatory contractual breach occurs ‘in the United States’ for [the FSIA] purposes if performance could have been required in the United States and then was requested there.”¹⁷²

An illustrative case, *Morris v. People’s Republic of China*, concerning, incidentally, pre-1949 Chinese bonds was dismissed because of the lack of “direct effects” in the United States.¹⁷³ The

¹⁶⁵ *Id.* at 618.

¹⁶⁶ *Id.* at 607.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 619.

¹⁶⁹ *Weltover*, 504 U.S. at 619.

¹⁷⁰ 148 F.3d 127 (2d Cir. 1998).

¹⁷¹ *Id.* at 132.

¹⁷² *Virtual Countries, Inc. v. Republic of South Africa*, 300 F.3d 230, 239 (2d Cir. 2002).

¹⁷³ *See Morris v. People’s Republic of China*, 478 F.Supp. 2d 561 (S.D.N.Y. 2007) (holding that the criterion of direct effects was unmet both for the Foreign Sovereign Immunities Act and for commercial activity in the United States); *see also Jackson*, 794 F.2d 1490 (dismissing on the grounds that the FSIA was not retroactive); *Altmann*, 541

plaintiffs were individuals “seeking to recover on defaulted bonds issued by the PRC’s predecessor government in 1913.”¹⁷⁴ The PRC moved to dismiss, in part on the grounds that the PRC had sovereign immunity because the commercial activity exception did not apply in this case.¹⁷⁵ The plaintiff argued the third prong of the commercial activity exception applied: where a foreign sovereign commits an act abroad, in connection with commercial activity abroad, that has a direct effect in the United States.¹⁷⁶

The court determined that the commercial activity exception did not apply, and, thus, the PRC had sovereign immunity, because the plaintiff “has not made a showing of a ‘direct effect’ as required by the statute.”¹⁷⁷ First, the court noted that the plaintiff “purchased his bonds over sixty years after the PRC’s predecessor government defaulted in 1939 and forty years after the bonds matured[,]” consequently lacking the “immediacy required[.]”¹⁷⁸ The court determined that the “act of purchasing the bonds many decades after default [...] is an intervening act breaking the causal relationship.”¹⁷⁹ The plaintiff was not harmed because “the legally significant acts . . . [were] felt in 1939 and 1960, not in 2000 when the plaintiff purchased and [sic] the defaulted bonds in a ‘collectibles’ market.”¹⁸⁰

However, the court stated that “[n]othing in the commercial activity exception expressly limits cognizable effects to those felt solely by plaintiff. Thus, plaintiff could arguably rely on the effect felt by the former holders of his bonds.”¹⁸¹ If the plaintiff could have proven that at one point the default had a direct effect in the United States through the previous holders, then the court could find a direct effect; unfortunately, the plaintiff never put forward any evidence to this effect.¹⁸²

U.S. 677 (holding that the FSIA is retroactive).

¹⁷⁴ *Morris*, 478 F. Supp. 2d at 563.

¹⁷⁵ *Id.* at 565–66.

¹⁷⁶ *Id.* at 563; 28 U.S.C. § 1605(a)(2).

¹⁷⁷ *Morris*, 478 F. Supp. 2d at 568.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Id.* at 568–69.

¹⁸¹ *Id.* at 569.

¹⁸² *Id.* at 569 n.12 (citing *Commercial Bank of Kuwait v. Rafidain Bank*, 15 F.3d 238 (2d Cir. 1994) (holding that failure to remit funds to third-party banks in New York had a

Factors which the court would have considered to have implicated a direct effect include: (1) “prior ownership of plaintiff’s bonds by U.S. citizens or corporations at the time of any default”; (2) whether “issuing banks were located in the United States”; (3) whether “[t]he bonds were [] issued or payable in U.S. currency”; (4) whether the PRC had a “designated agent to administer the bonds in the United States”; (5) whether “negotiations concerning the bond issuance or payment occurred within the United States”; and (6) “importantly, [where] the contractually designated locations where payments of principal and interest were to be paid[.]”¹⁸³

Because (1) plaintiff never showed evidence of prior ownership of the bond; (2) plaintiff’s bonds were not issued to American banks and there were no designated locations or negotiations in the United States; and (3) the bonds were not in U.S. dollars, the court found that plaintiff did not suffer a direct effect in the United States.¹⁸⁴

4. Retroactivity

China should not be able to assert absolute immunity under the pre-FSIA sovereign immunity doctrine, because the FSIA effectively is retroactive. In 2004, the Supreme Court heard *Republic of Austria v. Altmann*.¹⁸⁵ The plaintiff had discovered that “her uncle’s valuable art works had either been seized by the Nazis or expropriated by Austria after World War II,” and she filed suit to recover said art.¹⁸⁶ Plaintiff sued under the FSIA, and Austria moved to dismiss on the grounds that when the art was taken, the United States still followed the theory of absolute immunity, and “nothing in the FSIA retroactively divests [Austria] of that immunity.”¹⁸⁷

The Supreme Court disagreed.¹⁸⁸ The Court found that Congress intended for the FSIA to create conformity in regard to

direct effect in the United States)); *see also* *Weltover, Inc. v. Republic of Argentina*, 941 F.2d 145, 152 (2d Cir. 1991) (“Because defendants’ breach of the [bond] agreement deprived plaintiffs of their contractual rights to receive payment . . . , defendants’ acts caused a direct effect to plaintiffs.”).

¹⁸³ *Morris*, 478 F. Supp. 2d at 570–71.

¹⁸⁴ *Id.* at 571.

¹⁸⁵ 541 U.S. 677 (2004) (holding that the FSIA is retroactive).

¹⁸⁶ *Id.* at 677.

¹⁸⁷ *Id.*

¹⁸⁸ *See id.*

how courts decided assertions of immunity, quoting the Act: “[c]laims of foreign states to immunity should *henceforth* be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.”¹⁸⁹ The Court interpreted this provision to mean that any assertion of immunity from the date the FSIA was enacted would be examined under the FSIA principles, regardless of when the original claim arose.¹⁹⁰

Responding to fears that allowing retroactivity would “open[] foreign nations worldwide to vast and potential liability for expropriation claims in regards to conduct that occurred generations ago[,]”¹⁹¹ Justice Breyer wrote in his concurrence that “statutes of limitations, personal jurisdiction and venue requirements, and the doctrine of *forum non conveniens* will limit the number of suits brought in American courts.”¹⁹²

IV. Defenses of the PRC

If a U.S. court grants jurisdiction, the PRC will assert three defenses, discussed in turn below.

