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## Absolute, Restrictive, or Something More: Did Beijing Choose the Right Type of Sovereign Immunity for Hong Kong?

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# ABSOLUTE, RESTRICTIVE, OR SOMETHING MORE: DID BEIJING CHOOSE THE RIGHT TYPE OF SOVEREIGN IMMUNITY FOR HONG KONG?

## INTRODUCTION

Hong Kong was a British colony until 1997 when it was returned to China.<sup>1</sup> Today, Hong Kong remains a common law jurisdiction, distinct from Mainland China,<sup>2</sup> and enjoys a high degree of autonomy.<sup>3</sup> Before 1997, Hong Kong followed the British doctrine of restrictive sovereign immunity, under which a foreign sovereign is not immune from claims arising out of commercial activities.<sup>4</sup> China, however, has espoused the more traditional doctrine of absolute sovereign immunity, under which a foreign sovereign is always immune from suit, whether or not the claim arose from commercial activities.<sup>5</sup>

In 2008, an American vulture fund<sup>6</sup> sued the Democratic Republic of the Congo (the “DRC”) in Hong Kong, seeking enforcement of arbitral awards by garnishing mining-right fees that certain state-owned Chinese companies owed to the DRC.<sup>7</sup> The national government in Beijing intervened heavily in the *Congo* cases,<sup>8</sup> effectively forcing Hong Kong to abandon its common law restrictive doctrine of immunity and shift to China’s more traditional absolute

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<sup>1</sup> IAN DOBINSON & DEREK ROEBUCK, INTRODUCTION TO LAW IN THE HONG KONG SAR 1 (2d ed. 2001).

<sup>2</sup> “Mainland China” is a geographical term referring to the People’s Republic of China, minus Taiwan, Hong Kong, and Macau. See Hong Xue, *The Voice of China: A Story of Chinese-Character Domain Names*, 12 CARDOZO J. INT’L & COMP. L. 559, 575 (2004).

<sup>3</sup> See DOBINSON & ROEBUCK, *supra* note 1, at 1–3.

<sup>4</sup> Dem. Rep. Congo v. FG Hemisphere Assocs. (*Congo III*), [2011] Legal Reference System paras. 62, 502–12 (C.F.A.) (H.K.); FG Hemisphere Assocs. v. Dem. Rep. Congo (*Congo I*), [2009] 1 H.K.L.R.D. 410, para. 37 (C.F.I.) (H.K.); RODA MUSHKAT, ONE COUNTRY, TWO INTERNATIONAL LEGAL PERSONALITIES: THE CASE OF HONG KONG 65 (1997).

<sup>5</sup> See, e.g., Voest-Alpine Trading USA Corp. v. Bank of China, 142 F.3d 887, 890–91 (5th Cir. 1998); Jackson v. People’s Republic of China, 794 F.2d 1490, 1494 (11th Cir. 1986); Midland Inv. Co. v. Bank of Comm’ns [1956] 40 H.K.L.R. 42, 43 (H.C.); Civil Air Transp. Inc. v. Chennault, [1950] 34 H.K.L.R. 358, 360 (H.C.).

<sup>6</sup> A vulture fund is a professional plaintiff that buys defaulted sovereign debts owed by developing countries at a deep discount on the secondary sovereign debt market, and then sues the sovereign debtor, seeking recovery of the face value of the debt plus interest. See *infra* note 94 and accompanying text.

<sup>7</sup> *Congo I*, 1 H.K.L.R.D. para. 4.

<sup>8</sup> See, e.g., *id.* paras. 31, 55.

sovereign immunity doctrine.<sup>9</sup> Part III of this Comment argues that Beijing was wrong to require Hong Kong to regress from the restrictive to the absolute doctrine of sovereign immunity.

Further, the *Congo* cases were more than just suits against a foreign sovereign defendant—they were also suits filed by a vulture fund, a highly controversial species of plaintiff.<sup>10</sup> Part IV of this Comment proposes a solution to the problem of vulture-fund suits that does not involve shifting to the absolute doctrine of sovereign immunity.

## I. GENERAL BACKGROUND

The *Congo* cases were brought in Hong Kong by a vulture fund plaintiff, against a sovereign defendant that claimed immunity. The Chinese government intervened heavily.<sup>11</sup> The “core question of law” was whether Hong Kong should retain the British restrictive doctrine of sovereign immunity or shift to Mainland China’s absolute doctrine.<sup>12</sup> This Part of the Comment will provide background information on the following: (A) the distinction between absolute and restrictive sovereign immunity; (B) restrictive sovereign immunity in Hong Kong before it was handed over to China; (C) the statutory vacuum after Hong Kong’s return to China; (D) China’s adherence to absolute immunity; and (E) vulture funds’ challenge to the doctrine of sovereign immunity.

### A. *From Absolute to Restrictive Sovereign Immunity*

Traditionally in public international law, the government of one sovereign country, together with its agents and instrumentalities, enjoyed absolute sovereign immunity from suit in the courts of another sovereign country.<sup>13</sup> After the Second World War, as the role of the state changed, more and more countries shifted to a new “restrictive” doctrine of sovereign immunity, which carved out exceptions to claims of immunization from suit in

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<sup>9</sup> See Interpretation of Paragraph 1, Article 13 & Article 19 of the Basic Law of Hong Kong by the Standing Comm. Nat’l People’s Cong (2011) Cap. 2114, BLIS (requiring Hong Kong to defer to the People’s Government as to rules and policies on state immunity) [hereinafter Interpretation of Article 13].

<sup>10</sup> See, e.g., *Congo III*, [2011] Legal Reference System (C.F.A.) (H.K.).

<sup>11</sup> See, e.g., *Congo I*, 1 H.K.L.R.D. paras. 31, 55.

<sup>12</sup> *Congo III*, [2011] Legal Reference System para. 2.

<sup>13</sup> See generally DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 197–98 (3d ed. 2010) (explaining that a state’s absolute immunity from suit in the domestic courts of another country arose in the early 19th century).

foreign courts.<sup>14</sup> Under a common form of restrictive sovereign immunity, foreign sovereign entities do not enjoy immunity from claims arising out of commercial activities.<sup>15</sup>

### *B. Restrictive Sovereign Immunity in Hong Before 1997*

Before its return to China in 1997, Hong Kong followed the British restrictive approach and did not extend sovereign immunity to commercial transactions.<sup>16</sup> In fact, Hong Kong was one of the earliest common law jurisdictions to adopt the restrictive rule of sovereign immunity.<sup>17</sup> As early as 1956, Hong Kong limited sovereign immunity to acts for “public use[s],” and placed the burden of proof on the sovereign defendant claiming immunity.<sup>18</sup> In *Midland Investment*, a British corporate plaintiff sued the Bank of Communications of Shanghai for surrendering securities in its account to the Chinese government after the Communists took over Shanghai.<sup>19</sup> The defendant, an instrumentality of China, challenged the jurisdiction of the court in Hong Kong because the action impleaded the sovereign state of China.<sup>20</sup> Finding that the defendant failed to adduce “evidence of dedication to public uses,” the judge ruled not to accord sovereign immunity to China.<sup>21</sup>

In 1975, restrictive sovereign immunity was still a novelty in English Law.<sup>22</sup> But the Judicial Committee of the Privy Council, which was then Hong Kong’s court of last resort,<sup>23</sup> affirmed the application of restrictive sovereign

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<sup>14</sup> *Id.*

<sup>15</sup> *See generally id.* at 199 (stating that, beginning after the Second World War, courts in Europe and the United States began to make exceptions to absolute sovereign immunity when the State engaged in commercial activities).

<sup>16</sup> *Congo III*, Legal Reference System paras. 62, 502; *Congo I*, 1 H.K.L.R.D para. 37; MUSHKAT, *supra* note 4, at 65.

<sup>17</sup> *Congo III*, Legal Reference System para. 132 (surveying the adoption of the restrictive approach by a number of common law jurisdictions, and noting that “Hong Kong comes early in that list”) (citing *Midland Inv. Co. v. Bank of Comm’ns* [1956] 40 H.K.L.R. 42 (H.C.)).

<sup>18</sup> *Midland Inv. Co.* 40 H.K.L.R. at 48 (“In my view . . . it is necessary for the foreign sovereign, if he wishes to discharge the onus of satisfying the court that he is entitled to sovereign immunity . . . to produce satisfactory evidence that the property seized is dedicated or destined to public use.”)

<sup>19</sup> *Id.* at 42.

<sup>20</sup> *Id.* at 43, 45.

<sup>21</sup> *Id.* at 49.

<sup>22</sup> *See Trendtex Trading Corp. v. Cent. Bank of Nigeria*, [1977] Q.B. 529 at 533 (Eng.); *see also Playa Larga (Owners of Cargo Lately Laden on Board) v. I Congreso del Partido (Owners)*, [1983] A.C. 244 (H.L.) 278 (Lord Bridge of Harwich) (appeal taken from Eng.).

<sup>23</sup> *See DOBINSON & ROEBUCK*, *supra* note 1, at 84.

immunity in Hong Kong.<sup>24</sup> In *The Philippine Admiral*, the Republic of the Philippines claimed sovereign immunity<sup>25</sup> from in rem actions against a commercial trading vessel that was operated by private charterers but was owned by the Filipino government.<sup>26</sup> The Privy Council recognized a growing prevalence around the world of the restrictive theory of sovereign immunity,<sup>27</sup> and found it “more consonant with justice” than the absolute theory.<sup>28</sup> Therefore, the Privy Council decided to apply the restrictive theory to the in rem actions at bar,<sup>29</sup> while leaving the question of sovereign immunity regarding in personam actions “open to the House of Lords to decide,” and expecting the House to reach the same restrictive conclusion.<sup>30</sup>

The House of Lords met that expectation in *I Congreso del Partido*,<sup>31</sup> in which their Lordships abolished the in rem versus in personam distinction and applied the restrictive doctrine across-the-board.<sup>32</sup> In 1973, after a military coup in Chile,<sup>33</sup> the Cuban government severed diplomatic ties with Chile and

<sup>24</sup> *Philippine Admiral (Owners) v. Wallem Shipping (H.K.) Ltd. (The Philippine Admiral)*, [1977] A.C. 373 (P.C.) 374 (appeal taken from H.K.), *aff'g* Wallem Shipping (H.K.) Ltd. v. Owners of the Ship “Philippine Admiral,” [1974] H.K.L.R. 111 (C.A.).

<sup>25</sup> *The Philippine Admiral*, [1977] A.C. at 376.

<sup>26</sup> *Id.* at 386–89.

<sup>27</sup> *Id.* at 397 (“There is no doubt . . . that since the Second World War there has been . . . a movement away from the absolute theory of sovereign immunity . . . towards a more restrictive theory.”).

<sup>28</sup> *Id.* at 403.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 402–03. Before the issue of restrictive immunity came up in the House of Lords, it went to the Court of Appeal of England, which ruled to adopt the restrictive approach for England. *Trendtex Trading Corp. v. Cent. Bank of Nigeria*, [1977] 1 Q.B. 529 at 558 (Eng.). The Master of the Rolls, Lord Denning, quoted the relevant passage from *The Philippine Admiral*, and criticized the Privy Council for drawing a useless distinction between in rem and in personam actions. *Id.* at 556–57 (quoting *The Philippine Admiral*, A.C. at 373). *Trendtex Trading* was an English case, and was never appealed to the House of Lords. *Playa Larga (Owners of Cargo Lately Laden on Board) v. I Congreso del Partido (Owners)*, [1983] 1 A.C. 244 (H.L.) 261 (appeal taken from Eng.). The restrictive approach that *Trendtex Trading* established was, however, codified by Parliament a year later in 1978. *See infra* note 41 and accompanying text.

<sup>31</sup> The fact that this was a House of Lords decision taken on appeal not from Hong Kong should not diminish its authority in colonial Hong Kong in any significant way. Generally, House of Lords decisions had the same highly persuasive authority in Hong Kong as Privy Council decisions on non-Hong Kong appeals, which “was very great unless the decision was in a field where local circumstances made it appropriate for Hong Kong to develop along different lines.” *Solicitor (24/07) v. Law Soc’y of H.K.* [2008] 11 H.K.C.F.A.R. 117, 133 para. 15 (C.F.A.); *see also* *De Lasala v. De Lasala*, [1980] A.C. 546 (P.C.) 558 (appeal taken from H.K.) (“[L]ooked at realistically [the House of Lords’] decisions on [statutory interpretation] will have the same practical effect as if they were *strictly binding* . . .” (emphasis added)); *Tai Hing Cotton Mill Ltd. v. Liu Chong Hing Bank*, [1986] 1 A.C. 80 (P.C.) 108 (appeal taken from H.K.) (“Once it is accepted, as in this case it is, that the applicable law is English, their Lordships of the Judicial Committee will follow a House of Lords’ decision which covers the point in issue.”).

<sup>32</sup> *I Congreso del Partido*, 1 A.C. at 261.

<sup>33</sup> *Id.* at 259, 277.

instructed the defendants, state-owned Cuban corporations, not to deliver sugar ordered by a Chilean importer.<sup>34</sup> When the defendants bought a new trading vessel from a shipyard in England in 1975, the Chilean company filed a number of claims in an English court both in rem against the new ship, and in personam against the defendants.<sup>35</sup> Because these events occurred between 1973 and 1975, the common law of that time was in question, and later statutes were not applied retroactively.<sup>36</sup> Although their Lordships were divided on the outcome of the case,<sup>37</sup> they unanimously affirmed the move toward restrictive sovereign immunity made in *The Philippine Admiral*, and extended it to in personam actions.<sup>38</sup>

The common law of Hong Kong recognized the restrictive rule in 1956 at the earliest.<sup>39</sup> By 1981, when *I Congreso del Partido* was decided in the House of Lords, it was unambiguous that the restrictive rule of sovereign immunity had been cemented in the common law of Hong Kong by the highest authority.<sup>40</sup>

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<sup>34</sup> *Id.* at 258–59.

<sup>35</sup> *Id.* at 257–58.

<sup>36</sup> *Id.* at 260.

<sup>37</sup> *Id.* at 276.

<sup>38</sup> *Id.* at 261 (Lord Wilberforce) (“I would unhesitatingly affirm as part of English law the advance made by *The Philippine Admiral* [1977] A.C. 373 with the reservation that the decision was perhaps unnecessarily restrictive in, apparently, confining the departure made to actions in rem.”); *id.* at 272 (Lord Diplock) (“I agree broadly with [Lord Wilberforce’s] analysis of the “restrictive” theory . . . .”); *id.* at 276 (Lord Edmund-Davies) (“I respectfully concur.”); *id.* at 277 (Lord Keith of Kinkel) (“I find myself in full agreement with the opinion expressed by my noble and learned friend, Lord Wilberforce, regarding the principles which at the material time represented the law of England in the field of sovereign immunity.”); *id.* at 278 (Lord Bridge of Harwich) (“I would not possibly hope to emulate, let alone improve upon, the penetrating analysis of the relevant principles, derived from the welter of material put before us, which is set out in the speech of my noble and learned friend, Lord Wilberforce, and with which I broadly agree.”).

