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A tale of two immunities: the ongoing transition from absolute to restrictive sovereign immunity in China

Xueliang Ji

School of Law, Xi'an Jiaotong University, Xi'an, Shaanxi, People's Republic of China

ABSTRACT
This article examines the doctrine of sovereign immunity and its implications in the context of China's evolving stance on this principle. The paper delves into the historical foundations and theoretical underpinnings of sovereign immunity, distinguishing between absolute immunity and the more recent concept of restrictive immunity. The analysis focuses on China's position on sovereign immunity, considering its historical adherence to absolute immunity and its endorsement of the United Nations Convention on Jurisdictional Immunities of States and Their Property. The paper also addresses China's law on foreign state immunity and critically examines the impact of this law and its difference compared with the FSIA and UN Convention. Drawing on comparative legal analysis and case studies, the paper evaluates China's shift from absolute to restrictive immunity, taking into account the interests of the private sector and the need for a fair and predictable legal framework. It explores the challenges and benefits associated with this transition, emphasizing the importance of harmonization with international legal norms and the enhancement of China's reputation as a reliable player in global commerce. Ultimately, the paper argues that China's transition towards restrictive immunity is not only necessary to protect its economic interests but also crucial for maintaining diplomatic credibility and fostering international cooperation. By embracing this shift, China can contribute to the harmonization of global legal norms and enhance its standing as a responsible participant in the international legal landscape.

KEYWORDS
Sovereign immunity; China's law on foreign state immunity; the Congo case; FSIA; the UN Convention

I. Introduction

The doctrine of sovereign immunity has long been a part of international customary law.[1] There are two forms of sovereign immunity: 'absolute immunity' and 'restrictive immunity'. Absolute immunity is a type of sovereign immunity which prevents government officials from being sued in criminal and civil prosecution for damages until they are

CONTACT Xueliang Ji 1066714759@qq.com

[1]H Fox and P Webb, *The Law of State Immunity* (3rd edn, OUP, 2013) 1. See also M Brenninkmeijer and F Gélinas, 'The Problem of Execution Immunities and the ICSID Convention' (2021) 22(3) *The Journal of World Investment & Trade* 429; J Martin Hunterand JG Olmedo, 'Enforcement/Execution of ICSID Awards Against Reluctant States' (2018) 12(3) *The Journal of World Investment & Trade* 307; S McKenzie, 'Sovereign Immunity of Uncrewed Surveillance Vehicles and the Limits of Enforcement Jurisdiction' (2023) *Nordic Journal of International Law* (published online ahead of print 2023) <https://doi.org/10.1163/15718107-bja10062>.

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working within the scope of their duties, and the restrictive immunity is limited to the public acts of foreign states and does not extend to suits where their commercial conduct is in question.

The absolute doctrine has been justified on grounds including independence and equality of states, international comity, and non-intervention in the internal affairs of other States.[2] From the beginning of the last century, a growing number of states have incorporated the restrictive doctrine of state immunity,[3] under which the state's sovereign acts are distinguished from commercial acts and a state cannot be immune from the jurisdiction of a foreign court for its commercial activities.[4] The states' extensive participation in international trade, since the early twentieth century, was the primary trigger for this transformation.[5] The restrictive immunity can better protect the legitimate interests of private participants and may offer them the last resort in dispute resolution.[6] In terms of dispute resolution mechanism between states and private entities, the enforcement of the foreign arbitral award is a jurisdictional mess in terms of the clash between municipal laws of the state and the international laws.

While China stands as a prominent actor in international trade, it remains characterized by its comprehensive immunity policy[7] – a stance in stark contrast to major trade partners such as the United States, United Kingdom, and Australia. Interestingly, in 2005, China aligned itself with the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property. Widely interpreted as endorsing restrictive immunity, this commitment suggested a possible shift in China's stance on this principle. Although the Convention remains unenforced, China's endorsement was initially perceived as a sign of its growing inclination towards restrictive immunity. Yet, the narrative was challenged by a pivotal ruling of the Hong Kong Court of Final Appeal in 2011. While China's law on foreign state immunity (the Law), will go into force on 1st January 2024, seems to incorporate the restricted immunity as other countries.[8]

[2]D Gaukrodger, 'OECD Working Papers on International Investment: Foreign State Immunity and Foreign Government Controlled Investors' (OECD, 2010) 7, 11, 13–14.

[3]Ibid, 11; The movement started in civil law jurisdiction; following the Foreign Sovereign Immunities Act of 1976 adopted in United States, other common law states including the UK, Canada, Australia, South Africa and Singapore also followed the US model to enact national legislation to incorporate the restrictive approach.

[4]William Harvey Reeves, 'Absolute or Restricted Immunity for Foreign Sovereign Litigants – What Is the Law in the United States' (1964) 8 *Sec Int'l & Comp L Bull* 11.

[5]D Qi, 'State Immunity, China and Its Shifting Position' (2008) 7(2) *Chinese Journal of International Law* 312.