A. Successor Government

Though it was not argued in *Morris*, in prior cases against the PRC, China has argued that the People’s Republic is not the successor to the Imperial Qing or Nationalist governments.¹⁹³ It is unlikely this argument would succeed. Customary international law provides for two types of succession: (1) succession of states and (2) succession of governments.¹⁹⁴ The *Restatement (Third) of Foreign Relations Law of the United States* provides that a succession of state “may create a discontinuity in statehood [whereas] a succession of government [] leaves statehood unaffected.”¹⁹⁵ The Restatement maintains that “[w]hen a state

¹⁸⁹ *Id.* at 697 (quoting 28 U.S.C. § 1602) (emphasis added in original).

¹⁹⁰ *Id.* at 697–99.

¹⁹¹ *Altmann*, 541 U.S. at 730 (2004) (Kennedy, J., dissenting).

¹⁹² *Id.* at 713 (Breyer, J., concurring).

¹⁹³ *See, e.g.*, *Jackson v. People’s Republic of China*, 550 F. Supp. 869, 872 (N.D. Ala. 1982).

¹⁹⁴ RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 208 n.2 (A.L.I. 1987).

¹⁹⁵ *Id.*

succeeds another state with respect to particular territory, the capacities, rights, and duties of the predecessor state with respect to that territory terminate and are assumed by the successor state[.]”¹⁹⁶ The “capacities, rights, and duties [of a state] are not affected by a mere change in the regime or in the form of government or its ideology.”¹⁹⁷

U.S. courts have adopted the Restatement view.¹⁹⁸ As early as 1870, the Supreme Court held that “on . . . deposition [of the former government] the sovereignty [of the state] does not change, but merely the person or persons in whom it resides.”¹⁹⁹ U.S. courts have determined that the Soviet government in Russia was the successor government to the Tsarist government.²⁰⁰ *United States v. National City Bank*²⁰¹ involved claims brought by the United States (from claims assigned to it by the Soviet government) against the National City Bank.²⁰² The United States was attempting to claim deposits at the National City Bank of \$2.26 million originally deposited by a Russian bank which had been nationalized by the Soviet government (the Soviet claim against the bank’s deposits being assigned to the United States).²⁰³ The National City Bank sought to offset this claim by arguing they were owed \$4.43 million for defaulted bonds they held, which had been issued by the Tsarist Government.²⁰⁴ The Court determined that the Soviet government did inherit the obligation to pay the Tsarist bonds, elegantly arguing “the State of Russia was the obligor on the Notes before the revolution and the State of Russia continued as the obligor after the revolution. The regime in power changed. The state, as a continuing personality, persisted.”²⁰⁵

¹⁹⁶ *Id.* § 208.

¹⁹⁷ *Id.* § 208 cmt. a.

¹⁹⁸ *See, e.g.,* *Trans-Orient Marine Corp. v. Star Trading & Marine, Inc.*, 731 F. Supp. 619, 623 (S.D.N.Y. 1990) (“The law is clear that the obligations of a state are unaffected by a mere change in government.”).

¹⁹⁹ *The Sapphire*, 78 U.S. 164, 168 (1870) (allowing the Court to hear a case that was brought by Emperor Napoleon against Americans regarding a French vessel to continue even after Napoleon was deposed).

²⁰⁰ *E.g.,* *United States v. Nat’l City Bank*, 90 F. Supp. 448, 452 (S.D.N.Y. 1950).

²⁰¹ *See generally id.*

²⁰² *Id.* at 452.

²⁰³ *Id.* at 451.

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 452 (citing *The Sapphire*, 78 U.S. 164; *Guaranty Trust Co. v. U.S.*, 304 U.S.

This principle was similarly applied regarding Sudan²⁰⁶ and the PRC in *Jackson v. People's Republic of China*.²⁰⁷ In *Jackson*, the court held that “[t]he People’s Republic of China is the successor government to the Imperial Chinese Government and, therefore, the successor to its obligations.”²⁰⁸ The PRC, in emerging victorious in the Chinese Civil War, gained hegemony over the territory of the former Republic of China, itself succeeding to the territory of Imperial Qing.²⁰⁹ Under international law, the PRC assumed the rights and responsibilities of the Republic of China.²¹⁰ Change of government through violent overthrow is still merely a change of government in the eyes of international law.²¹¹ And as discussed *supra*, the determinations of a “foreign state” for the FSIA purposes are to be examined through the lens of international law principles.²¹²

The United States at one time did not recognize the PRC as the legitimate sovereign, but this lack of recognition does not provide a

126 (1938)).

²⁰⁶ *Trans-Orient Marine Corp. v. Star Trading & Marine, Inc.*, 731 F. Supp. 619, 621 (S.D.N.Y. 1990). The plaintiff was a transportation agent shipping agricultural products from the United States to Sudan as part of a U.S. government program that allowed developed nations to purchase agricultural goods with low interest rates and long repayment periods. The plaintiff had been granted an exclusive license to operate as Sudan’s agent for the purposes of this program. *Id.* at 620 n.2. The agreement between the plaintiff and the Sudanese government was signed in October 1983 and granted the exclusive license from October 1984 through September 1989. In January 1985, the Sudanese government broke the agreement by granting the exclusive license to a different shipping company. In April 1985, a military coup deposed the Sudanese government and created a new regime. In June 1989, there was *another* military coup, installing a different military regime. The plaintiff brought suit against the post-June 1989 military government, arguing they breached the 1983 agreement. The military regime argued it was neither responsible for the contractual obligations of the prior government, nor was it responsible for the contractual obligations of the government before that one. *Id.* at 620. The court held the new military regime liable for the contractual obligations of the pre-April 1985 government, noting that “the obligations of a state are unaffected by a mere change in government.” *Id.* at 623.

²⁰⁷ *Jackson*, 550 F. Supp. at 872.

²⁰⁸ *Id.*

²⁰⁹ *See supra* Section II.A.1

²¹⁰ *See Jackson*, 550 F. Supp. at 872.

²¹¹ *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 208 cmt. a (A.L.I. 1987); *Jackson*, 550 F. Supp. at 872; *Lehigh Valley R. Co. v. State of Russia*, 21 F.2d 396, 401 (2d Cir. 1927).

²¹² *See supra* Section III.B.1.

defense for the PRC. For example, in *Lehigh Valley Railroad Co. v. Russia*,²¹³ the plaintiff was the U.S. government on behalf of the ‘State of Russia’, pursuing the Valley Railroad Company for “loss of explosives and ammunition [in Lehigh Valley’s possession] while in transit from the United States to Russia[.]”²¹⁴ The Tsarist government initiated the suit against Lehigh Valley, but upon the overthrow of the Tsarist government, the provisional government-in-exile was allowed to continue the suit.²¹⁵ The Second Circuit determined that a nation consisted of two entities: (1) the state, which “is a community or assemblage of men,” and (2) “the government[, which is] the political agen[t] through which it acts in international relations.”²¹⁶ The “state is perpetual, and survives the form of its government. The recognized government may carry on the suit, at least until the new government becomes accredited [by the political branches].”²¹⁷ As the Eleventh Circuit noted during the *Jackson* appeal, the United States has recognized the PRC as the “political agent” of the ‘State of China’ since the 1970s.²¹⁸ Accordingly, the law on successor governments would result in the PRC inheriting the claims and obligations of the previous government.²¹⁹ Upon recognition of the PRC by the United States, a court would find that an obligation against the ‘State of China’ is properly served against the PRC.²²⁰

B. *Odious Debt*

Another defense China has previously argued is that any debt incurred by a predecessor government is “odious debt.”²²¹ The doctrine of odious debt is primarily an academic one as very few courts have discussed the concept and none of them have reached decisive holdings.²²² One author defines an odious debt as one that

²¹³ See generally *Lehigh Valley R. Co.*, 21 F.2d 396.