<sup>39</sup> *See, e.g., Congo III*, [2011] Legal Reference System para. 94 (C.F.A.) (H.K.). (citing *Midland Inv. Co. v. Bank of Commercials* [1956] 40 H.K.L.R. 42, 48 (H.C.)); MUSHKAT, *supra* note 4, at 65 (citing *Midland Inv. Co.*, 40 H.K.L.R. at 48).

<sup>40</sup> Even the majority in *Congo III*, which disregarded the restrictive rule at common law and applied absolute immunity, *Congo III*, Legal Reference System para. 411, conceded that “[i]n 1981, the House of Lords confirmed the adoption of the restrictive immunity theory as a matter of common law in *I Congreso del Partido* . . . .” *Congo III*, Legal Reference System para. 221.

### C. *The Statutory Vacuum in Hong Kong After 1997*

In 1978, Parliament codified the restrictive doctrine of sovereign immunity in the State Immunity Act (the “SIA”),<sup>41</sup> which was extended to Hong Kong in 1979.<sup>42</sup> Therefore, “on 30 June 1997, the theory of state immunity applied by the Hong Kong courts, whether under the SIA 1978 or on the basis of some underlying doctrine of common law, was a restrictive theory, recognizing a commercial exception to what was otherwise an absolute immunity.”<sup>43</sup>

The SIA, however, ceased to have effect in Hong Kong when the territory was returned to China on July 1, 1997,<sup>44</sup> leaving behind a “statutory vacuum.”<sup>45</sup> No local ordinance in Hong Kong or national legislation in China was ever passed on sovereign immunity to fill this vacuum.<sup>46</sup>

Legislative history—or lack of legislative history—suggests that the lapse of the SIA was not entirely inadvertent.<sup>47</sup> Before the United Kingdom returned governance of Hong Kong to China, the British and the Chinese governments negotiated to “localise” parts of the SIA (including a provision providing a commercial exception to sovereign immunity)<sup>48</sup> by enacting a local Hong Kong ordinance.<sup>49</sup> But the ordinance was never finished, allegedly “because of the [Chinese government]’s sovereignty concerns.”<sup>50</sup> As a result, the SIA

<sup>41</sup> State Immunity Act, 1978, c. 33, § 3 (U.K.); see *Congo III*, Legal Reference System para. 75 (“[T]he doctrine of restrictive immunity . . . was ‘codified and consolidated’ by the SIA.” (quoting VAUGHAN LOWE, INTERNATIONAL LAW 185 (2007))).

<sup>42</sup> State Immunity (Overseas Territories) Order, 1979, S.I. 1979/458, ¶ 2; see *Congo III*, Legal Reference System para. 220; *FG Hemisphere Assocs. v. Dem. Rep. Congo (Congo II)*, [2010] 2 H.K.L.R.D. 66, para. 252 (C.A.) (H.K.); *Congo I*, [2009] 1 H.K.L.R.D. 410, para. 41 (C.F.I.).

<sup>43</sup> *Congo III*, Legal Reference System para. 222.

<sup>44</sup> *Id.*

<sup>45</sup> *Congo II*, H.K.L.R.D. para. 252.

<sup>46</sup> *Congo III*, Legal Reference System para. 367, 370; see Dahai Qi, *State Immunity, China and Its Shifting Position*, 7 CHINESE J. INT’L L. 307, 316–17 (2008) (examining and ruling out a number of suspect Chinese statutes that might be marginally relevant to sovereign immunity, and concluding that, “[o]wing to the scarcity of domestic legislation both substantively and procedurally on State immunity, it is questionable that Chinese People’s Courts are capable of applying the international law principle of State immunity in either absolute or restrictive approach to an actual case.”).

<sup>47</sup> *Congo III*, Legal Reference System para. 371.

<sup>48</sup> Constitutional Affairs Comm., *Localisation of Laws*, LEGISLATIVE COUNCIL OF H.K. (Dec. 16, 1996), <http://www.legco.gov.hk/yr96-97/english/panels/ca/papers/xx1612x3.htm> (“The most important provision in the [SIA] is that a State will not be immune in respect of proceedings in relation to commercial dealings.”), available at.

<sup>49</sup> *Id.* (“The Act will cease to have effect in Hong Kong as from 1 July 1997 and hence the need for a localised Bill.”).

<sup>50</sup> Memorandum from Sec’y for Constitutional Affairs to the H.K. Legislative Council Panel on Constitutional Affairs para. 4(a) (June 12, 1997), available at <http://www.legco.gov.hk/general/english/library/>

expired, along with half of the 300 or so British enactments that were applicable to Hong Kong before 1997.<sup>51</sup>

This legislative history might suggest that the Chinese government intended to let the SIA expire.<sup>52</sup> But to infer purpose or intent from legislative inaction is almost always a tricky business.<sup>53</sup> In the *Congo* cases, specific factors caution against drawing any conclusion on Chinese intent to phase out restrictive immunity in Hong Kong. To begin with, the SIA was not unique in its position as an expired British statute. As mentioned above, the group of British and Chinese officials in charge of “localization” allowed half of all the then-applicable British statutes to lapse.<sup>54</sup> Moreover, if the failure to localize the British codification of the restrictive approach indicated intent to revert Hong Kong to the absolute approach, the same logic could also lead to the converse conclusion; that is, the failure to enact a Chinese codification of the absolute approach indicated intent to preserve the restrictive approach.<sup>55</sup> In any event, a mere mention of Chinese “sovereignty concerns” in the records cannot be very informative. There was simply no statute on point.<sup>56</sup> Thus, the legislative history of the SIA offers little guidance, except a conclusion that the statutes were completely quiet on the question of whether Hong Kong followed the restrictive or the absolute approach after 1997.<sup>57</sup>

On the other hand, at common law, the settled expectation was that the demise of the SIA would bring back to life the pre-SIA common law, which had by then adopted the restrictive rule.<sup>58</sup> Writing on the eve of Hong Kong’s

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<sup>51</sup> *Congo III*, Legal Reference System para. 371(a).

<sup>52</sup> The majority in *Congo III* concluded unequivocally that the Chinese government deliberately prevented the continued application of the restrictive rule in Hong Kong by frustrating a British effort to localize of the SIA. *Id.* para. 372 (“It is therefore clear that the CPG specifically decided that there should not be legislation in [Hong Kong] to import the commercial exception to absolute immunity provided for under the SIA 1978.”). A deliberate plan to let the SIA go was also suggested in the letters from the Commissioner of the Ministry of Foreign Affairs. *Id.* para. 463 (Mortimer, J., dissenting).

<sup>53</sup> See generally William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67 (1988)(explaining the difficulties courts have encountered when confronted with legislative inaction and arguing that using legislative inaction as legislative history is problematic from a normative perspective.).

<sup>54</sup> *Congo III*, Legal Reference System para. 371(a).

<sup>55</sup> The latter conclusion was suspected in the majority opinion in the Court of Appeal. See *Congo II*, [2010] 2 H.K.L.R.D. 66, para. 121 (C.A.) (H.K.) (“[W]ere it intended that the courts of Hong Kong should apply the [absolute] . . . theory of sovereign immunity, that intention would be given effect by legislation.”).

<sup>56</sup> See *supra* note 45 and accompanying text.

<sup>57</sup> See *supra* notes 45–46 and accompanying text.

<sup>58</sup> See *supra* notes 39–40 and accompanying text.

reunification with Mainland China, Professor Mushkat opined, “It may be assumed that [Hong Kong] judges will continue to follow the ‘restrictive approach’ to state immunity as incorporated in the common law, *although this may give rise to some doctrinal conflicts with their Mainland counterparts.*”<sup>59</sup> Clearly, observers anticipated conflicts with Chinese law and policy from the outset.

#### *D. Mainland China’s Adherence to Absolute Sovereign Immunity*

One can ascertain China’s position on sovereign immunity through works by commentators and the news media, but it is more straightforward to start with a look at representations made by the Chinese government itself on this matter. When listed as defendants in commercial lawsuits in foreign courts, sovereign entities of the People’s Republic of China have often vigorously argued for the absolute doctrine of sovereign immunity, and that China must be immune from suit even when a claim arises out of purely commercial activities.<sup>60</sup>

Perhaps in keeping with its strong adherence to the absolutist doctrine, the Chinese government appears to prefer extrajudicial and diplomatic channels to communicate its stance on absolute sovereign immunity. For instance, when a U.S. federal district court tried *Morris v. People’s Republic of China*, the Chinese Embassy in Washington, D.C. sent a memorandum (the “Embassy Memo”) to the U.S. Department of State.<sup>61</sup> The Embassy Memo reiterated China’s adherence to the absolutist view, stating, “[T]he Chinese side has declared a solemn position on sovereign immunity to the US side *on many occasions.*”<sup>62</sup> Such diplomatic communications tend to be difficult to get hold of, making it almost impossible to verify their accuracy.<sup>63</sup> Any exhaustive

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<sup>59</sup> MUSHKAT, *supra* note 4, at 66 (emphasis added).

<sup>60</sup> See, e.g., *Voest-Alpine Trading USA Corp. v. Bank of China*, 142 F.3d 887, 890–91 (5th Cir. 1998); *Jackson v. People’s Republic China*, 794 F.2d 1490, 1494 (11th Cir. 1986); *Midland Inv. Co. v. Bank of Comm’ns*, [1956] 40 H.K.L.R. 42 (H.C.); *Civil Air Transp. Inc.*, [1950] 34 H.K.L.R. 358 (H.C.) (granting sovereign immunity to the People’s Republic of China in a dispute over airplane sales, even though the PRC was not a party).

<sup>61</sup> *Morris v. People’s Republic of China*, 478 F. Supp. 2d 561 (S.D.N.Y. 2007); see *Congo II*, [2010] 2 H.K.L.R.D. 66 para. 96 (C.A.) (H.K.).

<sup>62</sup> *Congo II*, [2010] 2 H.K.L.R.D. 66, para. 96 (C.A.) (H.K.) (emphasis added) (quoting Letter from the Office of the Comm’r of the Ministry of Foreign Affairs of China in the H.K. Special Admin. Region, to the Constitutional and Mainland Affairs Bureau of the H.K. Gov’t (May 21, 2009)).

<sup>63</sup> After an extensive search to the best of this author’s ability, only one diplomatic document of this kind was unearthed. See Foreign Broadcast Information Service, *People’s Republic of China: Aide Memoire of the Ministry of Foreign Affairs*, reprinted in 22 I.L.M. 75, 81 (1983).

survey of such Chinese assertions of absolute sovereign immunity through diplomatic channels would certainly be difficult.<sup>64</sup> But the *Congo II* court, which reviewed the Embassy Memo and quoted the above statement, found it “undoubtedly correct,” and took it at face value.<sup>65</sup>

It appears to be routine for Chinese diplomats to protest to the executive branch of the foreign government whenever China is sued in a foreign court.<sup>66</sup> In contrast, China does not extend the benefit of such diplomatic exchanges to the court in which the case is being tried. For example, the U.S. district court in *Morris* did not review the Embassy Memo.<sup>67</sup> Not a single word of the Embassy Memo made it into the district court’s judgment in that case,<sup>68</sup> nor was there any mention in the court’s opinion of any Chinese objection to the court’s application of the restrictive approach as codified in U.S. statutes.<sup>69</sup>

Nonetheless, in a few earlier cases, China and its instrumentalities did argue in court for absolute immunity.<sup>70</sup> One such example is *Jackson v. People’s Republic of China*, where the U.S. Court of Appeals for the Eleventh Circuit heard China’s absolutist position on sovereign immunity.<sup>71</sup> In this 1986 case, American plaintiffs sued the communist Chinese government for payments on bonds issued by the pre-revolution imperial Chinese government.<sup>72</sup> China argued that it had maintained the absolute doctrine as a fundamental part of its sovereignty; that only a handful of developed countries had adopted the restrictive rule; and that the restrictive rule was not applicable to those developing countries that did not agree to it, such as China.<sup>73</sup> The court also quoted a statement of interest filed by the United States,<sup>74</sup> which read in relevant part, “China’s adherence to [the absolute] principle results, in part, from its adverse experience with extraterritorial laws and jurisdiction of

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<sup>64</sup> See Pat K. Chew, *Political Risk and U.S. Investments in China: Chimera of Protection and Predictability?*, 34 VA. J. INT’L L. 615, 679 n.309 (1993) (“There have been few reported cases of U.S. nationals suing the Chinese government.”).

<sup>65</sup> *Congo II*, 2 H.K.L.R.D. para. 96.

<sup>66</sup> See, e.g., Jill A. Sgro, Comment, *China’s Stance on Sovereign Immunity: A Critical Perspective on Jackson v. People’s Republic of China*, 22 COLUM. J. TRANSNAT’L L. 101, 127–28 (1983) (describing Scott v. People’s Republic of China, No. CA3-79-0836-D (N.D. Tex. filed June 29, 1979)).

<sup>67</sup> See *Morris v. People’s Republic China*, 478 F. Supp. 2d 561 (S.D.N.Y. 2007).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> See, e.g., *Midland Inv. Co. v. Bank of Commc’ns*, [1956] 40 H.K.L.R. 42, 43, 45 (H.C.); see also *supra* text accompanying note 20.

<sup>71</sup> *Jackson v. People’s Republic of China*, 794 F.2d 1490, 1494 (11th Cir. 1986).

<sup>72</sup> *Id.* at 1491–92.

<sup>73</sup> *Id.* at 1494.

<sup>74</sup> *Id.*

western powers [within China] in the nineteenth and early twentieth centuries.”<sup>75</sup> The court did not rule on these arguments about absolute immunity, and affirmed the dismissal of the case on other grounds.<sup>76</sup>

China has a reputation for adamant insistence on absolute sovereign immunity among legal commentators. A cursory reading of a standard international law textbook<sup>77</sup> would reveal that China is typically considered one of the last holdouts for the absolute doctrine of sovereign immunity.<sup>78</sup> In his *CASES AND MATERIALS ON INTERNATIONAL LAW*, Professor D.J. Harris wrote, “[O]nly China, India and a small number of developing states now follow the absolute immunity approach.”<sup>79</sup> Other commentators, including native Chinese scholars, have reached similar conclusions.<sup>80</sup> Professor Roda Mushkat remarked in 1997 that “China’s practice relating to sovereign immunity . . . reflects a determined adherence to the doctrine of absolute immunity.”<sup>81</sup>

Considering China’s position as discussed in this Part, it is difficult to question the forcefulness and vigor with which China asserts its support for the absolute doctrine. However, commentators have expressed serious doubts as to whether China’s adherence to the absolute doctrine has persisted.<sup>82</sup> Part III.B of this Comment examines the persistency question in detail and explains the importance of persistency.

One important recent development that relates to persistency is China’s signing of the United Nations Convention on Jurisdictional Immunities of

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<sup>75</sup> *Id.* See generally Sgro, *supra* note 66, at 119–22 (explaining the motives behind China’s staunch adherence to the absolute doctrine of sovereign immunity).