[6]Guan Feng (James), 'Do State-Owned Enterprises Enjoy Sovereign Immunity' *China Law Insight* (27 September 2018) <www.chinalawinsight.com/2018/09/articles/dispute-resolution/do-state-owned-enterprises-enjoy-sovereign-immunity/>.

[7]Andrew Coleman and Jackson Nyamuya Maogoto, 'Westphalian Meets Eastphalian Sovereignty: China in a Globalized World' (2013) 3 *AsianJIL* 237.

[8]The State Council Information Office of The People's Republic of China, 'China Adopts Foreign State Immunity Law' *Xinhua* (2 September 2023) <http://english.scio.gov.cn/chinavoices/2023-09/02/content_111200459.htm>; John Coyle, 'China's Draft Law on Foreign State Immunity Would Adopt Restrictive Theory' *Conflict of Laws.net* (2023) <https://conflictoflaws.net/2023/chinas-draft-law-on-foreign-state-immunity-would-adopt-restrictive-theory/>; For example, in Article 7 of China's law on Foreign State Immunity, a commercial activities exception has been provided. According to this article, when some conditions are met, a foreign state is not shielded from legal action resulting from commercial operations. Additionally, there is an arbitration exception in the Law. Besides, referring to Article 9, a foreign state is not immune from liability 'for personal injury or death, or for damage to movable or immovable property, caused by that foreign state within the territory of the People's Republic of China'. What's more, in accordance with Article 12, a foreign state that has consented to arbitration of disputes is not immune from legal action with regard to 'the effect and interpretation of the arbitration agreement' and 'the recognition or annulment of arbitral awards'. The mentioned articles of the Law all illustrate that China is changing its attitude and accept restricted immunity in its laws.

This divergence of interpretation is intriguing, especially when considering that China's courts have seldom been chosen as forum courts by parties embroiled in international investment and trade disputes. As such, China's stance on sovereign immunity seems to have a somewhat limited impact on private parties' litigation strategies. A case in point is the notable 'Congo case'[9] and it has raised significant questions about sovereign immunity.

In Part II, the development of sovereign immunity will be first explored in four stages by referring to cases, the Convention, and legislation: from the 1950s until China signed the Convention; after China signed the Convention; after the *Congo* case; and after the publication of the Law. As suggested by some experts,[10] there are three alternative means available to China to affirm its shift to the doctrine of restrictive immunity, namely governmental statements, ratification of the Convention, and domestic legislation. The publication of the Law has illustrated China's changing attitude on the state immunity. In Part III, the question of immunity has been considered. The US statute FSIA (Foreign Sovereign Immunities Act), the UN Convention and the Law have been discussed. In Part IV, the author has compared the Law with US FSIA and UN Convention and it turns out that the Law has some unique characteristics. And the possible impact of the Law has been analysed. Finally, in Part V, a conclusion will be made on the position of China's sovereign immunity and the possible influence the Law may have in the future.

II. Historical perspective of immunity

Although restrictive sovereign immunity has gained popularity recently,[11] before the enactment of the Law, China has always applied total sovereign immunity in its courts.[12] Its deep-seated aversion to recognizing foreign judicial jurisdiction stems from China's history of Western powers' extraterritorial laws and jurisdiction.[13] For example, between 1842 and 1860, the Qing Emperor signed the unequal Treaties, which granted Western citizens jurisdictional privileges. This established the legal foundation for consular jurisdiction, which persisted until the middle of the twentieth century.[14] However, China's diplomatic notes contradict its practice. According to several early examples from the 1950s through the 1980s, when Chinese agents or instrumentalities were sued overseas, the Chinese sovereign defendants occasionally did not even argue the immunity, merely submitting to the foreign court's jurisdiction.[15] It is important to first examine China's history of sovereign immunity practise before evaluating the Law.

[9] *Energoinvest DD v the Democratic Republic of Congo and Société Nationale d'Electricité (S.N.E.L.) (II)* ICC Case No 11442/KGA.

[10] See Reports of International Arbitral Awards (RIAA), *United Nations Publication* (Vol IX, 223–24) 331–32 <https://legal.un.org/riaa/volumes/riaa_IX.pdf>.

[11] Rosalyn Higgins Dbe Qc, 'Recent Developments in the Law of Sovereign Immunity in the United Kingdom' in *Themes and Theories* (Oxford, 2009; online edn, Oxford Academic, 22 March 2012) 333 <https://doi.org/10.1093/acprof:oso/9780198262350.003.0022>.

[12] *Jackson v People's Republic China*, 794 F2d 1494 (11th Cir 1986) [*Jackson v China*]; see also Jill A Sgro, 'China's Stance on Sovereign Immunity: A Critical Perspective on *Jackson v. People's Republic of China*' (1983) 22 *Colum J Transnat'l L* 101.

[13] Coyle (n 8).