²¹⁴ *Id.* at 399.

²¹⁵ *Id.* at 400.

²¹⁶ *Id.* (citing *State of Texas v. White*, 74 U.S. 700, 720 (1868); *Cherokee Nation v. Georgia*, 30 U.S. 1, 22–28 (1831)).

²¹⁷ *Id.* at 401.

²¹⁸ See *Jackson*, 794 F.2d at 1491.

²¹⁹ See *Lehigh Valley*, 21 F.2d at 399; *Nat’l City Bank*, 90 F. Supp. at 452.

²²⁰ See *id.*

²²¹ See *Jackson*, 794 F.2d at 1495; *Morris*, 478 F. Supp. 2d at 565 n.6.

²²² Jeff A. King, *Odious Debt: The Terms of the Debate*, 32 N.C. J. INT’L L. & COM. REG. 605, 644–48 (2007) (defining the doctrine of “odious debt,” discussing the authorities

is made: (1) in the “absence of the population’s consent, (2) absence of benefit to the population, and (3) [with] the creditor’s awareness of these facts.”²²³

In 1956, the Supreme Court of the Netherlands denied the claim of a “Dutch national employed in the Netherlands Indies administration” who “claimed lost salary relating to a period of internment” suffered under Japanese occupation during World War II.²²⁴ The Dutch national argued that the Netherlands was still responsible for the salary, even though the obligation for that kind of debt was transferred to Indonesia under treaty.²²⁵ He believed that because Indonesia would consider the debt odious and repudiate it, the Netherlands was responsible for his pay.²²⁶ The Dutch court rejected the doctrine of odious debt, finding that “it had no application to that case.”²²⁷

In a series of arbitrations between the United States and the Islamic Republic of Iran, the Iran-United States Claims Tribunal, in response to an Iranian argument that a 1948 contract for materiel from the United States was odious debt, also did not assert the existence of the doctrine.²²⁸ The Tribunal did state that “if such a doctrine did exist, it did so only in cases of state and not government succession.”²²⁹

In the two cases brought in the United States regarding pre-1949 Chinese debt, the PRC argued in the alternative that it was not liable for odious debts incurred by its predecessors.²³⁰ But neither court addressed the issue: one was dismissed on jurisdictional grounds and the other on procedural grounds.²³¹

in international law, and identifying key issues in advocating for or critiquing the doctrine).

²²³ *Id.* at 630.

²²⁴ *Id.* at 645.

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.* at 645.

²²⁸ King, *supra* note 222, at 645–46 (citing *United States v. Islamic Republic of Iran*, 32 Iran-US Cl. Trib. Rep. 162 (1996) (Chamber Two Award No. 574-B36-2 of 3 Dec. 1996)).

²²⁹ *Id.* at 646.

²³⁰ *Jackson*, 794 F.2d at 1495; *Morris*, 478 F. Supp. 2d at 565 n.6.

²³¹ *Jackson*, 794 F.2d at 1495 (finding no jurisdiction under the Foreign Sovereign Immunities Act because the Act did not apply retroactively – the Supreme Court would find the Act to apply retroactively in 2004); *Morris*, 478 F. Supp. 2d at 573 (finding that the statute of limitations had expired).

With the doctrine of odious debt unsettled in international and United State law, it is unlikely a U.S. court would recognize the doctrine against American interest.²³² And even if the U.S. court did acknowledge the doctrine, it would likely argue, as the Iran-United States Tribunal did, that it would not apply to debt incurred by the Republic of China or the Imperial Qing government, because the People's Republic is only a successor government, not a successor state.

C. *Statute of Limitations*

The third defense the PRC has asserted in the past is that the statute of limitations bars recovery. But it is important to note that, under federal law, a debt does not expire once the statute of limitations has run its course.²³³ Only Mississippi and Wisconsin “have statutes that extinguish the debt upon the running of the statute of limitations.”²³⁴ The American Bar Association notes that under federal law, debt is “an obligation to pay money[, but that definition does not] include[] the qualifier that the debt is still enforceable in court.”²³⁵

For a court sitting in New York, the court “will apply New York’s ‘borrowing statute,’ to determine what statute of limitations to apply.”²³⁶ Most bonds cases will likely be heard in a federal or state court in New York as New York City’s preeminence as a financial mecca induces governments to issue their bonds in the state.²³⁷ “The New York statute of limitations for bringing ‘an

²³² See Louis A. Perez Jr. & Deborah M. Weissman, *Public Power and Private Purpose: Odious Debt and the Political Economy of Hegemony*, 32 N.C. J. INT'L L. & COM. REG. 699, 712 (2007) (recounting the rejection of the odious debt doctrine by an arbitration overseen by the United States government regarding debt incurred by the former dictator of the Dominican Republic owed to an American company).

²³³ Thomas R. Dominczyk, *Collecting Time-Barred Debt: Is It Worth the Risk?*, A.B.A. (Apr. 22, 2014), https://www.americanbar.org/groups/business_law/publications/blt/2014/04/04_dominczyk/ [<https://perma.cc/UT2D-TXVA>]; see 15 U.S.C. § 1692a(6) (defining consumer debt without inclusion of a qualifier that the debt is still enforceable in court).

²³⁴ Dominczyk, *supra* note 233 (citing Miss. Code Ann. § 15-1-3 (2018); Wis. Stat. Ann. § 893.05 (2020)).

²³⁵ *Id.* (citing 15 U.S.C. § 1692a(6)).

²³⁶ *Morris*, 478 F. Supp. 2d at 571 (citing N.Y. C.P.L.R. § 202 (McKinney 2019)) (internal citation omitted).

²³⁷ See Susan Black & Anella Munro, *Why Issue Bonds Offshore?*, 52 BANK INT'L SETTLEMENTS PAPERS 97, 119 (2010).

action upon a contractual obligation or liability' is six years."²³⁸ However, if the bond is "sold by the issuer after publication of an advertisement for bids for the issue in a newspaper of general circulation and secured only by a pledge of the faith and credit of the issuer," then the statute of limitations is 20 years.²³⁹ Two inquiries are then undertaken to determine when the statute of limitations begins to run: (1) what is the injury and when does the injury take place; and (2) can the statute of limitations be tolled?