<sup>76</sup> Jackson, 794 F.2d at 1494, 1499.

<sup>77</sup> See, e.g., D.J. HARRIS, *CASES AND MATERIALS ON INTERNATIONAL LAW* (6th ed. 2004).

<sup>78</sup> *Id.* at 307.

<sup>79</sup> *Id.* But cf. IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 324 n.31 (6th ed. 2003) (listing China along with fourteen other countries as still accepting the principle of absolute sovereign immunity). Sir Ian’s treatise appears outdated, as it included in that list now-defunct countries such as Czechoslovakia and the USSR. *Id.*

<sup>80</sup> See, e.g., Qi, *supra* note 46, at 307 (“China has been regarded as one of the staunchest supporters of the principle of absolute immunity of State and its property from the jurisdiction of other States.”); Sgro, *supra* note 66, at 101 (stating that “[T]he P.R.C. adheres to the traditional ‘absolute’ doctrine of sovereign immunity . . .”); cf. Lee M. Caplan, *State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory*, 97 AM. J. INT’L L. 741, 760–61 (2003) (“Evidence suggests that even the People’s Republic of China, a staunch supporter of absolute immunity, may be moderating its position.”).

<sup>81</sup> MUSHKAT, *supra* note 4, at 66.

<sup>82</sup> See *infra* notes 201, 204–05 and accompanying text.

States and Their Property (the “UN Convention”).<sup>83</sup> The UN Convention codified the restrictive doctrine of sovereign immunity,<sup>84</sup> which China ostensibly opposed.<sup>85</sup> What is more startling is that, apart from the regular business-transaction exception, this Convention provides several additional exceptions to sovereign immunity. These exceptions include an exception for arbitral agreements,<sup>86</sup> which, as Part II.A shows, is squarely on point for the *Congo* cases.<sup>87</sup> Thus, by the stroke of a pen, China put itself on the cutting edge of restricting sovereign immunity. This signing was even more out-of-character for China, considering the small number of countries that signed the UN Convention.<sup>88</sup> As of October 13, 2012, there were only thirty-one signatories and accessions to the UN Convention.<sup>89</sup> A mere eight out of these thirty-one countries have ratified it,<sup>90</sup> and the UN Convention requires deposits of instruments of ratification by thirty nations to enter into force.<sup>91</sup> It will take years, perhaps even decades, for this Convention to come into force.<sup>92</sup> It will probably take even longer for China, one of the most determined absolutist holdouts, to ratify this Convention. Nonetheless, under the Vienna Convention of the Law of Treaties, China has an obligation “to refrain from acts which would defeat the object and purpose” of the UN Convention, as it has “signed the treaty,” but has not “made its intention clear not to become a party to the treaty.”<sup>93</sup>

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<sup>83</sup> 1 UNITED NATIONS, *United Nations Convention on Jurisdictional Immunities of States and Their Property*, in MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL: STATUS AS AT 1 APRIL 2009, at 142, U.N. Doc. ST/LEG/SER.E/26, U.N. Sales No. E.09.V.3 (2009). [hereinafter *Status of United Nations Convention on Jurisdictional Immunities of States and Their Property*].

<sup>84</sup> United Nations Convention on Jurisdictional Immunities of States and Their Property, G.A. Res. 59/38 U.N. Doc. A/RES/59/38 arts. 10–17 (Dec. 2, 2004) (not yet in force).

<sup>85</sup> See Qi, *supra* note 46, at 307 (noting that while China has historically supported absolute immunity, its signature on the Convention on Jurisdictional Immunities of States and Their Property may indicate it is shifting toward the restrictive approach).

<sup>86</sup> G.A. Res. 59/38, *supra* note 84, art. 17.

<sup>87</sup> See *infra* notes 114–21 and accompanying text.

<sup>88</sup> See *Status of United Nations Convention on Jurisdictional Immunities of States and Their Property*, *supra* note 83, at 142.

<sup>89</sup> U.N. Treaty Collection, Status: United Nations Convention on Jurisdictional Immunities of States and Their Property, [http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg\\_no=III-13&chapter=3&lang=en](http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=III-13&chapter=3&lang=en) (last visited Oct. 13, 2012).

<sup>90</sup> *Id.*

<sup>91</sup> G.A. Res. 59/38, *supra* note 84, art. 30.

<sup>92</sup> See *Status of United Nations Convention on Jurisdictional Immunities of States and Their Property*, *supra* note 83, at 142.

<sup>93</sup> Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331.

### E. *The Rise of the Vultures*

Outside Hong Kong and Mainland China, a new challenge to sovereign immunity emerged in the early 1980s in the form of vulture funds. Vulture funds are a novel and controversial species of professional plaintiff that pursues claims against foreign sovereigns.<sup>94</sup> One example of this new species in the legal fauna later brought the *Congo* cases to Hong Kong.<sup>95</sup> Vulture funds tend to describe themselves in euphemistic and innocent-sounding terms, such as investors “in problematic emerging market[s]”<sup>96</sup> who specialize in “uncovering, investigating, and managing alternate investment opportunities . . . .”<sup>97</sup> Politicians such as Gordon Brown have described the actions of vulture funds in much stronger language: “We particularly condemn the perversity where Vulture Funds purchase debt at a reduced price and make a profit from suing the debtor country to recover the full amount owed—a morally outrageous outcome.”<sup>98</sup> In neutral terms, a vulture fund typically buys defaulted sovereign debt owed by developing countries at a deep discount on the secondary market, and then sues the sovereign debtor, seeking recovery of the face value of the debt plus interest.<sup>99</sup>

Rich New York investors making a profit by suing poverty-ridden, debt-laden developing nations may seem morally questionable.<sup>100</sup> Beyond these ethical issues, vulture funds also cause financial problems. By disrupting international debt restructuring or debt relief efforts, vulture funds often inflict

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<sup>94</sup> See Oliver Jones, *Let the Mainland Speak: A Positivist Take on the Congo Case*, 41 H.K. L.J. 177, 178 (2011) (“The morality of DDFs is complex and controversial.”). See generally Jonathan I. Blackman & Rahul Mukhi, *The Evolution of Modern Sovereign Debt Litigation: Vultures, Alter Egos, and Other Legal Fauna*, 73 LAW & CONTEMP. PROBS. 47 (2010) (laying out the history of vulture funds and their litigation strategies in phases).

<sup>95</sup> See Dem. Rep. Congo v. FG Hemisphere Assocs. (*Congo III*), [2011] Legal Reference System para. 18 (C.F.A.) (H.K.).

<sup>96</sup> FG Hemisphere Assoc., LLC, *FG Hemisphere*, FGHem (Oct. 15, 2006), <http://web.archive.org/web/20070405091536/http://www.fghem.com/> (accessed by searching for FGHem.com in the Internet Archive index).

<sup>97</sup> FG Hemisphere Assoc., LLC, *The Company*, FGHem (Oct. 9, 2007), <http://web.archive.org/web/20071009114226/http://www.fghem.com/> (accessed by searching FGHem.com in the Internet Archive index).

<sup>98</sup> Blackman & Mukhi, *supra* note 94, at 53 n.30 (quoting Gordon Brown, then Chancellor of the Exchequer of the United Kingdom).

<sup>99</sup> See *id.* at 49; see also Jones, *supra* note 94, at 178; Christopher C. Wheeler & Amir Attaran, *Declawing The Vulture Funds: Rehabilitation of a Comity Defense in Sovereign Debt Litigation*, 39 STAN. J. INT'L L. 253, 254 (2003).

<sup>100</sup> See Blackman & Mukhi, *supra* note 94, at 53 (“Vulture funds tend to be secretive about their investors, which is not surprising, given the political distastefulness of seeking to reap profits at the expense of indebted, and typically very poor, countries and their citizenry.”).

real damage on both the impoverished sovereign debtor and other more conventional creditors, which sometimes include taxpayers in donor countries in the West.<sup>101</sup> Given the possibility of the prospect of a judicial decision awarding the full value of sovereign debt, profit-seeking vulture funds often refuse to agree to restructuring schemes.<sup>102</sup> If the vulture fund becomes the last creditor standing, it has the entire debtor country to itself, and could indirectly profit from all the concessions, donations, and investments made to the debtor by all the other creditors, donors, and investors.<sup>103</sup> Such a monopoly on debt collection could discourage other more generous and benevolent creditors from going along with debt restructuring, drives up the interest rate for the debtor to borrow in the future, and generally hinders the economic development of the indebted country.<sup>104</sup>

As professional plaintiffs of sovereign debtors, vulture funds are committed advocates for the restrictive doctrine of sovereign immunity, and are constantly seeking to expand the scope of the exceptions to sovereign immunity.<sup>105</sup> Partly because of the vulture litigations over the past decades in creditor-friendly jurisdictions, which included the United Kingdom,<sup>106</sup> the doctrine of sovereign immunity in such jurisdictions has been gradually eroding.<sup>107</sup> This erosion makes it easier for non-cooperative creditors, such as vulture funds, to succeed in litigation against sovereign defendants, thus discouraging debt restructuring and undermining the finances and economic development of poor, indebted countries.<sup>108</sup>

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<sup>101</sup> See Elizabeth Broomfield, Note, *Subduing the Vultures: Assessing Government Caps on Recovery in Sovereign Debt Litigation*, 2010 COLUM. BUS. L. REV. 473, 475–77; see also GREG PALAST, VULTURES' PICNIC 375–77 (2011) (detailing the vulture fund Hamsah's obstructive role in an international effort to relieve Liberia's debt, and the harms Hamsah caused to all parties involved); Wheeler & Attaran, *supra* note 99, at 259–66 (discussing the problem of vulture fund holdouts that refuse to participate in sovereign debt restructuring).

<sup>102</sup> Broomfield, *supra* note 101, at 475.

<sup>103</sup> See *id.* at 491–94 (discussing harms of the holdout problem in the context of the World Bank's Heavily Indebted Poor Countries (HIPC) Initiative); see also PALAST, *supra* note 101, at 376–77 (analyzing Hamsah's role in Liberia's debt restructuring).

<sup>104</sup> Broomfield, *supra* note 101, at 475–77.

<sup>105</sup> See *id.* at 479–94 (laying out the gradual erosion of sovereign immunity since 1976); see also Ryan E. Avery, Note, *Out of the Desert and to the Oasis: Legislation on Predatory Debt Investing*, 18 U. MIAMI INT'L & COMP. L. REV. 267, 283–85 (2011) (describing the erosion of foreign sovereign immunity in the United States as a result of vulture litigations).

<sup>106</sup> Broomfield, *supra* note 101, at 486.

<sup>107</sup> See *id.* at 479–83.

<sup>108</sup> *Id.* at 494.

## II. SHIFT TO ABSOLUTE SOVEREIGN IMMUNITY AFTER THE *CONGO III* CASE

This Part provides further background information specifically on the *Congo III* case in Hong Kong. The *Congo* cases embodied every theme covered so far in this Comment. The plaintiff was a vulture fund.<sup>109</sup> The defendant was a foreign sovereign who claimed immunity.<sup>110</sup> The intervener represented the Chinese national government in Beijing.<sup>111</sup> The core question of law, at least for the purpose of this Comment, was whether Hong Kong should follow restrictive immunity or absolute immunity.<sup>112</sup> The outcome was that Hong Kong adopted absolute immunity under pressure from Beijing.<sup>113</sup>

### A. *Facts of the Congo Cases*

The facts of the *Congo* cases are straightforward. An American vulture fund named FG Hemisphere Associates sued the Democratic Republic of the Congo in Hong Kong to enforce two arbitral awards.<sup>114</sup> FG Hemisphere bought the arbitral awards from Energoinvest DD, a Yugoslavian company that built hydroelectric projects for the DRC back in the 1980s.<sup>115</sup> Energoinvest never received payment for those construction projects.<sup>116</sup> In 2003, it won two awards against the DRC in the arbitration courts of the International Chamber of Commerce.<sup>117</sup> After Energoinvest sold these awards to FG Hemisphere in 2004, the American vulture fund went after DRC assets around the world, and sought enforcement of the arbitral awards against the DRC in several countries.<sup>118</sup>

The DRC happened to have deals with the state-owned China Railway Group Ltd. and its Hong Kong subsidiaries.<sup>119</sup> Subject to approval by the Chinese government, and under a series of cooperation agreements with the Chinese government and a consortium of state-owned Chinese enterprises

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<sup>109</sup> Dem. Rep. Congo v. FG Hemisphere Assocs. (*Congo III*), [2011] Legal Reference System para. 18.

<sup>110</sup> FG Hemisphere Assocs. v. Dem. Rep. Congo (*Congo I*), [2009] 1 H.K.L.R.D. 410, paras. 7, 14 (C.F.I.) (H.K.).

<sup>111</sup> *Id.* paras. 9, 10, 14.

<sup>112</sup> *Congo III*, Legal Reference System para. 2.

<sup>113</sup> See Interpretation of Article 13 *supra* note 9.

<sup>114</sup> *Congo III*, Legal Reference System para. 13; *Congo I*, 1 H.K.L.R.D paras. 1–4, 16.

<sup>115</sup> *Congo III*, Legal Reference System paras. 7, 14.

<sup>116</sup> *Id.* para. 7.

<sup>117</sup> *Id.* paras. 7–8, 13.

<sup>118</sup> *Id.* paras. 14–15.

<sup>119</sup> See *Congo I*, 1 H.K.L.R.D paras. 17–18.

including China Railway, the DRC would receive entry fees,<sup>120</sup> among other things,<sup>121</sup> for granting the Chinese the right to exploit the DRC's rich mineral resources.<sup>122</sup>

### B. Procedural History

In 2008, FG Hemisphere went to Hong Kong to enforce the arbitral awards against the DRC by attempting to garnish part of the entry fees that China Railway would pay through its subsidiaries in Hong Kong to the DRC.<sup>123</sup> The case went through the court system of Hong Kong, and eventually found its way to the national legislature in Beijing.<sup>124</sup>

The Court of First Instance of the High Court of Hong Kong ruled in favor of the DRC.<sup>125</sup> FG Hemisphere appealed to a panel of three judges in the Court of Appeal of the High Court. The Court split 2-1 in favor of FG Hemisphere, and reversed the Court of First Instance's decision.<sup>126</sup> The DRC then appealed to the Court of Final Appeal.<sup>127</sup> In a provisional opinion, three of the five justices on the panel held that the DRC was absolutely immune, and sought interpretation of the Basic Law from the Standing Committee of the National People's Congress in Beijing.<sup>128</sup> The two other justices dissented.<sup>129</sup>

The Standing Committee handed down a brief opinion affirming the provisional view of the majority in the Court of Final Appeal.<sup>130</sup> Soon

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<sup>120</sup> *Id.* paras. 21, 23–24.

<sup>121</sup> The compensation to the DRC included mainly infrastructure comprising “railroads, asphalted and non-asphalted roads, urban networks, airports, hospitals, hydroelectric and electric stations, buildings, houses, health centers and universities.” *Id.* para. 88.