[14] Mariya Tait Slys, 'Chapter IV – Extraterritorial Consular Jurisdiction in China' in *Exporting Legality: The Rise and Fall of Extraterritorial Jurisdiction in the Ottoman Empire and China* (Graduate Institute Publications, 2014) <https://books.openedition.org/iheid/802>.

[15] Yilin Ding, 'Absolute, Restrictive, or Something More: Did Beijing Choose the Right Type of Sovereign Immunity for Hong Kong?' (2012) 26 *Emory Int'l L Rev* 1021.

A. From absolute to restrictive: tracing the evolution of China's approach to sovereign immunity

Before the 1950s, China supported absolute immunity. The earliest record of such a position can be found in the *Rizaeff Freres v. the Soviet Mercantile Fleet* of 1927.[16] Until the end of the1970s, although the Chinese government has still claimed the absolute doctrine of sovereign immunity, it has provided some compromises.[17] On the one hand, when China *per se* was sued in a foreign court, the Chinese government would strongly claim its sovereign immunity. For example, in the *Hongkong Aircraft* case,[18] the PRC government protested the court's decision to reject the Chinese sovereign's immunity claim, declaring that 'the British Government has no right of jurisdiction over the assets of the Chinese aviation corporation retained in Hong Kong … the British Government must immediately stop its illegal acts against the sovereign of the People's Republic of China'.[19] On the other hand, despite its defensive position in trial advocacy, China has taken a more flexible stance on sovereign immunity. To avoid embarrassment in foreign courts, China began to use intermediate buffers such as foreign exchange banks' overseas branches in international transactions.[20] Also, to attract foreign investment, China has entered into various bilateral investment treaties (BITs) with foreign investors and committed itself to submitting to an international arbitral tribunal where disputes arise.[21] By doing so China does not waive its immunity from the jurisdiction of any foreign courts, it nonetheless voluntarily compromises its immunity from the jurisdiction of an international arbitral tribunal.

Starting from the early 1980s, the deepened Chinese economic reform and improved Sino-US diplomatic relationship have boosted China's national economy and enlarged its international trading activities. During the period, the landmark *Jackson* case[22] has shown China's official stance on absolute sovereign immunity. In this case, the Republic of China was sued by American plaintiffs for the repayment of debts issued by the imperial Chinese government.[23] China contended that it had kept the absolute concept as a basic component of its sovereignty.[24]

The Chinese government's official position on absolute sovereign immunity demonstrates a defensive, yet more delicate approach taken by China in dealing with such issues in foreign courts. Three key features appear under analysis. Firstly, the decision was made more upon political considerations. There were multiple correspondences between the Foreign Ministry of the PRC and the US State Department. The Chinese government reiterated its absolutist position through a memorandum addressed directly to the State Department and the State Department (for the first time after the enactment of

[16] Ferdous Rahman, 'Questioning Chinese Government's Stand for Sovereign Immunity' (2017) 9(1) *Transnational Corporate Review* 321.

[17] R O'Brien, 'Sovereign Immunity and the People's Republic of China' (1983) 13(2) *Hong Kong Law Journal* 202. See also Julien Chaisse and Xueliang Ji, 'Hong Kong's Participation in International Dispute Settlement: Deviations from Conventional Sovereignty' (2022) 17(2) *Asian Journal of WTO Law & Health Policy* 307.

[18] *Hong Kong Aircraft* [1953] AC 70.

[19] J Huang and J Ma, 'Immunities of States and Their Property: The Practice of the People's Republic of China' (1988) *Hague Yearbook of International Law* 163.

[20] See O'Brien (n 17) 203–04.

[21] See Qi (n 5) 318–19.

[22] *Jackson v The People's Republic of China* 794 F 2d 1490 (11th Cir 1986).

[23] Ibid, 1491–92.

[24] Ibid, 1494. 孙昂, '国家豁免案件的法律适用问题研究——在司法与外交复合语境中的探讨' (2021) 2 *国际法研究* 4 (Ang Sun, 'A Study on the Application of Law in Cases of State Immunity: An exploration in the Compound Context of Justice and Diplomacy' (2021) 2 *International Law Studies* 4).

FSIA) exercised its right to submit amicus briefs in cases involving foreign sovereigns. The view of the executive branch has affected the US courts in concluding the case. Secondly, the Chinese government tended to state its stance on sovereign immunity through diplomatic channels. In the memorandum addressed to the State Department, it was claimed that the Chinese government vehemently rejected the imposition of the US law at the expense of China's sovereignty and henceforth, enjoyed jurisdictional immunity.[25] Thirdly, it seems China, to some extent, has departed from the conventional doctrine of absolute immunity to at least, a less rigid position. The Chinese government initially declined to appear as a defendant but later was persuaded by the State Department to retain US counsel and appear before the district court for the limited purpose of asserting China's sovereign immunity. The appointment of US counsel and special appearance before US courts as a gesture of goodwill demonstrates commendable flexibility on China's part.[26]