1. *Injury of Nonpayment of Principal and Interest*

Regarding the statute of limitations for a bond, "when a contract provides for the payment of money in installments, such as interest installments, the statute of limitations runs on each installment from the date it becomes due[.]"²⁴⁰ For example, the '4½% Gold Loan of 1898' has a 45-year maturity.²⁴¹ Issued on March 2, 1898, payments were redeemable semi-annually on March 1 or September 1 until the year 1943.²⁴² For the payment maturing on March 1, 1920, the statute of limitations began running on March 1, 1920, and expired March 1, 1926.²⁴³ Consequently, the New York statute of limitations expired for default on the last payment sometime in 1949.²⁴⁴ Courts have, however, allowed the statute of limitations to "toll" if a superior power prevents the injured party from seeking redress.²⁴⁵

2. *Tolling from Lack of Forum due to a "Superior Power"*

A court may toll the statute of limitations if a "superior power" intervened.²⁴⁶ In the aftermath of the American Civil War, the Supreme Court was tasked to determine how the war affected legal rights of citizens in both the Union and the former Confederate

²³⁸ *Morris*, 478 F. Supp. 2d at 571 (citing N.Y. C.P.L.R. 213(2) (McKinney 2019)).

²³⁹ N.Y. C.P.L.R. 211(a) (McKinney 2019).

²⁴⁰ *Vigilant Ins. Co. of Am. v. Housing Auth. of City of El Paso, Tex.*, 660 N.E.2d 1121, 1124–26 (N.Y. 1995).

²⁴¹ Bond. No. 1898/3, art. 3, TREATIES 1, *supra* note 22, at 108.

²⁴² 4½% Gold Loan of 1898, *supra* note 37.

²⁴³ *See id.*; N.Y. C.P.L.R. 213(2) (McKinney 2019).

²⁴⁴ *See id.*

²⁴⁵ *See infra* Section III.C.2.

²⁴⁶ *See generally* *Hanger v. Abbott*, 73 U.S. 532 (1867).

states. In one case, *Hanger v. Abbott*,²⁴⁷ there was a question of whether the three-year statute of limitations in Arkansas for breach of contract continued to run during the Civil War.²⁴⁸ The plaintiff-creditor was a resident of New Hampshire and the defendant-debtor a resident of Arkansas.²⁴⁹ The cause of action first accrued on October 25, 1859, but “all the lawful courts of the State where the defendant resided were closed by reason of the insurrection and rebellion[.]” from May 6, 1861 through January 1, 1865.²⁵⁰ The Court reasoned the “[a]bility to sue was the status of the creditor when the contract was made, but the effect of war is to suspend the right, not only without any fault on his part, but under circumstances which make it his duty to abstain from any such attempt.”²⁵¹ Consequently,

it is the loss of the ability to sue that stops the running of the statute. The inability may arise from a suspension of right, or from the closing of the courts, but whatever the original cause, the proximate and operative reason is that the claimant is deprived of the power to institute his suit.²⁵²

As the Court clarified in *Braun v. Sauerwein*, where “the creditor has been disabled to sue, by a *superior power*, without any default of his own . . . the running of a statute of limitation may be suspended[.]”²⁵³ It is unclear, however, if tolling is only permissible where the plaintiff first had the right to sue, then lost it, or if tolling is also allowed where there was not an adequate tribunal to hear the case even at the time the contract was made; for instance, if the contract was formed during the era of absolute sovereign immunity. For the purpose of the below discussion, the author will assume that tolling is permissible where there was not an ability to sue at the time the contract was made.

²⁴⁷ *See id.*

²⁴⁸ *Id.* at 533.

²⁴⁹ *Id.*

²⁵⁰ *Id.* at 534.

²⁵¹ *Id.* at 540.

²⁵² *United States v. Wiley*, 78 U.S. 508, 513 (1870); *see also* *Compania Maritima v. United States*, 145 F. Supp. 935, 936 (Ct. Cl. 1956). *See generally* *Braun v. Sauerwein*, 77 U.S. 218 (1869).

²⁵³ *Braun*, 77 U.S. at 222–23 (emphasis added).

a. Absolute Sovereign Immunity

For any injury caused by a sovereign state that occurred prior to 1952, a plaintiff has a strong argument that the statute of limitations should be tolled up to May 19, 1952, the date that the federal government adopted the theory of restrictive immunity.²⁵⁴ If, for example, a plaintiff held a 45-year 1898 Chinese Imperial bond, payable in New York, a plaintiff's claim for defaulted annual interest coupons at the time of the injury (anywhere between 1899 and 1943) could not be heard in the United States before 1952 because the Chinese government could raise the defense of sovereign immunity and the U.S. court would dismiss on the theory of absolute sovereign immunity.²⁵⁵ Because there was no forum for the plaintiff to be heard, the statute of limitations on the plaintiff's claims would be delayed until an adequate forum is found.²⁵⁶

b. Tate Letter

With the release of the Tate Letter, this same plaintiff gained the ability to sue the Chinese government.²⁵⁷ Consequently, the plaintiff's claims expired in 1958, six years after the Tate Letter.²⁵⁸ As noted during the FSIA Congressional hearings, however, the Tate Letter, while generally adopting the restrictive immunity theory, in practice, required courts to receive written notice from the executive branch detailing whether or not a nation should receive immunity in a particular case.²⁵⁹ However, after the Tate Letter, there were nominally two Chinese governments: the Nationalist Government in Taipei and the Communist Government in Beijing, muddies the water.²⁶⁰ And “[d]uring 1983 the foreign minister of China presented the Secretary of State with an *Aide Memoire* stating that the PRC recognized no obligation to pay external debts incurred by earlier Chinese governments[.]”²⁶¹

As discussed above, the State Department has allowed suit of

²⁵⁴ Tate Letter, *supra* note 103.

²⁵⁵ See *Schooner Exchange*, 11 U.S. at 146–47.

²⁵⁶ See *Wiley*, 78 U.S. at 513.

²⁵⁷ See Tate Letter, *supra* note 103.

²⁵⁸ See N.Y. C.L.P.R. 211(a), 213(2) (McKinney 2019).

²⁵⁹ See *FSIA Hearings*, *supra* note 115.

²⁶⁰ See *Republic of China v. American Express Co.*, 195 F.2d 230, 235 (2d Cir. 1952) (“[The PRC claimants are] representatives of an unrecognized foreign government[.]”).