<sup>122</sup> *Congo III*, Legal Reference System paras. 16–17; *Congo I*, 1 H.K.L.R.D. paras. 4, 17–29. See generally Suzanne Siu, Note, *The Sovereign-Commercial Hybrid: Chinese Minerals for Infrastructure Financing in the Democratic Republic of the Congo*, 48 COLUM. J. TRANSNAT'L L. 599, 603 (2010) (describing the Sino-Congolese collaboration as “a sovereign-commercial hybrid that draws . . . upon the doctrines of: (1) public international law; (2) international commercial law; and (3) public regulatory and administrative law,” and pointing out that the collaboration is “neither an investment treaty based on reciprocal inter-state promises, nor an investment contract involving a genuinely private investor.”).

<sup>123</sup> *Congo III*, Legal Reference System para. 19; *Congo I*, 1 H.K.L.R.D. paras. 2–4.

<sup>124</sup> See *infra* notes 125–31 and accompanying text.

<sup>125</sup> *Congo I*, 1 H.K.L.R.D. para. 148.

<sup>126</sup> *FG Hemisphere Assocs. v. Dem. Rep. Congo (Congo II)*, [2010] 2 H.K.L.R.D. 66, paras. 181, 241–45, 282 (C.A.) (H.K.).

<sup>127</sup> *Congo III*, Legal Reference System para. 32.

<sup>128</sup> *Id.* para. 415.

<sup>129</sup> *Id.* paras. 1–180 (Bokhary, J., dissenting); *id.* paras. 417–532 (Mortimer J., dissenting).

<sup>130</sup> Compare *id.* paras. 325–27, 331, 336, 407 (noting that governance of foreign affairs, including the setting of rules for immunity, is reserved by the Basic Law to Central People's Government, and certifying

afterwards, the Court of Final Appeal in Hong Kong issued its final judgment, dismissing the case on grounds of absolute sovereign immunity.<sup>131</sup>

### C. *Beijing's Intervention in the Congo Cases*

Beijing kept an eye on the *Congo* cases from the very beginning, and voiced its objection to the lawsuit.<sup>132</sup> Shortly after the trial began in the Court of First Instance, the executive branch of the Hong Kong government became aware that the DRC had raised the issue of absolute sovereign immunity.<sup>133</sup> Soon, the Secretary for Justice of Hong Kong intervened,<sup>134</sup> and persuaded the trial court to enter into evidence a letter from the Ministry of Foreign Affairs,<sup>135</sup> which stated China's adherence to the absolute doctrine of sovereign immunity in foreign affairs.<sup>136</sup>

When the *Congo I* case was appealed to the Court of Appeal, the Ministry of Foreign Affairs sent a second letter to the Hong Kong government, which was again brought into court by the Secretary for Justice as intervener.<sup>137</sup> Likewise, when the Court of Final Appeal heard the *Congo III* case, the Ministry of Foreign Affairs sent a third letter.<sup>138</sup> Both of these latter letters restated China's foreign policy of adhering to the absolute theory of sovereign immunity.<sup>139</sup> But each new letter also purports to explain a more specific issue, including the emergence of vulture funds,<sup>140</sup> and China's signature to the UN Convention.<sup>141</sup>

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questions for review by the Standing Committee of the National People's Congress), *with* Interpretation of Article 13, *supra* note 9 (establishing that governance of foreign affairs, including setting state immunity rules, is the province of the Central People's Government.).

<sup>131</sup> Dem. Rep. Congo v. FG Hemisphere Assocs., [2011] Legal Reference System 1213 para. 8 (C.F.A.) (H.K.) (final judgment).

<sup>132</sup> See FG Hemisphere Assocs. v. Dem. Rep. Congo (*Congo I*), [2009] 1 H.K.L.R.D. 410, paras. 13–14 (C.F.I.) (H.K.); see also *Congo III*, Legal Reference System para. 211 (“The Office of the Commissioner of the Ministry of Foreign Affairs in the Hong Kong Special Administrative Region has also stated clearly . . . that, regarding the issue of state immunity, the consistent position of China is that a state and its property shall, in foreign courts, enjoy absolute immunity, including absolute immunity from jurisdiction and from execution.”).

<sup>133</sup> See *Congo I*, 1 H.K.L.R.D. 410 para. 9.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* paras. 15, 31.

<sup>136</sup> *Id.* para. 14.

<sup>137</sup> FG Hemisphere Assocs. v. Dem. Rep. Congo (*Congo II*), [2010] 2 H.K.L.R.D. 66, para. 91 (C.A.) (H.K.).

<sup>138</sup> *Congo III*, [2011] Legal Reference System para. 211.

<sup>139</sup> See *id.*; *Congo II*, 2 H.K.L.R.D. 66 para. 91.

<sup>140</sup> *Congo III*, Legal Reference System para. 211 (“Supporting the economic development of developing states has also been one of the foreign policies of China. In recent years, certain foreign companies have

Such active participation by Beijing is unprecedented in Hong Kong's judicial history.<sup>142</sup> Beijing seemed particularly determined to influence the outcome of the *Congo* case, and went to extreme lengths to impose its absolute doctrine of sovereign immunity on Hong Kong.<sup>143</sup>

#### *D. Judicial Opinions and the Outcome of the Congo Case*

At the beginning of the judgment of the Court of Final Appeal, Judge Bokhary wrote, "The core question of law in this case is about the extent of the [sovereign] immunity from suit . . . Is it absolute immunity or is it restrictive immunity . . . ?"<sup>144</sup> Given the statutory vacuum on the subject of sovereign immunity, judges had to find guidance in the common law, and the Basic Law of Hong Kong,<sup>145</sup> which serves as Hong Kong's de facto constitution.<sup>146</sup> The common law of Hong Kong, which "shall be maintained" under the Basic Law,<sup>147</sup> had incorporated the restrictive rule long ago.<sup>148</sup> But the Basic Law vests the power to conduct foreign affairs in the national government in Beijing,<sup>149</sup> and specifically prohibits Hong Kong courts from adjudicating "acts of state such as . . . foreign affairs."<sup>150</sup> As shown previously in Part I.D, China is widely viewed as one of the last stubborn absolutist holdouts.<sup>151</sup> The three letters that the Secretary for Justice presented to the courts have also made the Ministry of Foreign Affairs' preference for absolute immunity

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acquired the debts of impoverished African states and profited from claiming those debts through judicial proceedings, thus adding to the financial burden of these impoverished states and hampering the efforts of the international community in assisting these states. Such practice is inequitable and some states have even enacted legislation to impose restrictions on the same. If the Hong Kong Special Administrative Region were to adopt a regime of state immunity that is not consistent with that of the state and thereby facilitate the pursuance of the above-mentioned practice, it would be contradictory to the above-mentioned foreign policy of China and tarnish the international image of China.").

<sup>141</sup> See *infra* note 212 and accompanying text.

<sup>142</sup> See Eric T.M. Cheung, *Undermining Our Judicial Independence and Autonomy*, 41 H.K. L.J. 411, 411 (2011) (stating that the Court of Final Appeal "held for the first time that it must first refer four questions . . . to the Standing Committee of the National People's Congress . . . before [the Court of Final Appeal] is to make any final decision on the applicable principle of state immunity.").

<sup>143</sup> See *id.* at 412 (describing the increasingly insistent letters from the Chinese Government to the courts of Hong Kong).

<sup>144</sup> *Congo III*, Legal Reference System para. 2.

<sup>145</sup> See *id.* paras. 227–31, 318.

<sup>146</sup> MUSHKAT, *supra* note 4, at 145 (1997); see also DOBINSON & ROEBUCK, *supra* note 1, at 23 ("The Basic Law is sometimes referred to as Hong Kong's constitution.").

<sup>147</sup> XIANGGANG JIBEN FA art. 8 (H.K.).

<sup>148</sup> See *supra* notes 40–41 and accompanying text.

<sup>149</sup> XIANGGANG JIBEN FA art. 13 (H.K.).

<sup>150</sup> XIANGGANG JIBEN FA art. 19 (H.K.).

<sup>151</sup> See *supra* notes 78–81 and accompanying text.

abundantly clear.<sup>152</sup> Hong Kong's common law seems incompatible with Beijing's foreign affairs. Therefore, "the core question of law" in the *Congo III* case is whether Hong Kong should follow the restrictive approach that its common law prescribes, or the absolute approach that Beijing's foreign policy dictates.<sup>153</sup>

To resolve this core question in the *Congo* cases, nine judges in three courts (not counting the Standing Committee) wrote seven separate judicial opinions,<sup>154</sup> many of which are extremely thorough. Obviously, any attempt at summarizing the hundreds of pages of opinions within the limited space of this Comment would inevitably run a tremendous risk of oversimplification. Therefore, the summary below focuses only on points relevant to the core question identified above, and has to forego discussions on many weighty issues—the most prominent being Hong Kong's "threatened constitutional crisis" caused by the *Congo III* case—that are less relevant for our purposes.<sup>155</sup>

On sovereign immunity, Judge Reyes of the Court of First Instance started his analysis with the remark that "[i]t is plain that immediately prior to 1 July 1997 Hong Kong followed the restrictive approach," and he buttressed that with pre-SIA case law, including *The Philippine Admiralty* and *I Congreso del Partido*.<sup>156</sup> He then turned to the question of sovereign immunity after 1997, and enumerated a number of theories put forth by counsel for both sides of the *Congo I* case.<sup>157</sup> Notably, a "Theory 1" suggested that "as a result of the SIA ceasing to have effect, the common law as it had developed prior to the extension of the SIA to Hong Kong was revived and continues to apply."<sup>158</sup> Judge Reyes reluctantly expressed his "provisional view" that this theory, out of all four, gives "the more correct and straightforward analysis."<sup>159</sup>

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<sup>152</sup> See Dem. Rep. Congo v. FG Hemisphere Assocs. (*Congo III*), [2011] Legal Reference System para. 211 (C.F.A.) (H.K.); FG Hemisphere Assocs. v. Dem. Rep. Congo (*Congo II*), [2010] 2 H.K.L.R.D. 66, para. 91 (C.A.) (H.K.); FG Hemisphere Assocs. v. Dem. Rep. Congo (*Congo I*), [2009] 1 H.K.L.R.D. 410, para. 31 (C.F.I.) (H.K.).

<sup>153</sup> *Congo III*, Legal Reference System paras. 2, 211.

<sup>154</sup> See *Congo III*, Legal Reference System; *Congo II*, 2 H.K.L.R.D. 66; *Congo I*, 1 H.K.L.R.D. 410.

<sup>155</sup> *Congo III*, Legal Reference System para. 84.

<sup>156</sup> *Congo I*, 1 H.K.L.R.D. paras. 37–41.

<sup>157</sup> *Id.* paras. 42–82.

<sup>158</sup> *Id.* para. 43.

<sup>159</sup> *Id.* para. 71.

The majority in the Court of Appeal, Judge Stock and Judge Yuen, shared Reyes' preference for Theory 1.<sup>160</sup> The Court held that the common law of Hong Kong had incorporated the restrictive rule of sovereign immunity before it was given statutory effect by the SIA, and that once the SIA ceased to have effect, the common law was resuscitated.<sup>161</sup> Judge Yeung dissented. He argued that courts in Hong Kong must follow Mainland China's foreign policy of adhering to the absolute doctrine, and he based this opinion on articles 13 and 19 of the Basic Law,<sup>162</sup> which allocate foreign policy responsibilities to the national government in Beijing.<sup>163</sup>

Two dissenting justices in the Court of Final Appeal agreed with the majority opinions in the courts below that common law restrictive immunity was revived after the SIA lapsed in 1997.<sup>164</sup> Justice Bokhary wrote, "When [the SIA] ceased to have effect in Hong Kong on 1 July 1997, [the restrictive] rule of Hong Kong common law once again stood on its own feet."<sup>165</sup> Justice Mortimer agreed: "When the [SIA] ceased to apply on 1 July 1997 the common law became applicable as it had been before 1979."<sup>166</sup>

The majority in the Court of Final Appeal, however, gave in to pressure from Beijing. After quoting extensively from all three letters from the Ministry of Foreign Affairs,<sup>167</sup> and repeatedly quoting them afterward as authority and source of law,<sup>168</sup> the majority concluded that "as a matter of legal and constitutional principle" it was not open to courts in Hong Kong to consider the scope of sovereign immunity, and that Hong Kong courts must give total deference to Beijing's absolute approach.<sup>169</sup> "[I]t is not for the Court to express its opinion about the appropriateness of the [national government's] policy of absolute as opposed to restrictive immunity," wrote the majority.<sup>170</sup> More tellingly, the Court suggested in a seemingly unprincipled fashion that Beijing is free to "tailor its response to a dispute involving a foreign State on a case-

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<sup>160</sup> See *FG Hemisphere Assocs. v. Dem. Rep. Congo (Congo II)*, [2010] 2 H.K.L.R.D. 66, para. 47 (C.A.) (H.K.).

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* para. 250 (Yeung, J., dissenting).

<sup>163</sup> *Id.* para. 228.

<sup>164</sup> Compare *Dem. Rep. Congo v. FG Hemisphere Assocs. (Congo III)*, [2011] Legal Reference System para. 138 (C.F.A.) (H.K.) (Bokhary, J., dissenting) with *id.* paras. 493, 523 (Mortimer, J., dissenting).

<sup>165</sup> *Id.* para. 138 (Bokhary, J., dissenting).

<sup>166</sup> *Id.* paras. 496, 523 (Mortimer, J., dissenting).

<sup>167</sup> *Id.* paras. 197, 202, 211 (majority opinion).

<sup>168</sup> *Id.* paras. 224, 259–61, 267, 280, 363.

<sup>169</sup> *Id.* para. 226.

<sup>170</sup> *Id.* para. 281.

by-case or treaty-by-treaty basis.”<sup>171</sup> Because of this Court of Final Appeal’s majority decision in the *Congo III* case, which the Standing Committee in Beijing later affirmed,<sup>172</sup> Hong Kong reverted to absolute sovereign immunity.

### III. WHY THE SHIFT TO ABSOLUTE IMMUNITY WAS WRONG

The most significant impact of the *Congo III* case on Hong Kong, aside from any constitutional issue, is Hong Kong’s shift from its common law restrictive doctrine of sovereign immunity to China’s absolute doctrine. Hong Kong’s shift will have profound negative implications on China as well. This Part argues the shift to absolute immunity was wrong, because it is (A) regressive for Hong Kong, (B) untenable for China, and (C) detrimental to China’s long-term interests.