Another distinct development is on the immunity position of the state-owned entity (the SOE). As early as 1979, *Scott's*[27] case has already stated that the Chinese corporation is a separate legal entity in itself and enjoys its own rights and has its own obligations. It also has the distinct ability to sue or be sued.[28] Mr Ni Zhengyu, a Chinese member of the International Law Commission, on numerous occasions, insisted on the 'absolute immunity' doctrine while accepting that the SOE does not have sovereign immunity in complying with the tax laws and regulations of host countries.[29]

B. China's sovereign immunity dilemma: from diplomatic channels to the United Nations Convention

As a major achievement in the field of international law on sovereign immunity, the General Assembly of the United Nations has adopted the Convention which embraces the restrictive immunity doctrine. The Convention will not be in force until it is ratified by thirty parties.[30] According to the United Nations Database, there have been 28 signatories and 23 parties have made ratifications.[31]

The negotiations of the convention have received enthusiastic and active participation from China. In a speech delivered in the 58th session of the General Assembly, the Chinese representative recognized the need for a unified international convention to fill in the lacuna of national legislations in most countries in the field of sovereign immunity, and to maintain stability in international relations. In September 2005, China signed the Convention and accordingly, it is obliged to refrain from acts that would defeat the objective and purpose of the Convention under the 1969 Vienna Convention.[32]

[25]See Qi (n 5) 323.
[26]JA Sgro, 'China's Stance on Sovereign Immunity: A Critical Perspective on Jackson v. People's Republic of China' (1983) 22(1) *Columbia Journal of Transnational Law* 106, 119–20; JS Mo, 'Issues of Sovereign Immunity in the Australia-China Trade and Investment' (1991) 7 *Queensland University of Technology Law Journal* 61.
[27]*Scott v People's Republic of China*, No CA3-79-0836-d (ND Tex).
[28]See Huang and Ma (n 19) 172–73.
[29]See Mo (n 26) 62.
[30]The United Nations Convention on Jurisdictional Immunities of States and Their Property (adopted 2 December 2004) A/RES/59/38 Art 30.
[31]'CHAPTER III: PRIVILEGES AND IMMUNITIES, DIPLOMATIC AND CONSULAR RELATIONS, ETC' (*United Nations Treaty Collection*, 16 July 2023) <https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=III-13&chapter=3&clang=_en>.
[32]Ibid.

The Law on Judicial Immunity from Measures of Constraint for the Property of Foreign Central Banks, which is the first Chinese law on sovereign immunity, was passed by the National People's Congress in October 2005.[33] This Law only exempts the assets of a foreign central bank from execution and attachment unless the immunity is waived in written form. It is consistent with the Chinese traditional approach[34] and does not concern the issue of sovereign immunity from local jurisdiction[35] while some regard it as an important legislative experience for the PRC to make a general law on state immunity in the future.[36]

However, when it comes to court proceedings, China still persistently reiterated its absolutist doctrine through diplomatic channels. For example, in the *Morris* case, the Chinese embassy in Washington, DC, similar to what happened in the *Jackson* case, sent a memorandum to the State Department declaring China's solemn position of absolute immunity.[37]

During the period, the position that the SOE does not enjoy sovereign immunity at least to their commercial activities was reinforced in the *China Aviation Oil* case,[38] where the Chinese government during the whole process directed the Chinese SOE to cooperate with the Singapore authorities during investigation and litigation.

C. The 'Congo case': an examination of China's stance on sovereign immunity and its implications for Hong Kong

The *Congo* case, strictly speaking, is a decision made by Hong Kong courts, nonetheless, the Chinese government's strong interference in the decision highlights China's hesitation in shifting towards the doctrine of restrictive immunity[39] and has been widely criticized for possibly defeating the object and purpose of the Convention as well as to have profound negative implications on China's long-term interests.[40] But under the effect of Basic Law and the *Congo* case, the type of sovereign immunity adopted in Hong Kong shall be consistent with that in China. The significant fact is that Hong Kong, being a special administrative region of China as well as an international financial and trading centre, with its well-developed common law system and respect for rule of law, has been rendered as a popular jurisdiction for litigation and arbitration.

In this case, the Democratic Republic of the Congo (the DRC) was sued by an American fund in Hong Kong for the enforcement of two arbitral awards. The case started in 2008

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[33]Article 4 of the Law: 'The Law enters into force from the date of adoption'. For the official Chinese version, See Law of the People's Republic of China on Judicial Immunity from Measures of Constraint for the Property of Foreign Central Banks (Zhonghua Renmin Gongheguo Waiguo Zhongyang Yinhang Caichan Sifa Qiangzhi Cuoshi Huomian Fa) and Gazette of the Standing Committee of the National People's Congress of the People's Republic of China (Quanguo Renmin Daibiao Dahui Changwu Weiyuanhui Gongbao), No 7, 2005, Published on 15 November 2005, Beijing, 544.