²⁶¹ *Jackson*, 794 F.2d at 1495.

unrecognized states such as Iran and Cuba, but there has never been a situation where the Government allowed suit of an unrecognized de facto government when it also recognized an official government which did control territory, but did not have de facto control over the majority of the country.²⁶² It is thus unclear whether a bondholder did in fact have the ability to sue the PRC, or if either the lack of recognition of the PRC or the arbitrary nature of lawsuits against sovereigns pre-FSIA would constitute a “superior power.”

c. The FSIA

If the same plaintiff can successfully make the argument that because neither the U.S. Congress nor the State Department recognized the PRC, the plaintiff could not have brought suit against the PRC until the passage of the FSIA in 1976, then the statute of limitations would be tolled to 1976.²⁶³ For the plaintiff, the vagaries of State Department sovereign immunity determinations have given way to objective analyses by the judiciary.²⁶⁴ Unlike the pre-FSIA scenario, it is more likely than not that a court would allow a suit against the PRC once the FSIA was enacted. As discussed above, the definition of a “foreign state” in the Act is based on international law, rather than political branch diplomacy.²⁶⁵ In addition, the unrecognized PRC meets the criteria to qualify as a foreign state, for purposes of the FSIA, laid out by the Second Circuit in *Morgan Guaranty*: the PRC has the power (1) to declare and wage war; (2) to conclude peace; (3) to maintain diplomatic ties with other sovereigns; (4) to acquire territory by discovery and occupation; (5) to make international agreements and treaties.²⁶⁶ Further, the PRC possesses (6) a defined territory and (7) a permanent population (8) controlled by its own government.²⁶⁷ Consequently, the plaintiff’s statute of limitations would run from 1976 and expire in 1981.²⁶⁸

An attempt to litigate pre-1949 bond claims using the tolling

²⁶² See *Sabbatino*, 376 U.S. at 408–12; *National Petrochemical*, 860 F.2d at 553–54 (2d Cir. 1988), *cert. denied*, 489 U.S. 1081 (1989).

²⁶³ *Wiley*, 78 U.S. at 513; FSIA, 28 U.S.C. §§ 1602–1611, 1330, 1391(f), 1332, 1441(d).

²⁶⁴ H.R. REP. NO. 94-1487, at 8 (1976).

²⁶⁵ *Id.* at 14; see also *supra* Part II.

²⁶⁶ *Morgan Guar. Trust*, 924 F.2d at 1243.

²⁶⁷ *Id.*

²⁶⁸ N.Y. C.L.P.R. 211(a), 213(2) (McKinney 2019).

argument was tried in the *Morris* case discussed *supra*.²⁶⁹ The bondholder's tolling argument was unsuccessful in that the court dismissed the complaint as untimely.²⁷⁰ The court determined that the statute of limitations period, "[a]bsent tolling, . . . would be time-barred six years after payment on each interest coupon could be demanded."²⁷¹ To survive dismissal, the plaintiff had to "show that the statute of limitations was continuously tolled from at least 1966 until no more than six years before the present action."²⁷²

The *Morris* plaintiff argued that there were several "'superior powers' that precluded suit on the bonds."²⁷³ These included that (1) "both World War II and the Communist Revolution in China prevented courts from hearing this claim"; (2) "the American government's prior policy of granting sovereigns absolute immunity" prevented suit; (3) the "suit could not be bought [sic] in a federal court while the PRC was a non-recognized government"; (4) "there was no way to effect service until China became a party to the Hague Service Convention in 1991"; and (5) the "FSIA was not retroactive when it was passed and did not become retroactive until the Supreme Court so found in" *Altmann*.²⁷⁴

The court disagreed, concluding that "foreign governments could be subject to suit since the issuance of the Tate letter in 1952[.]"²⁷⁵ and that "the FSIA was in fact retroactive from the moment it became law and allowed suit on this claim no later than 1976."²⁷⁶ The court finished its analysis by stating that even "[i]f plaintiff is correct that no court could entertain his claim against the PRC until it was recognized by the United States, then he is still only entitled to tolling into the 1980s."²⁷⁷

²⁶⁹ See *supra* Section III.B.3.

²⁷⁰ *Morris*, 478 F.Supp. 2d at 573.

²⁷¹ *Id.* at 571–72.

²⁷² *Id.* at 572.

²⁷³ *Id.*

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ The court failed to consider that other courts would turn away plaintiffs for retroactive claims prior to the *Altmann* decision. Ironically, a federal district court in Alabama did just this in 1986, dismissing a claim by an American holder of a 1911 Imperial Chinese bond against the PRC because the FSIA "did not apply retroactively." *Morris*, 478 F.Supp. 2d at 572 (quoting *Jackson*, 794 F.2d at 1491).

²⁷⁷ *Id.* at 573.

3. *Pari Passu Obligations*

Were a U.S. court to agree with the District Court in *Morris*, the same hypothetical plaintiff is left holding a pretty-looking antique if they failed to sue by 1981. The above analysis, however, was predicated on the plaintiff claiming an injury of default on the coupons and principal payments. A recent case in the Second Circuit, *NML Capital, Ltd. v. Republic of Argentina*,²⁷⁸ has presented the possibility that another type of injury could allow plaintiffs to pursue claims on these old bonds.

Sovereign bonds commonly contain a *pari passu* clause: *pari passu* is Latin for “by equal step,” and is defined as “[p]roportionally; at an equal pace; without preference[.]”²⁷⁹ Generally, the clause acts to ensure that creditors within the same or similar class of debt are treated equally because “[w]hen sovereigns default[,] they do not enter bankruptcy proceedings where the legal rank of debt determines the order in which creditors will be paid[,] the [*pari passu* clause] prevents [a sovereign] as payor from discriminating against [one set of bonds] in favor of [another].”²⁸⁰

a. *NML Capital v. Argentina*

In 2012, the Second Circuit heard *NML Capital, Ltd. v. Republic of Argentina*.²⁸¹ In 1994, Argentina issued bonds in New York, governed under a Fiscal Agency Agreement (“FAA”).²⁸² The FAA contained a *pari passu* clause, which read:

The Securities will constitute . . . direct, unconditional, unsecured and unsubordinated obligations of the Republic and shall at all times rank *pari passu* without any preference among themselves. The payment obligations of the Republic under the Securities shall at all times rank at least equally with all its other present and future unsecured and unsubordinated External Indebtedness[.]²⁸³

²⁷⁸ *NML Capital, Ltd. v. Republic of Argentina*, 699 F.3d 246 (2d Cir. 2012), *cert. denied*, 571 U.S. 941 (2013).

²⁷⁹ *Pari passu*, BLACK’S LAW DICTIONARY (11th ed. 2019).

²⁸⁰ *NML Capital*, 699 F.3d at 259.

²⁸¹ *Id.* at 246.

²⁸² *Id.* at 251.

²⁸³ *Id.* (“‘External Indebtedness’ is limited to obligations payable in non-Argentine currency.”).