#### A. *The Regression for Hong Kong*

First, the shift to absolute sovereign immunity was wrong because it represents a regression for Hong Kong. As Part I.B of this Comment has shown, and as all the judges in the *Congo* cases agreed, Hong Kong followed the restrictive approach to sovereign immunity before 1997.<sup>173</sup> The history of restrictive sovereign immunity in Hong Kong can be traced back to as early as 1956.<sup>174</sup> It was a case appealed from Hong Kong that introduced the restrictive rule to English law in 1975,<sup>175</sup> and the restrictive rule was endorsed by the highest authorities both in case law and by statute.<sup>176</sup> Hong Kong was arguably a pioneer in the development of the restrictive doctrine of sovereign immunity among common law jurisdictions.<sup>177</sup>

#### 1. *Regression Violates Customary International Law.*

Therefore, there can be no doubt that the recent shift to absolute sovereign immunity caused by the *Congo* cases was regressive. This regression is more

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<sup>171</sup> *Id.* para. 282.

<sup>172</sup> Interpretation of Article 13, *supra* note 9.

<sup>173</sup> Compare *Dem. Rep. Congo v. FG Hemisphere Assocs. (Congo III)*, [2011] Legal Reference System paras. 62 (Bokhary, J., dissenting), and *id.* para. 222 (majority opinion), and *id.* para. 502 (Mortimer, J., dissenting), with *FG Hemisphere Assocs. v. Dem. Rep. Congo (Congo II)*, [2010] 2 H.K.L.R.D. 66, paras. 45, 78 (C.A.) (H.K.), and *id.* para. 246 (Yuen, J., concurring), and *FG Hemisphere Assocs. v. Dem. Rep. Congo (Congo I)*, [2009] 1 H.K.L.R.D. 410, para. 37 (C.F.I.).

<sup>174</sup> See *supra* note 39 and accompanying text.

<sup>175</sup> See *supra* note 40 and accompanying text.

<sup>176</sup> See *supra* notes 40–41 and accompanying text.

<sup>177</sup> See *supra* note 17 and accompanying text.

than just a description of the fact that Hong Kong reverted to an absolutist position that it had abandoned long ago. A regression is of particular significance in customary international law, which does not permit a state to unilaterally withdraw from an established rule to which it once agreed.<sup>178</sup>

But is restrictive sovereign immunity such an established rule of customary international law from which no state can unilaterally withdraw? The *Congo III* court refused to rule on this question.<sup>179</sup> What many judges in the *Congo* cases, including both the majority and the minority in the Court of Final Appeal, share in common is an explicit, total disregard for customary international law.<sup>180</sup> Commentators have already criticized the *Congo III* court for ignoring international law.<sup>181</sup> Little more needs to be said here other than that international law should not be sidelined because sovereign immunity “is an undisputed principle of customary international law.”<sup>182</sup> Regardless of the attitudes of Hong Kong courts, there are some strong indications that the restrictive rule has been crystallizing into a rule of international law. To find such indications, one can start by looking no further than the very line of cases that helped establish the restrictive rule in Hong Kong’s common law.

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<sup>178</sup> See Int’l Law Ass’n, Comm. on the Formation of Customary (Gen.) Int’l Law, *Statement of Principles Applicable to the Formation of General Customary International Law* 27 (2000) (“There is fairly widespread agreement that, even if there is a persistent objector rule in international law, it applies only when the customary rule is in the process of emerging. It does not, therefore, benefit States which came into existence only after the rule matured, or which became involved in the activity in question only at a later stage. Still less can it be invoked by those who existed at the time and were already engaged in the activity which is the subject of the rule, but failed to object at that stage. In other words, there is no ‘subsequent objector’ rule.”).

<sup>179</sup> Dem. Rep. Congo v. FG Hemisphere Assocs. (*Congo III*), [2011] Legal Reference System para. 410–11 (C.F.A.) (H.K.).

<sup>180</sup> For example, the majority in *Congo III* decided to ignore international law. *Congo III*, Legal Reference System para. 411 (“[W]e do not consider it necessary for us to enter upon [the question of customary international law] given that we have provisionally reached the conclusion that, as a matter of municipal law and constitutional principle, the doctrine of state immunity applicable in [Hong Kong] is one of absolute immunity.”). The dissenting Judge Bokhary made the same decision. *Id.* para. 121 (“[I]t is unnecessary for me to say whether I consider restrictive immunity to be a rule of customary international law. Nor is it necessary for me to decide whether persistent objection works.”).

<sup>181</sup> For example, Professor Carty speculated that the judges on the *Congo* case were so keen on building it up “into a constitutional confrontation along the lines of *The Common Law versus the Sovereignty of the PRC*” that customary international law was, intentionally or not, sidelined. Tony Carty, *Why Are Hong Kong Judges Keeping a Distance from International Law, and with What Consequences? Reflections on the CFA Decision in DRC v FG Hemisphere*, 41 H.K. L.J. 401, 408 (2011).

<sup>182</sup> RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES pt. 4 ch. 5, intro. note (1987); see also United Nations Convention on Jurisdictional Immunities of States and Their Property, *supra* note 84, at 1 (“[T]he jurisdictional immunities of States and their property are generally accepted as a principle of customary international law”).

## 2. *Restrictive Immunity is Becoming a Rule of Customary International Law*

In 1977, following Hong Kong's lead in *The Philippine Admiral*, the Court of Appeal in England introduced restrictive sovereign immunity into English law in *Trendtex Trading*,<sup>183</sup> a case that the House of Lords would later rely on as persuasive authority in *I Congreso del Partido*.<sup>184</sup> In *Trendtex Trading*, Lord Denning refused to wait for the House of Lords to act, because "we [the Court of Appeal] are not considering here the rules of English law on which the House has the final say. We are considering the rules of international law."<sup>185</sup> Furthermore, Lord Denning intended his endorsement of the restrictive approach to contribute to the formation of a new rule of customary international law, and his Lordship articulated the reasoning in his characteristically refreshing and poetic style:

I would ask: is there not here sufficient evidence to show that the rule of international law has changed? What more is needed? Are we to wait until every other country save England recognises the change? Ought we not to act now? Whenever a change is made, someone some time has to make the first move. One country alone may start the process. Others may follow. At first a trickle, then a stream, last a flood. England should not be left behind on the bank. ". . . We must take the current when it serves, or lose our ventures."<sup>186</sup>

Thus, in as early as January 1977, when *Trendtex Trading* was decided, the restrictive rule of sovereign immunity was already so far into the process of crystallization that English judges were impatient enough to risk reversal by the House of Lords, lest "England be left behind on the bank."<sup>187</sup>

Then in 1981, Lord Wilberforce, too, intended his decision in *I Congreso del Partido* "to form part of the corpus of international law."<sup>188</sup> According to his Lordship's reading of *Trendtex Trading*, that precedent "establishes that, as a matter of contemporary international law, the 'restrictive' theory should be

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<sup>183</sup> *Trendtex Trading Corp. v. Cent. Bank of Nigeria*, [1977] Q.B. 529 at 546 (Eng.).

<sup>184</sup> *Playa Larga (Owners of Cargo Lately Laden on Board) v. I Congreso del Partido (Owners)*, [1983] 1 A.C. 244 (H.L.) [261] (appeal taken from Eng.).

<sup>185</sup> *Trendtex Trading Corp.*, Q.B. at 557

<sup>186</sup> *Id.* at 556 (quoting WILLIAM SHAKESPEARE, JULIUS CAESAR, act 4, sc. 3).

<sup>187</sup> *Id.*

<sup>188</sup> *I Congreso del Partido*, 1 A.C. at 257.

generally applied.”<sup>189</sup> He found it “clear that international law, in a general way, in 1978, gave support to a ‘restrictive’ theory of state immunity . . . .”<sup>190</sup>

Aside from case law, many commentators have long recognized restrictive sovereign immunity as a rule of international law.<sup>191</sup> For example, after reviewing the works of many commentators, a report to the International Law Commission in 1982 concluded, “The restrictive trend is so overwhelming in the opinions of contemporary writers that it is no longer possible to find any trace of an ‘absolute’ doctrine among living authorities on international law.”<sup>192</sup> More recently, Lady Fox wrote in 2008,

[T]he overwhelming majority of States now supports a restrictive doctrine. . . . [I]t is rare in the last decade to find a case where a national court confronted with a claim relating to a commercial transaction involving a State trading entity has rejected jurisdiction on the basis of an absolute rule of immunity. With the adoption of the UN Convention one may accept that *a rule of restrictive immunity now applies*.<sup>193</sup>

Because the restrictive rule of sovereign immunity is forming, or perhaps has already formed, into a rule of customary international law, a regression to the absolute rule is not permissible under international law in Hong Kong, a jurisdiction that, for many years, followed the new restrictive approach.<sup>194</sup> Assuming China is responsible for this regression through its heavy-handed intervention in the *Congo* cases, and given that it is a signatory to the UN

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<sup>189</sup> *Id.* at 261.

<sup>190</sup> *Id.* at 260.

<sup>191</sup> *See, e.g.*, Special Rapporteur on Jurisdictional Immunities of States and Their Property, *Fourth Rep. on Jurisdictional Immunities of States and Their Property*, Int’l Law Comm’n, ¶¶ 117–19, U.N. Doc. A/CN.4/357, (Mar. 31, 1982) (by Sompong Sucharitkul) (citing a large number of commentators from the 1880s till the 1970s from a variety of countries who support the restrictive doctrine); Diane Howard, *Achieving a Level Playing Field in Public-Private Partnerships: Can Sovereign Immunity Upset the Balance?*, 73 J. AIR L. & COM. 723, 756 (2008) (“It is safe to conclude that the restrictive theory of state immunity has achieved the status of customary international law, for it is followed by a majority of the international community.”); Qi, *supra* note 46, at 331 n.78 (“It could be argued that the restrictive approach is thriving as a promising candidate for the status of a custom, and the adoption of the 2004 UN Convention is a definite boost to this approach.”). *But see, e.g.*, BROWNLIE, *supra* note 79, at 325–26 (“It is far from easy to state the current legal position in terms of customary or general international law. Recent writers emphasise that there is a *trend* in the practice of states towards the restrictive doctrine of immunity but avoid firm and precise prescriptions as to the present state of the law . . . . This divergence of views . . . is usually ignored in the academic sources.”).

<sup>192</sup> *Fourth Rep. on Jurisdictional Immunities of States and Their Property*, *supra* note 191 at 228.

<sup>193</sup> HAZEL FOX, *THE LAW OF STATE IMMUNITY* 412 (2d ed. 2008) (emphasis added).

<sup>194</sup> *See supra* text accompanying notes 183–90.

Convention, China may have opened itself up to criticism that its action “defeat[s] the object and purpose”<sup>195</sup> of the UN Convention.<sup>196</sup>

### *B. A Pledge of Persistent Adherence to the Untenable*

The shift to absolute sovereign immunity was also wrong for China, because the absolutist position cannot be, and has not been, defended persistently.<sup>197</sup> Because the restrictive doctrine is crystallizing into a rule of customary international law around the world, the only way for China to opt out of it and hang on to the old absolute doctrine is to be a persistent objector to the emerging restrictive rule.<sup>198</sup> Therefore, by intervening in the *Congo* cases and imposing its absolutist foreign policy on the Hong Kong judiciary, Beijing has effectively reaffirmed a commitment to persistently adhere to the absolute doctrine. The emphasis is on the word “persistent,” and it entails a stringent requirement:<sup>199</sup> China must continuously and vocally lodge protests against the restrictive rule, and consistently affirm its unwavering support for the absolute rule.<sup>200</sup>

#### *1. China’s Record Does Not Show Enough Persistency*

China’s actual track record, however, fails to meet such a stringent requirement. Despite what the Ministry of Foreign Affairs adamantly claimed in its letters to the government of Hong Kong in the *Congo* cases, numerous objective indicia show that China’s record on adhering to the absolute doctrine of sovereign immunity has not been entirely consistent.

Some early precedents from the 1950s till the 1980s show that when political subdivisions of China or Chinese instrumentalities were sued abroad,

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<sup>195</sup> Vienna Convention on the Law of Treaties, *supra* note 93, art. 18.

<sup>196</sup> *Id.*

<sup>197</sup> See *infra* Part III.B.1.

<sup>198</sup> See Curtis A. Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 YALE L.J. 202, 233–41 (2010) (discussing the intellectual roots of the persistent objector doctrine); see also, e.g., BEDERMAN, *supra* note 13, at 22 (“States were obliged to protest loud and often if they wished to avoid being bound by a rule of emerging global custom. . . [T]he general assumption is that, for global custom, silence means acceptance of a new rule.”); BROWNLIE, *supra* note 79, at 11 (“Evidence of objection must be clear and there is probably a presumption of acceptance which is to be rebutted. . . . [This principle] is well recognized by international tribunals.”).

<sup>199</sup> See Curtis A. Bradley & Mitu Gulati, *Customary International Law and Withdrawal Rights in an Age of Treaties*, 21 DUKE J. COMP. & INT’L L. 1, 24 (2010) (“[A] nation must repeatedly and prominently object to the rule on the international stage.”).

<sup>200</sup> *Id.*

the Chinese sovereign defendants sometimes did not even raise the issue of immunity, and simply submitted to the jurisdiction of the foreign court.<sup>201</sup> After “[e]xamining China’s practice over the last three decades” before 1983, Mr. O’Brien’s observation was that “there ha[d] not been any consistent adherence to a strict or absolute doctrine of sovereign immunity.”<sup>202</sup> In the early 1980s, when the restrictive rule had already been incorporated into Hong Kong’s common law<sup>203</sup> and was forming into a rule of customary international law,<sup>204</sup> Chinese legal scholars, according to O’Brien, were still “uncertain as to the current status of the doctrine of sovereign immunity.”<sup>205</sup> The uncertainty and inconsistency of the Chinese position was so great that O’Brien predicted, “China is unlikely to insist on an absolute doctrine of sovereign immunity.”<sup>206</sup>

A more recent deviation from persistent objection occurred in 2005 when a Singaporean court dismissed a Chinese state-owned enterprise’s claim of sovereign immunity.<sup>207</sup> The interesting development in that case is that the Chinese government body responsible for the management of large state-owned corporations, the State-owned Assets Supervision and Administration Commission of the State Council, openly “support[ed] the Singaporean government and concerned parties to investigate” the Chinese defendant, and instructed the defendant state-owned Chinese company to “cooperate with [sic] investigators for the case.”<sup>208</sup> The apparent rationale for the Chinese government’s decision is that the case should be handled “in line with international practice.”<sup>209</sup>

Perhaps because of this kind of pragmatic legal flexibility and maneuverability that the Chinese government exhibits in individual cases, the authoritative legal encyclopedia *Halsbury’s Laws of Hong Kong* includes a note which reads, “[T]he major difference between the Chinese position and the doctrine of restrictive immunity is theoretical. In practice, the Chinese

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<sup>201</sup> See, e.g., *Fisheries Dep’t Kwangtung Provincial Gov’t v. Fishing Trawler “North Carolina”*, [1951] 35 H.K.L.R. 72 (H.C.); *China Ocean Shipping Co. v S. Austl.*, (1980) 145 CLR 172 (Austl.).

<sup>202</sup> Roderick O’Brien, *Sovereign Immunity and the People’s Republic of China*, 13 H.K. L.J. 202, 202–03 (1983).