[34]CH Wu, 'One Country, Two State Immunity Doctrines: A Pluralistic Depiction of the Congo Case' (2014) 9(2) *National Taiwan University Law Review* 200, 205.

[35]Qi (n 5) 316.

[36]L Zhu, 'State Immunity from Measures of Constraints for the Property of Foreign Central Banks: The Chinese Perspective' (2007) 6(1) *Chinese Journal of International Law* 81.

[37]*Morris v People's Republic of China*, 478 F Supp 2d 561 (SDNY 2007); *Jackson v The People's Republic of China* 794 F 2d 1490, 11th Cir (1986).

[38]Qi (n 5) 325.

[39]Wu (n 34) 200.

[40]Y Ding, 'Absolute, Restrictive, or Something More: Did Beijing Choose the Right Type of Sovereign Immunity for Hong Kong' (2012) 26(2) *Emory International Law Review* 1024.

and went all the way through to the Court of Final Appeal (the CFA). The 'Congo case' concerned a credit agreement dispute between a state-owned electricity company in the Republic of Zaire, SNEL, and a finance company, Energo Invest. The agreement stipulated the construction of a power station in Zaire, with the government assuming SNEL's obligations under the contract. When SNEL defaulted, Energo Invest emerged victorious in an International Chamber of Commerce (ICC) tribunal against SNEL and the Zairian government. The rights under the arbitration award were subsequently purchased and resold by FG Hemisphere Associates. In 2007, Zaire's successor state, the DRC entered into an agreement with a Chinese consortium for infrastructure development in Congo, which also involved a $221 million 'entry fee' paid to Congo. Asserting this payment as a government asset, FG Hemisphere Associates brought a suit against Congo in Hong Kong.

In all three courts' decisions, it was accepted that the restrictive approach has been revived as part of the common law tradition in Hong Kong after the handover.[41] However, the majority of the CFA came to the decision for absolute immunity, which was later supported by the National People's Congress Standing Committee.

The decision has given rise to a heated constitutional debate.[42] But in the context of sovereign immunity, what is more relevant, is the representation made by the Chinese government in three letters delivered by the Office of the Commissioner of the Ministry of Foreign Affairs (the OCMFA) which were included as evidence in the *Congo* decision. They sent a strong message and a full picture of China's former position on sovereign immunity with respect to three key issues. Firstly, China has unequivocally and consistently applied the doctrine of absolute immunity under which the foreign state or its government is immune from jurisdiction and execution (the 1st OCMFA letter).[43] Secondly, the unenforced Convention has not changed China's former position of absolute immunity and this cannot be used to determine China's principled stance on important matters (the 2nd OCMFA letter).[44] Thirdly, as sovereign immunity is a part of a state's foreign affairs, the notion of sovereign immunity used in Hong Kong must be consistent with China's sovereignty; otherwise, China's sovereignty would be jeopardized (the 3rd OCMFA letter).[45]

It is noteworthy that despite the majority of CFA holding that sovereign immunity as part of the foreign affairs has no room for 'one country, two systems' and shall be determined by the executive branch, according to Article 153 of the Basic Law, China's bilateral agreements with other nations, which include waivers of absolute immunity, are not applicable to Hong Kong.[46] It will arguably leave Hong Kong in a disadvantageous position when it comes to the appointment of forum courts by trade parties.[47]

[41]*FG Hemisphere Associates LLC v Democratic Republic of Congo* (Congo Case) [2009] 1 HKLRD 410 [43], [44], [71]; [2010] 2 HKLRD 66 [47]; [2011] 14 HKCFAR 95 [138].
[42]Elizabeth Chan, 'The Vulture Swoops and Devours Its Prize: The Unsatisfactory Law of State Immunity in Democratic Republic of Congo v FG Hemisphere Associates LLC' (2013) 19 *Auckland U L Rev* 145.
[43]See Congo Case (n 41) [170].
[44]Ibid, [172].
[45]Ibid, [174]–[178].
[46]A Butler, 'Democratic Republic of the Congo v. FG Hemisphere Associates LLC – Hong Kong Conforms with China by Repudiating the Common Law Commercial Exception to Sovereign Immunity' (2012) 20(2) *Tulane Journal of International and Comparative Law* 484.
[47]UNCTAD (*Investment Policy Hub*, 5 April 2015) <http://investmentpolicyhub.unctad.org/IIA/CountryBits/93>; According to United Nations Conference on Trade and Development website, Hong Kong has entered into BITs with 17 economic entities compared to 130 entered by China.