The plaintiffs held bonds issued under this FAA prior to 2001.²⁸⁴

In 2001, Argentina defaulted on these bonds, instead offering new bonds in exchange in 2005 and 2010.²⁸⁵ The Argentine government refused to pay any interest or principal on the older bonds.²⁸⁶ The plaintiffs sued, arguing that “Argentina’s conduct violated the [*pari passu* clause] by both subordinating their [older] Bonds to the Exchange Bonds and lowering the ranking of their [older] Bonds below the Exchange Bonds.”²⁸⁷

The Exchange Bonds included in their prospectus a disclaimer that any of the older bonds that were not exchanged would “remain in default indefinitely” because “[t]he Government has announced that it has no intention of resuming payment on any bonds eligible to participate in [the] exchange offer[.]”²⁸⁸ The Argentinean legislature also passed a law that forbade the Government from making any “in-court, out-of-court or private settlement with respect to” the unexchanged bonds (called the “Lock Law”).²⁸⁹ The plaintiffs had refused to exchange their old bonds at either the 2005 or 2010 exchange offerings.²⁹⁰

The Second Circuit interpreted the FAA agreement to provide bondholders with “protect[ion] against [two] different forms of discrimination: the issuance of other superior debt and the giving of priority to other payment obligations.”²⁹¹ The court found multiple ways in which the Argentine government had subordinated the plaintiffs’ bonds in favor of the Exchange Bonds: (1) “Argentina made no payments for six years on plaintiffs’ bonds while simultaneously timely servicing the Exchange Bonds”; (2) “Argentina . . . renewed [a] moratorium in its budget laws each

²⁸⁴ *See id.*

²⁸⁵ *Id.*

²⁸⁶ *NML Capital*, 699 F.3d at 251.

²⁸⁷ *Id.* at 251–52.

²⁸⁸ *Id.* at 252.

²⁸⁹ *Id.*

²⁹⁰ *Id.* at 253.

²⁹¹ *Id.* at 259 (“The first sentence (‘[t]he Securities will constitute . . . direct, unconditional, unsecured, and unsubordinated obligations . . .’) prohibits Argentina, as bond *issuer*, from formally subordinating the bonds by issuing superior debt. The second sentence (‘[t]he payment obligations . . . shall at all times rank at least equally with all its other present and future unsecured and unsubordinated External Indebtedness.’) prohibits Argentina, as bond *payor*, from paying on other bonds without paying on the FAA bonds.”).

year since” 2001 forbidding payment on plaintiffs’ bonds; (3) prospectuses for new Argentine bonds declared that Argentina “has no intention of resuming payments on” plaintiffs’ bonds; (4) Argentina “stated in SEC filings that it had ‘classified the [plaintiffs’ bonds] as a separate category from its regular debt’ and is ‘not in a legal position to pay’ them”; and (5) the Argentine legislature passed the Lock Law forbidding settlement of the plaintiffs’ bonds, whereas, “were Argentina to default on the Exchange Bonds, and were the bondholders to obtain New York judgments against Argentina, there would be no barrier to the Republic’s courts recognizing those judgments.”²⁹²

The Second Circuit found that Argentina “violated the [*pari passu* clause] by persisting in its policy of discriminatory treatment of plaintiffs, for example, by passing the Lock Law.”²⁹³ The District Court had “suggested that a breach would occur with *any* non-payment that is coupled with payment on other debt[.]” and the Second Circuit did not overrule that holding.²⁹⁴ However, when the Second Circuit heard an appeal from the district court’s updated injunction order, it clarified that:

Our decision here does not control the interpretation of all *pari passu* clauses or the obligations of other sovereign debtors under *pari passu* clauses in other debt instruments. As we explicitly stated in our last opinion, we have not held that a sovereign debtor breaches its *pari passu* clause every time it pays one creditor and not another, or even every time it enacts a law disparately affecting a creditor’s rights. We simply affirm the district court’s conclusion that Argentina’s extraordinary behavior was a violation of the particular *pari passu* clause found in the FAA.²⁹⁵

What is the consequence of this ruling for the hypothetical plaintiff? Depending on the language of the *pari passu* clause in their bond terms, any time the Chinese government pays out to other bonds, and does not pay on the defaulted bonds, there is a new injury.²⁹⁶

²⁹² *NML Capital*, 699 F.3d at 260.

²⁹³ *Id.* at 261.

²⁹⁴ *Id.* at 264 n.16.

²⁹⁵ *NML Capital, Ltd. v. Republic of Arg.*, 727 F.3d 230, 247 (2d Cir. 2013) (internal citations omitted).

²⁹⁶ *Id.* at 264 n.16.

Currently, China has at least fourteen outstanding bond series.²⁹⁷ At least one of these bonds, ISIN code XS1706605281, was set to pay a coupon on November 2, 2019.²⁹⁸ If China does pay that coupon, the injury would result on November 2, 2019, and the statute of limitations would run for six years after that, expiring in 2025; thus, allowing a plaintiff to bring suit in the next few years.

b. Remedies

In the *NML Capital* case, the Second Circuit affirmed the district court's grant of specific performance: Argentina had to pay its obligations under the *pari passu* clause.²⁹⁹ In addition, "whenever the Republic pays any amount due under the terms of the [Exchange] [B]onds, it must concurrently or in advance pay plaintiffs the same fraction of the amount due to them[.]"³⁰⁰ The district court "ordered that copies of the Injunctions be provided to all parties involved, directly or indirectly, in advising upon, preparing, processing, or facilitating any payment on the Exchange Bonds."³⁰¹ The judge's order forbade "Argentina's agents from aiding and abetting any further violation by [Argentina] of its obligations [under the *pari passu* clause], such as any efforts to make payments under the terms of the Exchange Bonds without also concurrently or in advance making a ratable payment to [plaintiffs]."³⁰²

The District Court also prohibited Argentina from changing how it made payments on the Exchange Bonds to prevent Argentina from creating an avenue by which it could pay the Exchange Bonds without paying plaintiffs.³⁰³ These strict measures were justified because Argentina created a disingenuous and "unprecedented, systematic scheme of making payments on other external

²⁹⁷ *Bond Finder: Issuer – People's Republic of China*, BUS. INSIDER: MARKETS INSIDER, <https://markets.businessinsider.com/bonds/finder?borrower=4614> [https://perma.cc/BDJ4-ELUA] (last visited Nov. 9, 2020).

²⁹⁸ *China, Volksrep. 17/27*, BUS. INSIDER: MARKETS INSIDER, https://markets.businessinsider.com/bonds/china-peoples_republic_of-bond-2027-xs1706605281 [https://perma.cc/K2QJ-4TQ2] (last visited Nov. 9, 2020) (providing detailed insight into this Chinese bond).

²⁹⁹ *NML Capital*, 727 F.3d at 254, 265 (internal citations omitted).

³⁰⁰ *Id.* at 254.

³⁰¹ *Id.* at 255.