<sup>203</sup> See *supra* text accompanying notes 39–40.

<sup>204</sup> See *supra* text accompanying notes 185–93.

<sup>205</sup> O’Brien, *supra* note 202, at 204.

<sup>206</sup> *Id.* at 207.

<sup>207</sup> See John Burton, *A Singapore Court Dismisses CAOHC’s Claim of Immunity*, FINANCIAL TIMES (May 10, 2005), <http://www.ft.com/intl/cms/s/0/6a14ae94-c17e-11d9-943f-00000e2511c8.html>.

<sup>208</sup> *CAO Debt Issues to be Solved in Line with Int’l Practice*, XINHUA NEWS AGENCY (Dec. 15, 2004), [http://news.xinhuanet.com/english/2004-12/15/content\\_2338923.htm](http://news.xinhuanet.com/english/2004-12/15/content_2338923.htm).

<sup>209</sup> *Id.*

pragmatic approach through its recognition of exceptions has reduced the practical difference to vanishing point.”<sup>210</sup> In a way, this encyclopedia entry may relieve some of the anxiety over Hong Kong’s adoption of Beijing’s absolutist position. But, on the other hand, it undermines, perhaps even directly contradicts, Beijing’s assertion of persistent adherence to the absolute doctrine of sovereign immunity.

In any event, the ultimate blow to any Chinese claim of persistent objection must be China’s signature to the UN Convention, which embraces the restrictive rule of sovereign immunity.<sup>211</sup> Not only was China among the first few nations to sign the UN Convention,<sup>212</sup> a representative of the Chinese government chaired the committee in the International Law Commission that drafted the UN Convention.<sup>213</sup> Perhaps the intimate Chinese involvement in the International Law Commission’s effort to codify the restrictive doctrine of sovereign immunity could be explained away as some sinister plot to sabotage the codification effort from within. But if there were any such plan, it was unsuccessful. After all, China did support the UN Convention by giving its signature in 2005,<sup>214</sup> thereby obliging itself under the Vienna Convention “to refrain from acts which would defeat the object and purpose” of the UN Convention.<sup>215</sup> It seems exceedingly difficult to square this history with Beijing’s unyielding insistence that it has always consistently adhered to the absolute doctrine. The explanation given by the Commissioner of the Ministry of Foreign Affairs seems anemic and specious:

China signed the Convention on 14 September 2005, to express China’s support of the above coordination efforts made by the international community. However, until now China has not yet ratified the Convention, and the Convention itself has not yet entered into force. Therefore, the Convention has no binding force on China, and moreover *it cannot be the basis of assessing China’s principled position on relevant issues*. . . . After signature of the Convention, the position of China in maintaining absolute immunity has not been

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<sup>210</sup> HALSBURY’S LAWS OF HONG KONG pt. 190.041, n.17 (2009), available at LexisNexis.

<sup>211</sup> See *supra* notes 84, 86 and accompanying text.

<sup>212</sup> See *supra* note 88 and accompanying text.

<sup>213</sup> See Caplan, *supra* note 80, at 761 n.142.

<sup>214</sup> See *supra* note 88 and accompanying text.

<sup>215</sup> Vienna Convention on the Law of Treaties, *supra* note 93, art. 18.

changed, and has never applied or recognised the so-called principle or theory of ‘restrictive immunity’ . . . .<sup>216</sup>

The Court of Appeal, for whom the above statement was really intended, simply responded, “It is not easy to know what to make of this, for to suggest that signature of a multilateral convention that adopts a particular policy is of no use in assessing the attitude of the signatory state to that policy seems illogical.”<sup>217</sup> Of course, as laid out at the outset of this discussion,<sup>218</sup> the focus here is not on assessing *what* is the attitude of the signatory state—China could not have made its “principled position” any clearer; it is on ascertaining the *persistency* by which China has objected to the restrictive rule and embraced the absolute rule of sovereign immunity. The persistent object doctrine sets a higher standard,<sup>219</sup> which China has clearly failed to meet by signing the UN Convention.

## 2. *UN Convention Renders Absolute Doctrine Ultimately Untenable*

Even if China could persistently object to the restrictive rule, the UN Convention will eventually render the absolutist position untenable. China can probably live with the bad name of being an “un-persistent” objector in violation of customary international law. But what is more troubling for China and Hong Kong is the prospect of the UN Convention coming into force. Publicists’ opinions on the likelihood of this prospect diverge wildly, ranging from the highly optimistic<sup>220</sup> to the extremely pessimistic.<sup>221</sup> Despite the divergence of opinion, even the most pessimistic commentators do not rule out the possibility that the UN Convention may take effect someday.

Therefore, the UN Convention represents a real probability that China and Hong Kong may be forced to reconsider the absolutist stance they take,

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<sup>216</sup> *FG Hemisphere Assocs. v. Dem. Rep. Congo (Congo II)*, [2010] 2 H.K.L.R.D. 66, para. 91 (C.A.) (H.K.) (emphasis added) (quoting a letter from the Office of the Commissioner of the Ministry of Foreign Affairs).

<sup>217</sup> *Id.* para. 92.

<sup>218</sup> See *supra* text accompanying note 199.

<sup>219</sup> See *supra* notes 198–99 and accompanying text.

<sup>220</sup> E.g., Sévrine Knuchel, *State Immunity and the Promise of Jus Cogens*, 9 NW. U. J. INT’L HUM. RTS. 149, 151 (2011) (“[I]t seems likely that the 30 ratifications necessary to bring it into effect will soon be achieved.”).

<sup>221</sup> E.g., George K. Foster, *Collecting from Sovereigns: The Current Legal Framework for Enforcing Arbitral Awards and Court Judgments Against States and Their Instrumentalities, and Some Proposals for its Reform*, 25 ARIZ. J. INT’L & COMP. L. 665, 688 (2008) (“[The UN Convention] now rests in a state of limbo with an uncertain future.”).

especially if the opinion of the more optimistic commentators turns out to be true. Given the trend toward restrictive immunity in international law,<sup>222</sup> in the long run, as time passes by, the absolute doctrine of sovereign immunity will only become increasingly obsolete and untenable. In the fullness of time, if and when China eventually ratifies the UN Convention and thereby adopts the restrictive approach, problems that emerged in the *Congo* cases would likely rear their ugly heads again. Vulture funds similar to FG Hemisphere would again be able to flock to Hong Kong courts and swoop in to feast on the carcasses of impoverished war-torn countries like the DRC that have been crushed by the murderous burden of debt. Persistent adherence to the ultimately untenable absolute doctrine of sovereign immunity is certainly not the answer.

### *C. A Detriment to China's Long-term Interests*

Lastly, apart from abstract legal principles, the shift to absolute sovereign immunity was wrong because it will prove detrimental to China's long-term economic interests. As a practical matter, the private sector in the Chinese economy is thriving and is heavily engaged in foreign trade,<sup>223</sup> but it faces various problems with foreign counterparties, including the increasingly daunting task of overseas debt collection.<sup>224</sup> Therefore, pragmatically speaking, it will probably harm China's own interests in the long run to categorically refuse to hear any plaintiff's case, including even valid claims of Chinese plaintiffs, against any foreign sovereign defendant.

#### *1. The Government's Calculation of State Interests was Flawed*

Such practical calculation of state interests is an important factor in deciding legal cases for the Chinese government. The Ministry of Foreign Affairs made this clear in its third letter to the Court of Final Appeal, "The regime of state immunity concerns the foreign policy and overall interests of the state . . . ."<sup>225</sup> According to the Ministry of Foreign Affairs, at the time of the *Congo III* case, the government's own estimate was that, for Hong Kong to retain its restrictive position on sovereign immunity, it would

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<sup>222</sup> See *supra* notes 185–93 and accompanying text.

<sup>223</sup> CIA, THE WORLD FACTBOOK: CHINA 127 (2008).

<sup>224</sup> See *infra* notes 262–70 and accompanying text.

<sup>225</sup> Dem. Rep. Congo v. FG Hemisphere Assocs. (*Congo III*), [2011] Legal Reference System para. 211 (C.F.A.) (H.K.).

“undoubtedly . . . have a long-term impact and serious prejudice to the overall interests of China . . . .”<sup>226</sup>

The ministry gave two main reasons to justify the official conclusion. First, the ministry feared that the restrictive doctrine would upset foreign debtor states with which China maintains good relations.<sup>227</sup> In the particular case at hand, the ministry admitted, “As a matter of fact, since the inception of the [*Congo* cases], the Government of the [DRC] has repeatedly made representations to the Central People’s Government [of China] through the diplomatic channel.”<sup>228</sup> Second, the Chinese government was worried that foreign sovereign debtors might reciprocally adopt the restrictive doctrine of sovereign immunity, and might retaliate against Chinese assets abroad.<sup>229</sup>

Professor Eric T.M. Cheung has pointed out the absurdity of this second rationale against retaining the restrictive rule in Hong Kong: the DRC, like many countries in the world, has already adopted the restrictive doctrine.<sup>230</sup> Therefore, China’s commercial activities abroad would not, at least not in theory, be covered by sovereign immunity in these debtor countries, regardless of the outcome of the *Congo* case in Hong Kong. Experts in Congolese law raised this point in litigation as well.<sup>231</sup> When counsel for the DRC tried to dispute it in oral argument, the court decided, perhaps quite wisely, to ignore this matter altogether.<sup>232</sup> It seems hard to imagine anyone, except paranoid mandarins on the top floors of the Ministry of Foreign Affairs, who would think that this single lawsuit in Hong Kong should have much to do with the legal protections that foreign countries afford to Chinese assets overseas.<sup>233</sup>

The real defect in the Ministry of Foreign Affairs’ calculation of China’s state interests is that it is too narrow and too shortsighted. It is too narrow because the ministry took into account no parties other than the governments of China and foreign debtor countries.<sup>234</sup> Other parties who stand to be affected by the ruling on the *Congo III* case, such as private creditors, were simply not contemplated. There appears to be no one in the ministry who bothered to look

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<sup>226</sup> *Id.*

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> Cheung, *supra* note 142, at 417–18.

<sup>231</sup> *Congo III*, Legal Reference System para. 33.

<sup>232</sup> *Id.*

<sup>233</sup> *Cf. id.* (“Nobody suggests that the extent of the state immunity to which the Congo is entitled depends on the extent of the state immunity available in its courts.”).

<sup>234</sup> *See id.* para. 211.

after the commercial interests of Chinese plaintiffs, for instance. The calculation is also admittedly shortsighted, as the ministry acknowledged that it intervened at the DRC's request, and that it had the immediate case in mind.<sup>235</sup> Although the ministry talked of "long-term impact," there was no discussion of the changing trade and economic conditions in the years to come.<sup>236</sup>

## 2. *Absolute Sovereign Immunity Will Increasingly Harm Private Sector Plaintiffs*

But whatever the government's view may be, the real economic landscape of China is changing fast, giving rise to more and more potential private plaintiffs.<sup>237</sup> The growth of the private sector in China has been rapid, especially since the 1990s.<sup>238</sup> In 1998, private businesses in China "had reached 32.4 million and employed 78.24 million people."<sup>239</sup> Although "the private sector is hard to document," in 2005 experts estimated that it accounted for about seventy percent of China's gross domestic product.<sup>240</sup> That same year, *Businessweek* magazine described China as "a private-sector economy."<sup>241</sup> According to the official national television station of China, by 2008 the private sector had "gone from being worth nothing to 19 trillion yuan . . . contributing 65 percent of the country's [gross domestic product]. It also accounts for 75 percent of national employment, and around half of the country's tax revenue."<sup>242</sup> By the end of 2010, the number of private enterprises in China had risen to more than 8.4 million, representing an annual increase of 14.3 percent, and accounting for seventy-four percent of all Chinese businesses.<sup>243</sup>

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<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> CIA, *supra* note 223, 127 ("China's economy during the last quarter century has changed from a centrally planned system that was largely closed to international trade to a more market-oriented economy that has a rapidly growing private sector and is a major player in the global economy.").

<sup>238</sup> Qi, *supra* note 46, at 328.

<sup>239</sup> John H. Matheson, *Globalization with Chinese Characteristics: China's Use of Merger, Acquisition and Investment Policy in Its Economic Development Strategy*, 15 WILLAMETTE J. INT'L L. & DISP. RESOL. 1, 32 (2007) (citation omitted).

<sup>240</sup> Pete Engardio, "China is a Private-Sector Economy," *BUS. WK.* (Aug. 22, 2005), [http://www.businessweek.com/magazine/content/05\\_34/b3948478.htm](http://www.businessweek.com/magazine/content/05_34/b3948478.htm) (quoting Fan Gang, a Chinese economist based in Beijing).

<sup>241</sup> *Id.*

<sup>242</sup> *Private Economy's Rapid Growth in China*, CCTV NEWS, (Sept. 27, 2009), <http://english.cctv.com/program/bizchina/20090927/101438.shtml>.

<sup>243</sup> Andrew Bruce, *Global Private-Sector Growth Accelerates*, CHINA DAILY, June 13 2011, at 15.

By and large, the Chinese government has welcomed this rapid development of the private-sector economy.<sup>244</sup> In 2004, the National People's Congress passed amendments to the Chinese Constitution,<sup>245</sup> which “enshrined private property as ‘inviolable.’”<sup>246</sup> Then in 2007, the National People's Congress passed the National Property Law,<sup>247</sup> which, according to the prevalent view, offers protection to private property for the first time since the founding of communist China in 1949.<sup>248</sup> The State Council set out policies in both 2005 and 2010 to encourage the continuous development of the private sector in the economy.<sup>249</sup> Given the trend of strong private sector growth over the past decades and an increase in legislative and policy support of the government,<sup>250</sup> the private sector in China will likely continue to expand in the future.

More importantly, this booming private sector has more foreign contacts, as it “tends to account for a disproportionately large part of China's exports . . . .”<sup>251</sup> Take for example China's trade and investment in Africa,

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<sup>244</sup> Qi, *supra* note 46, at 328–29.

<sup>245</sup> XIANFA art. 11, § 2 (2004) (China) (“The State protects the lawful rights and interests of the non-public sectors of the economy such as the individual and private sectors of the economy. The State encourages, supports and guides the development of the non-public sectors of the economy and, in accordance with law, exercises supervision and control over the non-public sectors of the economy.”); *id.* art. 13, §§ 1–2 (2004) (China) (“The lawful private property of citizens is inviolable. The state protects according to law the right of citizens to own and inherit private property.”).

<sup>246</sup> Ryan van Steenis, *From Mao to Madison and Back: An Examination of China's National Property Law and Its Diminished Potential*, 23 TEMP. INT'L & COMP. L.J. 35, 38 (2009) (quoting XIANFA art. 13, § 1 (2004) (China)).

<sup>247</sup> Wuquan fa (物权法) [Property Law] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 16, 2007, effective Oct. 1, 2007) (China).

<sup>248</sup> Steenis, *supra* note 246, at 38, 40 n.26.