Congo also addressed a side issue of waiver of immunity. It was helpful that the countries are only immune from enforcement proceedings in Hong Kong courts and tribunals if they explicitly waive their immunity from jurisdiction when the court's jurisdiction is firstly exercised.[48] In other words, a mere submission to arbitration and even express contractual waivers may not be sufficient. Because by agreeing to the arbitration agreements, the Democratic Republic of the Congo, in the plaintiff's view, has implicitly waived its immunity. But the arbitration agreement only constitutes a legal contract between the DRC and the other party to the arbitration agreement. The violation of this contract does not imply that Congo has granted permission for itself to be brought before the courts of any other State.[49]

D. Unravelling the sovereign immunity paradox: China's evolutionary approach and its implications for global relations

As the author embarks on an exploration into China's stance on the doctrine of sovereign immunity, it is essential to reflect upon several salient features. At its core, the country's position appears to gravitate towards an absolute interpretation of immunity, a principle that has served as a bedrock for their international legal engagements. However, this practice, nuanced and multi-dimensional, is increasingly displaying signs of transitioning towards a more restrictive doctrine, in light of the evolving international norms and domestic realities. This shift is particularly discernible in the context of SOEs, where absolute immunity is being increasingly limited. In the past, the absence of explicit national legislation on sovereign immunity further complicated the landscape, nudging the nation to resort to diplomatic channels to assert its positions. However, things have changed as the Law was published in 2022.[50] China's position would be radically altered by the Law, aligning it with other countries which have embraced the restricted immunity theory.[51]

Several observations can be made from the above review and discussion. Firstly, there was no specific national legislation dealing with the general principle of sovereign immunity in China before. The general position of absolute immunity maintains that a foreign state or government is immune from jurisdiction and execution in Chinese courts unless it has waived such immunity explicitly before the courts when the relevant issue is invoked. However, the Law would change this situation. Secondly, absolute immunity is however limited in its application to the SOE. Thirdly, according to the *Scott* case and the *China*

[48]*See* Congo Case (n 41) 379 and 392.

[49]*Democratic Republic of the Congo & Others v FG Hemisphere Associates LLC* FACV No 5 of 2010 (8 June 2011) and (8 September 2011) CFA, *Basic Law Bulletin* (2012) 16, <www.doj.gov.hk/tc/publications/pdf/basiclaw/basic14_3.pdf>.

[50]William S Dodge, 'China's Draft Law on Foreign State Immunity Would Adopt Restrictive Theory' *Transnational Litigation Blog* (2023) <https://tlblog.org/chinas-draft-law-on-foreign-state-immunity-would-adopt-restrictive-theory/>; 中华人民共和国最高人民法院, '栗战书主持召开十三届全国人大常委会第一百三十次委员长会议决定十三届全国人大常委会第三十八次会议12月27日至12月30日在京举行' *新华网* (2022) <www.court.gov.cn/zixun-xiangqing-382651.html> (The Supreme People's Court of the People's Republic of China, 'Li Zhanshu presided over the 130th Chairman's Meeting of the Standing Committee of the 13th National People's Congress, which decided that the 38th session of the Standing Committee of the 13th National People's Congress will be held in Beijing from December 27 to December 30' *Xinhuanet* (2022)); 李庆明, '加强涉外领域立法的重要成果——《外国国家豁免法》草案述评' *人民网* (2023) <http://world.people.com.cn/n1/2023/0109/c1002-32602208.html> (Qingming Li, 'Important achievements in strengthening legislation in the foreign-related field-Review of the draft Law on the Immunity of Foreign States' *People's Daily online* (2023)); 徐航, '这6件法律案将提请本次常委会会议继续审议' *中国人大网* (2022) <www.npc.gov.cn/npc/kgfb/202212/cbc42cfdf64e40cd9fe5a8e3d46246e3.shtml> (Hang Xu, 'These six bills will be submitted to the Standing Committee for further deliberation at this meeting' *the Chinese net* (2022)).

[51]Coyle (n 8).

Aviation Oil case, entities that are independent legal persons are distinguished from those which are part of the Chinese government itself and are not entitled to invoke immunity, at least concerning its commercial activities. It seems to indicate China has adopted a realistic policy to deal with the restrictive doctrine accepted by major trading partners of China. Fourthly, China has taken the issue of sovereign immunity as one aspect of foreign policy and has implicitly emphasized its function in facilitating foreign relations. It has been exemplified in China's practice of using negotiation, and international agreements to resolve differences among nations on the issue of sovereign immunity. Cases like *Jackson*, *Morris* and *Congo* show that the government prefers to communicate its stance on absolute immunity through diplomatic channels. Such ideology can also be found in the 3rd OCMFA letter, in which China stressed the importance of sovereign immunity on foreign relations, explained its signatory status of the Convention as an effort to enhance harmonious international relations and implicitly suggested that only absolute immunity is consistent with China's national interest which is to further protect the state's rapidly expanding development agreements with Africa.[52]

III. Examining the jurisdictional landscape: comparing the UN Convention, FSIA, and the Law

After clarifying the Chinese changing position on sovereign immunity in practice, this article will move on to look at the jurisdiction of SOEs under the Law, the Convention, and FSIA. Both the Convention and FSIA adopt the doctrine of restrictive sovereign immunity which grants the state immunity from jurisdiction and execution subject to few exceptions (e.g. commercial activities). The examination of SOEs will focus on two most relevant questions: (1) whether the SOE falls within the definition of 'state' and (2) whether the SOE can qualify for the exception of 'commercial activities'. Due to the limited scope of this article, it will only focus on the immunity from jurisdiction as opposed to enforcement. This part is not intended to be a comprehensive comparative study as it only offers an opportunity to discuss the possible immunity claim of the SOE in Chinese courts in the future.