³⁰² *Id.*

³⁰³ *Id.*

indebtedness, after repudiating its payment obligations to Plaintiffs[.]”³⁰⁴ The Second Circuit upheld the injunctions.³⁰⁵

However, it is unclear whether a court would impose these injunctions on China. Complicating factors include (1) that the debt was not originally incurred by the government of the PRC and (2) that China had settled certain claims with the United Kingdom in 1987.³⁰⁶ A court might look more kindly on a government that did not voluntarily incur the debt, but it may look unfavorably where China has paid British bondholders but not bondholders of other nationalities for historical debt.³⁰⁷

The same plaintiff may have one last avenue of resort available. In 1964, the Supreme Court of California heard *Coast Bank v. Minderhout*.³⁰⁸ The plaintiff, Coast Bank, made a series of loans to Burton and Donald Enright from January 18 to November 12, 1957.³⁰⁹ The Enrights “executed a promissory note for the full amount of the indebtedness.”³¹⁰ In a separate instrument, the Enrights “agreed that they would not transfer or encumber without [Coast Bank’s] consent certain real property owned by them until all of their indebtedness was paid.”³¹¹ Coast Bank had the right to “declare all remaining indebtedness due forthwith” if the Enrights defaulted.³¹²

In November 1958, still owing Coast Bank, the Enrights “conveyed the property to defendants without plaintiff’s knowledge or consent.”³¹³ Coast Bank proceeded to “accelerate the due date, but was unable to collect the unpaid balance.”³¹⁴ Consequently, Coast Bank brought suit against the defendants, arguing that the

³⁰⁴ *Id.*

³⁰⁵ *NML Capital*, 727 F.3d at 265 (internal citations omitted).

³⁰⁶ Agreement concerning the Settlement of Mutual Historical Property Claims, China-U.K., Jun. 5, 1987, 1656 U.N.T.S. 77 [hereinafter China-U.K. Debt Treaty]; see also, e.g., 4½% Gold Loan of 1898, *supra* note 37; 5% Gold Loan of 1911, *supra* note 47.

³⁰⁷ See China-U.K. Debt Treaty, *supra* note 306, at 79.

³⁰⁸ 392 P.2d 265 (Cal. 1964).

³⁰⁹ *Id.* at 266.

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² *Id.*

³¹³ *Id.*

³¹⁴ *Coast Bank*, 392 P.2d at 266.

Enright's instruments created an "equitable mortgage."³¹⁵ As the court noted:

[E]very express executory agreement in writing, whereby the contracting party sufficiently indicates an intention to make some particular property, real or personal, or fund, therein described or identified, a security for a debt or other obligation creates an equitable lien upon the property so indicated, which is enforceable against the property in the hands not only of the original contractor, but of his purchasers or encumbrancers with notice.³¹⁶

The court stated that "the instrument restricts the rights of the Enrights in dealing with their property for plaintiff's benefit[.]" and thus "afford some indication that the parties intended to create a security interest" in the property.³¹⁷ The court decided that "[t]he creation of [the security] interest was a . . . lawful object of the agreement[.]" thus allowing Coast Bank to "foreclose its security interest" against the defendants.³¹⁸

If the hypothetical plaintiff could show that their pre-1949 bond included a term which granted a security interest over either future loans of the Chinese government, or over Chinese revenues generally, then, theoretically, a plaintiff could pursue its security interest against current bondholders for the payments received from the Chinese government.³¹⁹

V. Concluding Framework

The possibility of successfully navigating a suit to claim damages on bonds that were issued over a century ago is unlikely. As such, anyone attempting to do so must learn "a verie formall art . . . with manie excellent superstitions and ceremonies[.]"³²⁰

A. Jurisdiction

A plaintiff first must overcome the jurisdictional hurdle of the FSIA. Three requirements must be met: (1) the state a foreign state,

³¹⁵ *Id.*

³¹⁶ *Id.* (quoting 4 JOHN NORTON POMEROY, POMEROY'S EQUITY JURISPRUDENCE § 1235 (5th ed. 1941)).

³¹⁷ *Id.* at 267.

³¹⁸ *Id.* at 269.

³¹⁹ *See id.*

³²⁰ SCOT, *supra* note 10, at 148 (explaining that one also may need to utter "certeine words both blasphemous and impious").

(2) the activity a commercial activity, and (3) there is a “direct effect” in the United States.³²¹ The first two questions are clearly met for a claim brought by a holder of pre-1949 Chinese bonds: the PRC has been adjudged a FSIA foreign state and issuing government bonds is a commercial activity under the Act. Finding a “direct effect in the United States” test is more uncertain.³²²

Helpful evidence of “direct effects” include: (a) a breach of contract when performance was validly requested in the United States; (b) ownership of the bonds by a U.S. citizen at the time of default; (c) whether the bonds were issued in the United States; (d) whether the bonds were issued or payable in dollars; (e) whether the PRC had a designated agent to administer the bonds in the United States; and (f) whether any negotiations concerning the bond occurred within the United States.³²³

A pre-1949 bond that meets some of these criteria is the “Imperial Chinese Government 5% Hukuang Railways Sinking Fund Gold Loan of 1911” from *Jackson*.³²⁴ This bond provides that “[a]ll payments of principal and interest on this Bond will be made in . . . New York in Dollars at the offices of Messrs. J.P. Morgan and Co., Messrs. Kuhn, Loeb & Co., The First National Bank of the City of New York and the National City Bank of New York[.]”³²⁵

Likewise, a court may find no evidence of “direct effects” if there is: (a) no evidence of prior American ownership of the bonds; (b) if plaintiff’s bonds were not issued to American banks; (c) that there were no designated locations or negotiations in the United States; and (d) that the bonds were not in U.S. dollars.³²⁶ *Morris* concerned a Chinese bond that, because its terms did not allow redemption in the United States, the court found it did not have a “direct effect” in the United States.³²⁷

B. Procedural Bars

A defendant-nation would assert that the claims brought against

³²¹ See *supra* Section II.A.4.

³²² See *supra* Section III.B.3.

³²³ See *Morris*, 478 F. Supp. 2d at 570–71.

³²⁴ *Jackson*, 550 F. Supp. at 871.

³²⁵ *Id.*

³²⁶ *Morris*, 478 F. Supp. 2d at 571.

³²⁷ See *id.* at 564.

it from an old bond are untimely.³²⁸ If the plaintiff argues breach of contract for failure to pay the principal or interest payment, the defense will win, and the case will be dismissed.³²⁹ Because the statute of limitations is six years, most old claims expired in the 1940s.³³⁰ Even if the plaintiff can find “superior powers” that persuade the court to toll the statute of limitations, there were no barriers to sue the PRC after the passage of the FSIA in 1976.³³¹ And even if a court believed that the statute should be tolled because the Supreme Court did not clarify that the FSIA was retroactive until 2004, the statute of limitations expired in 2010.³³²

Plaintiffs whose bonds have certain *pari passu* clauses will be able to argue that a new injury occurs every time their *pari passu* clause is violated.³³³ These clauses are violated any time the sovereign debtor pays creditors who hold subordinate bonds while refusing to pay the debtor.³³⁴ The substance of this argument will be discussed in the next section. Nonetheless, the important procedural point is that the six-year statute begins running from the date these new injuries occur, and thus, claims arising from contemporary *pari passu* injuries are not stale.