<sup>249</sup> Guowuyuan Guanyu Guli He Yingdao Minjian Touzi Jiankang Fazhan De Ruogan Jianyi (国务院关于鼓励和引导民间投资健康发展的若干意见) [Several Opinions of the State Council on Encouraging and Guiding the Healthy Development of Private Investment] (promulgated by the State Council, May 7, 2010, effective May 7, 2010), available at <http://en.pkulaw.cn/display.aspx?cgid=130117&lib=law>; see also Bruce, *supra* note 244, at 15.

<sup>250</sup> See, e.g., Qi, *supra* note 46, at 328 (2008) (“[T]his proclamation [that China is a private-sector economy] may better be taken as a prospect rather than a reality at this moment.”); Zhou Xin & Koh Gui Qing, *China Eyes Private Sector to Offset Growth Slowdown*, REUTERS, Dec. 16, 2011, available at <http://www.reuters.com/article/2011/12/16/us-china-economy-investment-idUSTRE7BF0KX20111216>; Hongliang Zheng & Yang Yang, *Development of Chinese Private Sector in the Past 30 Years: Retrospect and Prospect* 14–15 (University of Nottingham China Policy Institute, Discussion Paper No. 45, 2009) (“The first trend is that the private sector's rate of growth will continue to be higher than national GDP growth in China, and its share of GDP will rise further.”).

<sup>251</sup> Matheson, *supra* note 239, at 32 (citation omitted); see also Iftexhar Hasan et al., *Institutional Development, Financial Deepening and Economic Growth: Evidence from China*, 33 J. BANKING & FIN. 157, 159 (2009) (“The growth of the private sector has . . . led to China's impressive share in world exports.”).

which seems to be of particular relevance to the *Congo* case. Although commentators tend to focus on the growing presence of large Chinese state-owned enterprises in Africa, private businesses from China are also major participants.<sup>252</sup> Because they deem Africa as one of the last untapped regions of growth, Chinese private enterprises have felt “a renewed urgency . . . to relocate to Africa.”<sup>253</sup> While most of these private enterprises are in mining, telecommunications, construction and infrastructure projects,<sup>254</sup> Chinese retailers and wholesalers have also followed the business community into Africa.<sup>255</sup> In 2005, the United Nations Development Program, together with the Chinese government and a trade association representing 16,500 Chinese private companies,<sup>256</sup> launched the China–Africa Business Council, which was “believed to be the first Public-Private Partnership (PPP) initiative between China and Africa under the South-South Cooperation Framework.”<sup>257</sup> In accordance with official government policy,<sup>258</sup> the China–Africa Chamber of Industry and Commerce was established in 2006.<sup>259</sup> By 2009, the Conference of Chinese and African Entrepreneurs had been held three times, with the location of the conference alternating between China and Africa.<sup>260</sup> There is optimism in the legal literature that the presence of private Chinese enterprises will continue to grow in African countries.<sup>261</sup>

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<sup>252</sup> See generally Jing Gu, *China's Private Enterprises in Africa and the Implications for African Development*, 21 EUR. J. DEV. RES. 570, 571–73 (2009) (detailing the growth of China's private sector in Africa, and contradicting the convention view that emphasizes China's state-owned enterprises).

<sup>253</sup> Jeremy Stevens, *Global: China and Africa – Pragmatic Partners Maturing*, STANDARD BANK 3 (Apr. 28, 2011), <http://ws9.standardbank.co.za/sbrp/DocumentDownloader?docId=2916>.

<sup>254</sup> *Id.*

<sup>255</sup> *Id.*; see also David Haroz, *China in Africa: Symbiosis or Exploitation?*, 35 FLETCHER F. WORLD AFF. 65, 83 (2011) (“[P]rivate Chinese investment is beginning to flow into [Angola]. To date, such investment has largely focused on the extractive industries (principally oil) and telecommunications sectors.”).

<sup>256</sup> U.N. Dev. Programme, *Project Summary: Support to Establishing the China Africa Business Council (CABC)*, [www.undp.org.cn/projects/43576.pdf](http://www.undp.org.cn/projects/43576.pdf) (last visited Oct. 13, 2012).

<sup>257</sup> *Id.*; see also Uche Ewelukwa Ofodile, *Trade, Empires, and Subjects—China-Africa Trade: A New Fair Trade Arrangement, or the Third Scramble for Africa?*, 41 VAND. J. TRANSNAT'L L. 505, 527 n.127 (2008).

<sup>258</sup> See generally GOVERNMENT OF CHINA, *CHINA'S AFRICAN POLICY* (2006), available at [http://www.gov.cn/misc/2006-01/12/content\\_156490.htm](http://www.gov.cn/misc/2006-01/12/content_156490.htm).

<sup>259</sup> Uché U. Ewelukwa, *South-South Trade and Investment: The Good, The Bad and The Ugly—African Perspectives*, 20 MINN. J. INT'L L. 513, 572 (2011).

<sup>260</sup> Muhammad Yamany & Zhang Lin, *3rd Conference of Chinese, African Entrepreneurs Opens in Egypt*, XINHUA NEWS AGENCY (Nov. 7, 2009), [http://news.xinhuanet.com/english/2009-11/07/content\\_12407639.htm](http://news.xinhuanet.com/english/2009-11/07/content_12407639.htm).

<sup>261</sup> See, e.g., Haroz, *supra* note 255, at 83 (“[A]s the Angolan economy expands and Chinese private sector confidence in Angola grows, larger and more diversified Chinese investments should follow.”).

However, more commercial activities overseas inevitably lead to more disputes with foreign counterparties, which could in turn lead to a greater need to resolve such disputes and more legal actions against foreign defendants. In 2005, the Chinese press reported that, “a large number of private enterprises and share-holding enterprises acquired the right to export, emerging as a new force with rapid growth of export.”<sup>262</sup> Yet, in the same breath, the press painted a bleak picture of Chinese exporters with substandard bookkeeping, overdue accounts receivable, foreign counterparty defaults, and bad debts overseas.<sup>263</sup> It was common practice among Chinese business enterprises to keep unpaid accounts receivable on their books for years undisclosed to the public, which contributed to a large amount of bad debts.<sup>264</sup> Even in 2005, long before the recent global economic recession, Chinese overseas accounts receivable were estimated to total over \$100 billion, and the figure was growing by \$15 billion per year.<sup>265</sup> Later, in 2007, allegations began to fly that some overseas buyers were cheating Chinese exporters by routinely delaying payments.<sup>266</sup> Although companies had been warned of the high risks in emerging markets, including markets in Africa, these emerging markets remained “major destinations for Chinese enterprises.”<sup>267</sup> Thus, Chinese exporters’ troubles with delinquent foreign buyers continue to present a problem, and they seem to have only worsened.<sup>268</sup> An alarming number of Chinese businesses fall victim to fraud overseas,<sup>269</sup> and the total amount of bad debts owed to them in overseas trade has been steadily climbing by \$15 to \$17 billion annually since 2005.<sup>270</sup> All of these developments point to the growing need for China’s private sector to resolve international commercial disputes under the law.

Chinese exporters’ accounts-receivable problems bear a remarkable resemblance to some of the underlying facts in the *Congo* cases. It was precisely an overdue account receivable on the books of a Yugoslavian

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<sup>262</sup> *China Burdened with US\$100 Billion Overdue Accounts Receivable*, PEOPLE’S DAILY ONLINE (last updated Mar. 30 2005), [http://english.peopledaily.com.cn/200503/30/eng20050330\\_178775.html](http://english.peopledaily.com.cn/200503/30/eng20050330_178775.html).

<sup>263</sup> *Id.*

<sup>264</sup> *Id.*

<sup>265</sup> *Id.* (citing Han Jiaping, director of the credit management department under the Research Institute of Ministry of Commerce).

<sup>266</sup> Olivia Chung, *China’s Debtors Not Paying Up*, ASIA TIMES (Mar. 3, 2007), [http://www.atimes.com/atimes/China\\_Business/IC03Cb02.html](http://www.atimes.com/atimes/China_Business/IC03Cb02.html).

<sup>267</sup> *Id.*

<sup>268</sup> Chen Yang, *Collecting Overseas Debts Is Not Easy*, GLOBAL TIMES (June 13, 2011), <http://www.globaltimes.cn/NEWS/tabid/99/ID/661190/Collecting-overseas-debts-is-not-easy.aspx>.

<sup>269</sup> *Id.* (citing Kroll, a risk management consultancy headquartered in New York).

<sup>270</sup> *Id.* (citing Han Jiaping, “director of the credit management department under the Research Institute of the Ministry of Commerce”).

construction service exporter that eventually led to the *Congo* cases.<sup>271</sup> Of course, not all of the hundreds of billions of China's overseas bad debts are owed to private Chinese businesses by governments of failed states. The exact figures for foreign sovereign debts held by private Chinese parties are difficult to ascertain, as "there [are] no official statistics on China's overseas accounts receivable yet to be recovered."<sup>272</sup> But according to Mr. Dahai Qi, a Chinese diplomat in the Department of Treaty and Law of the Ministry of Foreign Affairs:<sup>273</sup>

[I]t is undeniable that the expansion of private sector in the Chinese economy as well as in the international trade area has created a new major interest group in Chinese society and also led to an increasing possibility of disputes between Chinese private persons and foreign State entities . . . . To [Qi's] knowledge, disputes of this kind or of a similar nature did happen on some occasions in the recent past . . . .<sup>274</sup>

In other words, it is not a remote, potential possibility that private Chinese citizens or businesses may have good legal claims against foreign states or their sovereign instrumentalities. Such cases have already emerged. As "a new major interest group in Chinese society,"<sup>275</sup> the private sector should be taken into consideration, when calculating China's national interest.

In view of this changing economic and political reality, it is highly plausible and quite reasonable that a private Chinese creditor, for instance, may wish to challenge sovereign immunity in her home court somewhere in China, in order to collect payment from her delinquent foreign sovereign debtor. Indeed, Mr. Qi has suggested that as China's private sector grows in international trade, the likelihood of such a case will probably only increase in

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<sup>271</sup> See *supra* notes 114–22 and accompanying text.

<sup>272</sup> *China Burdened with US\$100 Billion Overdue Accounts Receivable*, *supra* note 262 (citing Mei Xinyu, a researcher with the Ministry of Commerce); see also Yang, *supra* note 268 (quoting Han Jiaping as saying "[I]t is only an estimation, as so far no authorities have conducted such a survey").

<sup>273</sup> See Press Release, Gen. Assembly, Fourth Committee Chairman Says Peaceful Uses of Outer Space Have Potential for Implementation of Millennium Declaration, Sustainable Development, U.N. Press Release GA/SPD/289 (Nov. 10, 2004), <http://www.un.org/News/Press/docs/2004/gaspd289.doc.htm> (calling Mr. Qi a delegate for China); see also E-mail from Qi Dahai, diplomat, Chinese Ministry of Foreign Affairs, to author (Nov. 18, 2011) (on file with author) (stating that Mr. Qi is in the legal staff of the Chinese Ministry of Foreign Affairs).

<sup>274</sup> Qi, *supra* note 45, at 328 & n.72. Because of his sense of professional ethics, Mr. Qi declined to disclose any details of the disputes that he mentioned in passing in his article. E-mail from Qi Dahai, *supra* note 273.

<sup>275</sup> Qi, *supra* note 46, at 328.

the future.<sup>276</sup> A private Chinese party may find itself in a position similar to that of the American plaintiff in the *Congo* cases. By reaffirming its staunch adherence to the absolute doctrine of sovereign immunity in the *Congo* cases,<sup>277</sup> the Chinese government did more than just protect its friendly relations with foreign governments. It also closed Chinese courts on countless current and future Chinese plaintiffs who have, or will have, valid claims against foreign sovereigns. Such uniform and blind protection of foreign state interests at the expense of the legitimate interests of a large and growing population of private Chinese businesses should surely weigh heavily against the state interests of China in the foreign ministry's calculus. The harmful effects of the absolute doctrine on China's private sector will only accrue, as long as the official position of the government remains absolutist. In the long run, the absolute doctrine of sovereign immunity will prove a detriment to China's national interests.

#### IV. SUBDUING VULTURES WITHOUT REGRESSION TO ABSOLUTE IMMUNITY

Apart from being a case against a sovereign defendant, the *Congo* cases were started by a vulture fund plaintiff.<sup>278</sup> The litigation practices of vulture funds often arouse understandably strong moral concerns and cause real hardships to the third world.<sup>279</sup> This part of the comment argues that the novel challenge posed by vulture funds calls for a more targeted and nuanced approach than a simple rule of restrictive sovereign immunity and that recent anti-vulture legislation in the United Kingdom is a good model for Hong Kong to follow.

##### A. *The U.K. Legislative Answer to Moral Objections to Vulture Funds*

Vulture funds pose a unique challenge to the doctrine of sovereign immunity.<sup>280</sup> In the *Congo* cases, the involvement of a vulture plaintiff raises questions difficult for the courts to address, such as the following: If the restrictive doctrine should be adopted in China (or maintained in Hong Kong), and assuming there is no dispute as to the commercial nature of the sovereign defendant's activities, how should the court resolve the *Congo* cases? The

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<sup>276</sup> *Id.* at 328 & n.72.

<sup>277</sup> *See supra* text accompanying notes 132–43.

<sup>278</sup> Dem. Rep. Congo v. FG Hemisphere Assocs. (*Congo III*), [2011] Legal Reference System para. 18 (C.F.A.) (H.K.).

<sup>279</sup> *See supra* text accompanying notes 98, 100–08.

<sup>280</sup> *See supra* text accompanying notes 94–108.

Court of Appeal in the *Congo II* case, which did adhere to Hong Kong's old common law restrictive doctrine,<sup>281</sup> had no problem answering this question. Judge Stock wrote for the majority that he would allow the plaintiff vulture fund to enforce the arbitral awards and that he would also shift fees to the defendant DRC.<sup>282</sup> By reaching this conclusion from the starting point of restrictive immunity, the court's position seemed quite mechanical and inevitable. Judge Stock apparently wasted no time pondering the moral or humanitarian policy implications of allowing a vulture fund to take its pound of flesh from a deeply indebted third world country. None of the other Hong Kong judges in favor of resuscitating English common law in the *Congo* cases wrote about moral concerns, either.<sup>283</sup> Moral indifference may be the right attitude for judges,<sup>284</sup> but there should be a moral or policy dimension for the public and the legislature to consider.

Almost concurrently with the *Congo* cases in Hong Kong, several vulture funds filed suits in the United Kingdom against foreign sovereign debtors.<sup>285</sup> Although English judges were applying the restrictive doctrine and ruling in favor of the vulture funds most of the time,<sup>286</sup> the moral concerns with vulture funds were not completely forgotten. In 2007, Justice Andrew Smith in the High Court in London noted in his opinion in a vulture suit against Zambia: "The proceedings arouse strong feelings. Zambia is a poor country and sees itself as being vulnerable to 'vulture funds'. They say that this claim for more than US\$55 million is an improper attempt by [the plaintiff vulture fund] to exploit their vulnerability . . . ."<sup>287</sup> Soon, the controversial vulture funds began to attract the attention of the media and politicians in the United Kingdom.<sup>288</sup>

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<sup>281</sup> *FG Hemisphere Assocs. v. Dem. Rep. Congo (Congo II)*, [2010] 2 H.K.L.R.D. 66, para. 122 (C.A.) (H.K.).