The complex landscape of sovereign immunity and its implications in international law has been the subject of much analysis and debate.[53] This discussion focuses on two key aspects: the UN Convention on the Jurisdictional Immunities of States and Their Property and the FSIA in the United States are explored as important legal frameworks that shape the understanding and application of sovereign immunity. Additionally, the Law will be analysed in detail.

A. The UN Convention on the jurisdictional immunities of states and their property

After decades of work with the goal of setting forth an exhaustive approach to the issues of 'state and sovereign immunity', the UN came forth with 'The UN Convention on the

[52]See e.g. Zhujun Zhao and Jianping Guo, 'Settlement of Belt and Road Disputes Between China and Central Asian Countries' (2021) 29(1) *Asia Pacific Law Review* 201.

[53]Christopher Forsyth and Nitish Upadhyaya, 'The Spectre of Crown Immunity After the End of Empire in Hong Kong and India' (2013) 21(2) *Asia Pacific Law Review* 253; HWR Wade and CF Forsyth, *Administrative Law* (10th edn, OUP, 2009) 698; Beatrice I Bonafé, 'Of Rights and Remedies: Sovereign Immunity and Fundamental Human Rights Enzo Cannizzaro' in *From Bilateralism to Community Interest: Essays in Honour of Bruno Simma* (Ulrich Fastenrath and others eds, 2011) 825; Dbe Qc (n 11) 330.

Jurisdictional Immunities of States and Their Property'.[54] Adopted on the 2nd December 2004 and opened for signature on 17th January 2005,[55] this convention endorses 'restrictive immunity' under which the jurisdictional rules of private entities apply to sovereign entities as well in cases where they are engaging in commercial transactions. The convention is based on state practices under diverse domestic systems as well as experience gained under the European Convention of 1972.[56]

It was adopted with the belief that an international convention in this regard would 'enhance the rule of law and legal certainty' and contribute to 'harmonization' and 'further development of international law' in this area.[57] The essence of this convention indicates a developing consensus which has been consistently seen in doctrine as well as practice, that a state and its enterprises cannot, any longer, claim 'absolute immunity' from the proper jurisdiction of foreign courts and agencies essentially in the matters pertaining to commercial activities.

A 'state' is defined as

> (i) the State and its various organs of government; (ii) constituent units of a federal State or political subdivisions of the State, which are entitled to perform acts in the exercise of sovereign authority, and are acting in that capacity; (iii) agencies or instrumentalities of the State or other entities, to the extent that they are entitled to perform and are performing acts in the exercise of the sovereign authority of the State; (iv) representatives of the State acting in that capacity.[58]

According to the report of the International Law Commission,[59] the term 'other entities' was introduced to provide immunity to non-governmental entities, which in extraordinary circumstances may be bestowed with governmental functions acting on behalf of the sovereign. An example of the same could be commercial banks entrusted by a government to handle import and export licenses, which are solely within governmental responsibilities. SOEs do not hold any sovereign immunity in foreign courts until and unless the exercise of sovereign authority or the performance of a sovereign function can be established.[60]

In this connection, 'Commercial transaction' means

> (i) any commercial contract or transaction for the sale of goods or supply of services; (ii) any contract for a loan or other transaction of a financial nature, including any obligation of guarantee or indemnity in respect of any such loan or transaction; (iii) any other contract or transaction of a commercial, industrial, trading or profession nature, but not including a contract of employment of persons.[61]

B. Foreign sovereign immunity of 1976 in the US

Foreign sovereigns enjoyed absolute immunity in the US courts for nearly two centuries and the courts generally declined to assert any jurisdiction over cases involving foreign

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[54]'CHAPTER III' (n 31).
[55]Ibid.
[56]Philippa Webb, 'The United Nations Convention on Jurisdictional Immunities of States and Their Property' <https://legal.un.org/avl/pdf/ha/cjistp/cjistp_e.pdf>.
[57]See The United Nations Convention on Jurisdictional Immunities of States and Their Property (adopted 2 December 2004) A/RES/59/38 Annex.
[58]Ibid, Art 2 para 1(b).
[59]'Report of the International Law Commission on the Work of its Forty-third Session' (29 April–19 July 1991) UN Doc A/46/10, at 17 <https://legal.un.org/ilc/sessions/43/index.shtml>.
[60]See generally A Dickinson, 'State Immunity and State-Owned Enterprises' (*Clifford Chance Report*, December 2008) <http://business-humanrights.org/sites/default/files/media/bhr/files/Clifford-Chance-State-immunity-state-owned-enterprises-Dec-2008.PDF>.
[61]The UN Convention 2004 (n 57) Art 2 para 1(c).