C. Substantive Requirements

Breach of contract for default on interest or principal payments are substantively easy to prove. If the bondholder is the rightful owner of the bond, and the payments have not been made, the debtor is in default and owes restitution to the creditor.

But the ‘*pari passu* injuries’ are more difficult to prove substantively.³³⁵ Only the *NML Capital* case provides any guidance and the Second Circuit purposefully limited the scope of its holding to Argentina.³³⁶ The two factors the Second Circuit relied upon to find injury were (1) the clear priority protections granted to bondholders and (2) the actions of the debtor-nation to avoid paying

³²⁸ See *supra* Section III.C.

³²⁹ See *Morris*, 478 F. Supp. 2d at 563.

³³⁰ See *supra* Section III.C.

³³¹ See *supra* Section III.C.2.

³³² See *supra* Section III.B.4.

³³³ See *supra* Section IV.C.3.

³³⁴ See *supra* Section IV.C.3.a.

³³⁵ See *supra* Section IV.C.3.

³³⁶ See *NML Capital*, 699 F.3d at 260.

the debt.³³⁷

The “Chinese Imperial Government Gold Loan of 1898” includes the following provision: “[t]his entire loan shall have priority both as regards principal and interest over all future loans, charges or mortgages so long as this loan or any part thereof shall be unredeemed.”³³⁸ This broad grant of priority is similar to the Argentine bonds in *NML Capital*.³³⁹ Conversely, the “Reorganisation” bond in *Morris* provided, in Article IV, that: “The entire loan . . . shall have priority both as regards to principal and interest over all future loans, charges and mortgages charged upon the [“revenues of the Salt Administration of China”] so long as this loan or any part thereof shall be unredeemed.”³⁴⁰ The *Morris* bond only has priority over bonds that also derive revenues from the Salt Administration of China, which disintegrated during the Second World War.³⁴¹ Thus, plaintiffs with *pari passu* clauses reflective of the “Gold Loan of 1898” have a stronger argument for a ‘*pari passu* injury’ than those like the *Morris* bond.

The plaintiff also has to prove that China is a recalcitrant debtor-nation, akin to Argentina in *NML Capital*. Evidence of recalcitrance includes the PRC’s historic repudiation of Imperial and Nationalist debt and the disparate treatment of American and British bondholders by compensating British bondholders while refusing to pay American bondholders.³⁴²

³³⁷ See *id.* at 258–59.

³³⁸ E.g., 4½% Gold Loan of 1898, *supra* note 37.

³³⁹ See *supra* Section IV.C.3.a

³⁴⁰ Bond No. 1913/5, Fr. (Banque de l’Indo-Chine)-Ger. (Deutsch-Asiatische Bank)-Gr. Brit. (Hongkong & Shanghai Banking Corp.)-Japan (Yokohama Specie Bank)-Russ. (Russo-Asiatic Bank)-China, art. 4, *Chinese Government Five per Cent Reorganization Gold Loan Agreement (with Agreement for Advances, and Annexes)* (Apr. 26, 1913), reprinted in TREATIES 2, *supra* note 22, at 1008. See 4½% Gold Loan of 1898, *supra* note 37, at 2, para. 3(b).

³⁴¹ ARTHUR N. YOUNG, CHINA’S WARTIME FINANCE AND INFLATION, 1937–1945 50–53 (Harvard Univ. Press 2013) (1965) (explaining that the salt production facilities were captured by the Japanese early in the war and when the Communists seized power, they established their own salt monopoly, the China National Salt Industry Corporation); see *China National Salt Industry Corporation (CNSIC)*, GOVT.CHINADAILY.COM.CN, <http://govt.chinadaily.com.cn/s/201904/22/WS5cbd8917498e079e6801eb5b/china-national-salt-industry-corporation-cnsic.html> [<https://perma.cc/4BSS-ZWWJ>] (last updated Apr. 22, 2019).

³⁴² See *China, Britain Settle Claims*, *supra* note 70; H.R. Con. Res. 160, 110th Cong. (2007) (recommending that the PRC be denied access to U.S. capital markets until it complies with the WTO Agreement terms and conditions and honors its outstanding

D. Remedy

This paper has not discussed the difficulty of enforcing judgements on foreign sovereigns. Other writers have addressed this.³⁴³ In brief, “[i]t is easier to obtain a judgment against a foreign state than to execute that judgment.”³⁴⁴

But a plaintiff who can bring a ‘*pari passu* injury’ like in *NML Capital* may be able to seize revenues paid to other bonds from the same issuer. *Coast Bank* allowed the creditor to seize property from a third party because the lending contract to the debtor created an ‘equitable mortgage.’³⁴⁵ If a bond contains contractual language which allows subordination of future bonds or first liens on a country’s revenue, then the bondholder could pursue payments made to a bondholder with a subordinate bond. The *Morris* bond discussed above, by its terms, only allows priority over revenues from the Salt Administration of China, and because no payments are being made from this revenue stream, a plaintiff holding such bonds would be unsuccessful bringing a claim for violating the *pari passu* clause.³⁴⁶ Contrasting the bond in *Morris* with the “Gold Loan of 1898,” the Gold Loan creates priority over all future obligations of any kind, regardless of security or revenue stream, and, thus, present a bondholder with a higher likelihood of success bringing a claim under the *pari passu* clause.

VI. Conclusion

A pre-1949 bondholder can be forgiven for feeling as though the law in this field is like the fruit tree and pool of water in Tartarus, which taunts the thirsty without ever delivering refreshment.³⁴⁷ Very few factual situations exist that justify a court finding “direct effects” in the United States and suspending the passage of time by, for example, a perpetual broad-reaching *pari passu* clause. This is perhaps an intentional manifestation of an ameliorative policy for rehabilitated creditors. As idiosyncratic as the law may seem in this

defaulted public debts owed to U.S. citizens).

³⁴³ See Joseph W. Dellapenna, *Refining the Foreign Sovereign Immunities Act*, 9 WILLAMETTE J. INT’L L. & DISP. RESOL. 57, 75–78 (2001).

³⁴⁴ *Id.* at 75.

³⁴⁵ See *Coast Bank*, 392 P.2d at 265.

³⁴⁶ See *Morris*, 478 F. Supp. 2d at 572 n.16.

³⁴⁷ See PSEUDO-APOLLODORUS, *THE LIBRARY* (James G. Frazer trans., Harvard Univ. Press 1921).

area, the results are roughly fair. The beneficial flows of development capital in the present at some point should no longer be arrested by the unfinished business of prior generations. Accordingly, those desiring a return on their objet d'art through the courts perhaps are better advised instead to find an executive branch solution, perhaps a bellicose administration that demands reparations in return for trade concessions. In China's history, this sounds familiar.