<sup>282</sup> *Id.* para. 181.

<sup>283</sup> *Congo III*, Legal Reference System paras. 1–180 (Bokhary, J., dissenting); *id.* paras. 417–532 (Mortimer, J., dissenting).

<sup>284</sup> *See Jones, supra* note 94, at 201 ("Whatever may be said of the morality of [vulture funds] and the conduct of the PRC in Africa, such questions are not relevant to judges deciding the *Congo Case*.").

<sup>285</sup> Broomfield, *supra* note 101, at 504.

<sup>286</sup> *Id.* at 504–05.

<sup>287</sup> *Donegal Int'l Ltd. v. Republic of Zambia*, [2007] EWHC (Comm) 197, [2] (Eng.). Justice Smith ruled against Zambia, irrespective of the moral arguments, stating "I am concerned, of course, with the legal questions that are raised by the applications before me and not with questions of morality or humanity." *Id.*

<sup>288</sup> *See, e.g., Meirion Jones, UK Stops 'Vulture Funds' Picking on Poor*, BBC NEWS (last updated Apr. 8, 2010), <http://news.bbc.co.uk/2/hi/programmes/newsnight/8610062.stm> (reporting on vulture litigations, including Zambia's case in the High Court, quoting Gordon Brown on his moral objection to vulture funds); *Liberia Ordered to Pay 'Vulture Funds' over 1978 Debt*, BBC NEWS (last updated Nov. 26, 2009), <http://news.bbc.co.uk/2/hi/africa/8380117.stm>.

Members of Parliament took on the cause of banning vulture funds.<sup>289</sup> On April 8, 2010, the Parliament passed the Debt Relief (Developing Countries) Act,<sup>290</sup> which “limits the amount of money that commercial creditors can recover from certain developing countries,”<sup>291</sup> including the DRC.<sup>292</sup> The British media dubbed this legislation a “ban” on vulture funds.<sup>293</sup>

### *B. The Need for Anti-vulture Legislation in the Congo Case in Hong Kong*

This new legislative development in the United Kingdom has created an interesting situation for Hong Kong: as most judges on the *Congo* cases struggled against Beijing to preserve Hong Kong’s English common law heritage, and relied on British precedents from before the era of vulture funds,<sup>294</sup> “Mother England” had already moved on. Even if the restrictive doctrine of sovereign immunity were applied to the *Congo III* case, Hong Kong would still be a step behind the United Kingdom in this progression. Moreover, because of the new legislation against vulture funds, if FG Hemisphere were to bring the *Congo* cases now against the DRC in London, the English judge would agree with Beijing on the outcome of the case: the vulture fund cannot recover the debt in full from the DRC.<sup>295</sup> It appears that Hong Kong judges, applying case law from over thirty years ago<sup>296</sup> and crippled by a total vacuum of statute<sup>297</sup> (especially the absence of any new legislation comparable to the Debt Relief Act of the United Kingdom), are not equipped to properly deal with the new kind of lawsuits brought by vulture funds.

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<sup>289</sup> Broomfield, *supra* note 101, at 505–06.

<sup>290</sup> Debt Relief (Developing Countries) Act, 2010, c. 22 (U.K.).

<sup>291</sup> Debt Relief (Developing Countries) Act 2010 (Permanent Effect) Order, 2011, S.I. 2011/1136, explanatory note, (U.K.).

<sup>292</sup> Debt Relief (Developing Countries) Act, 2010, c. 22, explanatory note 4 (U.K.).

<sup>293</sup> See Jones, *supra* note 288 (“Britain’s parliament has voted to ban so-called ‘vulture funds’ . . .”); Meirion Jones, *Call for Jersey to Block \$100m DR Congo ‘Vulture’ Debt*, BBC NEWS (Nov. 15, 2011), <http://www.bbc.co.uk/news/business-15745003> (“ban on vulture funds”).

<sup>294</sup> See, e.g., Dem. Rep. Congo v. FG Hemisphere Assocs. (*Congo III*), [2011] Legal Reference System paras. 504–14 (C.F.A.) (H.K.) (Mortimer, J. dissenting); see also *supra* notes 16–40 and accompanying text.

<sup>295</sup> There seem to be some conflicting interpretations of the U.K. statute. See, e.g., Broomfield, *supra* note 101, at 506–07 (“The Bill . . . would exclude debt incurred after the Bill became effective”). But see, e.g., Avery, *supra* note 104, at 282 (“As it currently stands, [vulture funds] are prohibited from litigating HIPCs [(Highly Indebted Poor Countries)] in U.K. courts . . .”). “Highly Indebted Poor Countries” includes the DRC. Debt Relief (Developing Countries) Act, 2010, c. 22, explanatory note 4 (U.K.).

<sup>296</sup> See, e.g., *Congo III*, Legal Reference System paras. 504–14 (Mortimer, J., dissenting); see also *supra* notes 16–40 and accompanying text.

<sup>297</sup> See *supra* notes 44–46 and accompanying text.

When the Court of Appeal issued its judgment in favor of FG Hemisphere, the Financial Times quoted a jurist calling this “a classic ‘vulture fund’ case.”<sup>298</sup> The *Congo* cases epitomize the precarious situation frequently contemplated in the literature on vulture funds. It takes only one uncooperative vulture fund to stop investments in the debtor country. This forces the investor doing business with the targeted debtor country to pay the vulture fund first before paying the country, thus impeding economic development in the debtor country.<sup>299</sup>

Unsurprisingly, there are certain facts in the *Congo* cases that the court could not review or deemed immaterial, but may be of interest to legislators and policy-makers. If one takes all these factual details into account, it becomes evident that something more nuanced than a simple restrictive rule of sovereign immunity may be necessary for lawsuits involving vulture funds. For example, after Energoinvest finished the hydroelectric projects in the DRC in the 1980s, both Yugoslavia and the DRC descended into years of civil war and political chaos.<sup>300</sup> Also, FG Hemisphere happened to initiate litigation a week after the assassination of the DRC president, when six other countries invaded the DRC, and when there was no functioning national government to represent the DRC in the lawsuit.<sup>301</sup>

More embarrassing to the vulture plaintiff, after the *Congo III* case was resolved in Hong Kong, investigative news reports appeared in the British media showing improprieties associated with the sale of the arbitral awards to FG Hemisphere.<sup>302</sup> One typical justification for the social utility of vulture funds is that these litigious professional plaintiffs, by routinely examining the commercial dealings of their target sovereign debtors, serve as a check on corruption in developing countries.<sup>303</sup> But in this instance, the vulture fund may have instigated corruption. The British Broadcasting Corporation and the Guardian newspaper reported that the then Prime Minister of Bosnia, Nedžad

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<sup>298</sup> Tom Mitchell & William Wallis, *Hong Kong Court Ruling Hits Beijing's Congo Hopes*, FINANCIAL TIMES (last updated Feb. 24, 2010), <http://www.ft.com/cms/s/0/851d019c-209b-11df-9775-00144feab49a.html#axzz26vmzFaer> (quoting Akere Muna, a Cameroonian jurist).

<sup>299</sup> See *supra* notes 101–04 and accompanying text.

<sup>300</sup> Reporter Greg Palast Exposes How U.S. “Vulture” Funds Make Millions by Exploiting African Nations, DEMOCRACYNOW! (Nov. 22, 2011), [http://www.democracynow.org/2011/11/22/reporter\\_greg\\_palast\\_exposes\\_how\\_us](http://www.democracynow.org/2011/11/22/reporter_greg_palast_exposes_how_us).

<sup>301</sup> *Id.*

<sup>302</sup> Jones, *supra* note 293.

<sup>303</sup> See Broomfield, *supra* note 101, at 516–18; see also Peter Grossman, *FG Hemisphere Associates Responds to Inaccurate and Misleading Media Reports*, FGHEM (Dec. 2, 2011), <http://www.fghem.com/>.

Brankovic, sold the Yugoslavian arbitral awards illegally to FG Hemisphere.<sup>304</sup> Prime Minister Brankovic later resigned over corruption charges.<sup>305</sup>

The revelation of FG Hemisphere's allegedly illegal deals with dubious Bosnian politicians triggered a new round of public outcry in Britain against vulture funds, putting the U.K. government under pressure to extend the Debt Relief Act, which Parliament had already made permanent within the United Kingdom,<sup>306</sup> to offshore centers such as Jersey.<sup>307</sup> After being in force for over a year, the Debt Relief Act has garnered some considerable support in the United Kingdom,<sup>308</sup> and, therefore, it is probably here to stay. Seeing the success of the Debt Relief Act, similar legislative measures against vulture funds have been recommended for the United States.<sup>309</sup>

If restrictive sovereign immunity, plus the Debt Relief Act have worked for the United Kingdom, one cannot see any reason why the same should not work for Hong Kong. After all, much of Hong Kong's law came from the United Kingdom. If the Legislative Council of Hong Kong had the foresight to borrow the Debt Relief Act from the United Kingdom and make it retroactively applicable to the *Congo III* case, it might have been possible for Hong Kong to retain its traditional common law position on sovereign immunity. Beijing would probably be satisfied with an outcome where its African ally wins under the new anti-vulture statute, and therefore it might be much less meddlesome. Without Beijing's intervention, the entire "constitutional crisis"<sup>310</sup> surrounding the *Congo* cases would perhaps never have happened. In other words, it seems possible that a well-crafted statute limiting vulture activity in Hong Kong

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<sup>304</sup> Jones, *supra* note 293; Greg Palast et al., *UK Urged to Prevent Vulture Funds Preying on World's Poorest Countries*, GUARDIAN (Nov. 15, 2011), <http://www.guardian.co.uk/global-development/2011/nov/15/call-action-vulture-funds-poor>. FG Hemisphere has vehemently denied these news stories. Cf. Grossman, *supra* note 303 (denying similar allegations).

<sup>305</sup> Jones, *supra* note 293.

<sup>306</sup> Debt Relief (Developing Countries) Act 2010 (Permanent Effect) Order, S.I. 2011/1136, explanatory note, (U.K.); see also Mark Tran, *Can Vulture Funds be Prevented from Preying on Poor Countries?*, GUARDIAN: POVERTY MATTERS BLOG, <http://www.guardian.co.uk/global-development/poverty-matters/2011/nov/16/can-vulture-funds-be-prevented> (last modified Nov. 16, 2011).

<sup>307</sup> See, e.g., Greg Palast, et al., *Vulture Funds Await Jersey Decision on Poor Countries' Debts*, THE GUARDIAN (Nov. 15, 2011), <http://www.guardian.co.uk/global-development/2011/nov/15/vulture-funds-jersey-decision>; Jones, *supra* note 293.

<sup>308</sup> Jones, *supra* note 293.

<sup>309</sup> See Avery, *supra* note 105, at 280–89 (presenting arguments for passing a U.S. statute similar to the British Debt Relief Act). *But see* Broomfield, *supra* note 101, at 508–27 (arguing against statutes capping vulture recovery).

<sup>310</sup> Dem. Rep. Congo v. FG Hemisphere Assocs. (*Congo III*), [2011] Legal Reference System para. 84 (C.F.A.) (H.K.).

courts could have eliminated much, if not all, of the trouble the *Congo* cases actually brought about.

### CONCLUSION

About thirty years ago, two developing countries, Yugoslavia and the Democratic Republic of the Congo, entered into an agreement to build hydroelectric projects.<sup>311</sup> A decade later, both countries fell into civil war.<sup>312</sup> Another decade later, a Bosnian politician of questionable character transferred the old Yugoslavian deal to a group of New York investors known as a “vulture fund.”<sup>313</sup> Yet another decade later, the unfinished hydroelectric business formed the basis of a landmark case on the abstract legal principle of sovereign immunity in a former British colony in China.<sup>314</sup> The circumstances out of which the *Congo* cases arose have been so unpredictable. Little did anyone know that a happy story of economic cooperation between two third-world countries would lead to a regression in a fundamental international law principle in a far-away land.

Likewise, it will be a risky undertaking for anyone to predict the legacy of the *Congo* cases. But after careful examination, this Comment reaches the conclusion that the recent shift from restrictive to absolute sovereign immunity in Hong Kong caused by the *Congo III* case will prove to be a regrettable step in the wrong direction for Hong Kong, Mainland China, and the development of customary international law. This Comment also proposes a solution to undo the damage by the *Congo III* case.

For Hong Kong, a pioneer among common law jurisdictions applying restrictive sovereign immunity, the shift to absolute immunity was a regression, and thus impermissible under customary international law.<sup>315</sup> Hong Kong wrongfully reverted to the absolutist position that it had abandoned long ago.<sup>316</sup>

For China, a self-proclaimed adherent to the absolute doctrine, the position it reaffirmed in the *Congo* cases will not be tenable under the persistent objector doctrine. China’s objection to the new restrictive doctrine of sovereign

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<sup>311</sup> See *supra* Part II.A.

<sup>312</sup> See *supra* text accompanying note 300.

<sup>313</sup> See *supra* Part IV.B.

<sup>314</sup> See *supra* Part II.B.

<sup>315</sup> See discussion *supra* Part II.B.

<sup>316</sup> See discussion *supra* Part III.A.

immunity has not been persistent in the past,<sup>317</sup> and it will likely be even less persistent in the future. China's signature to the UN Convention will eventually force it to shift to restrictive immunity, and will bring back all the challenges it dodged in the *Congo* cases, including the problems with vulture funds.<sup>318</sup> Furthermore, as a practical matter, the absolute rule will prove detrimental to long-term Chinese interests, as it shuts the doors to Chinese courts on private Chinese plaintiffs claiming against foreign sovereigns.<sup>319</sup>

For the development of international law, the regression in Hong Kong is a step back against a prevailing trend, and therefore disrupted the formation of restrictive sovereign immunity into a rule of customary international law.<sup>320</sup> It also failed to address the novel issue of vulture funds with any foresight, or in any constructive way.<sup>321</sup>

Therefore, it is also the conclusion of this Comment that the mistake made in the *Congo* case can and must be corrected. The shift to absolute sovereign immunity should be reversed. But a simple rule of restrictive sovereign immunity would not be sufficient by itself. To subdue vulture funds, specific anti-vulture legislation should be applied. Adopting a U.K.-style statutory cap on vulture recovery should be a good starting point for Hong Kong.<sup>322</sup>

YILIN DING\*

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<sup>317</sup> See discussion *supra* Part III.B.

<sup>318</sup> See discussion *supra* Part III.B.

<sup>319</sup> See discussion *supra* Part III.C.

<sup>320</sup> See discussion *supra* Part III.A.

<sup>321</sup> See background *supra* Part I.E.

<sup>322</sup> See discussion *supra* Part IV.

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