sovereigns. The jurisdiction of US courts expanded in 1952, with the issuance of the 'Tate Letter' by the US State Department announcing the adoption of the 'restrictive theory' of sovereign immunity.[62] The FSIA was enacted in 1976, by the US government to provide clear standards for resolving issues relating to 'sovereign immunity' to free the decisions of the courts from diplomatic and political pressures.[63] It codified the 'restrictive theory' of sovereign immunity as a matter of federal law. The FSIA is currently the only legal justification for American courts to have jurisdiction over a foreign state.[64]

A 'foreign state' may be described as an instrumentality, a political subdivision, or an agent of the state itself. Any separate legal entity, corporate or otherwise when functioning as an organ of a foreign state or political subdivision thereof, or whose majority of shares or other ownership interest is owned by a foreign state or political subdivision thereof, and that is neither a citizen of the United States nor created under the laws of any third country is referred to as an 'agency or instrumentality'.[65]

Case law has recognized that companies that are wholly (or majority) owned by a foreign state will qualify as 'foreign state'.[66] However, if a sovereign does not directly own the shares of the SOE, courts may not find immunity status.[67] Alternatively, the SOE may claim immunity as an organ of a foreign state if its focus is motivated by a public purpose on behalf of the foreign government.[68] This line of argument can be justified by reference to the sovereign objectives of its investment activities which private citizens would not be able to advance and the fact that its operation is under a high degree of sovereign influence (e.g. independence of decision-making, hiring of managers).

A regular conduct of commercial activities or a specific commercial transaction or both come under the ambit of 'commercial activities'.[69] In the *Argentina* case,[70] it was noted by the court that when a state or its government participate as a private actor in the market, their actions are said to be commercial in nature as per the FSIA, and the ultimate motive of this matter is insignificant to the matter. The court used the criteria to determine that Argentina's conduct of issuing bonds was commercial, even though it was done to stabilize the economy. In contrast to the Convention, the commercial character of an operation is defined by the nature of the course of conduct, individual transaction, or act, rather than by its goal. In addition to that, the activities must have sufficient nexus with the US.[71] To determine such a nexus, certain concrete facts are of paramount importance. A false representation made in the United States, securities offences committed outside the United States but involving US firms, and securities violations that directly harm US shareholders can serve as examples for the same.[72]

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[62] Danny A Hoek, 'Foreign Sovereign Immunity and Saudi Arabia v. Nelson: A Practical Guide' (1995) 18 *HastingsInt'l & Comp L Rev* 620.
[63] Michael A Tessitore, 'Immunity and the Foreign Sovereign: An Introduction to the FSIA' (1999) 73(10) *Florida Bar Journal* 48.
[64] *Argentine Republic v Amerada Hess Shipping Corp* 488 US 428, 439 (1989).
[65] The Foreign Sovereign Immunity of 1976 (FSIA) § 1603(b).
[66] *BP Chemicals Ltd v Jiangsu SOPO Corporation (Group) Ltd* 420 F3d 810 (2005).
[67] *Dole Foods Co v Patrickson* 538 US 468 (2000).
[68] *TNB Fuel Services SDN BHD v China National Coal Group Corporation* [2017] HKCFI 1016, para 14.
[69] See FSIA (n 65) § 1603(d).
[70] *Republic of Argentina v Weltover* 504 US 607 (1992).
[71] See FSIA (n 65) § 1603(e), 1605(a)(2).
[72] See D Etlinger, 'Sovereign Wealth Fund Liability: Private Investors Left out in the Cold' (2010) 18(1) *University of Miami Business Law Review* 82.

Cases where both commercial and sovereign functions are involved usually pose certain challenges.[73] Just because a part of the parties' functions includes a few features of sovereign functions, it does not in itself entail that immunity can be sought from those functions in question that are not important to the claim.[74]

To sum up, while the SOE can generally enjoy sovereign immunity under the broad definition of 'foreign state', nonetheless it may still be caught under the exception of commercial activities given the integrated nature of financial transactions today.

C. The Law

China's foreign state immunity law would significantly alter its posture and bring it into line with other countries that have embraced the restricted principle. The Law presumes that foreign states and their assets are exempt from the jurisdiction of Chinese courts, as most such laws do. Article 3 states: 'Unless otherwise provided for by this law, foreign states and their property shall be immune from the jurisdiction of the courts of the People's Republic of China'.[75]

Article 2 defines 'foreign state' to contain 'sovereign states other than the People's Republic of China', 'institutions or components of … sovereign states', and 'natural persons, legal persons and unincorporated organisations authorised by … sovereign states … to exercise sovereign powers on their behalf and carry out activities based on such authorization'.[76] In this Article, when some conditions are met, the natural persons are included in the definition of 'foreign state'. Chinese courts will accept the Ministry of Foreign Affairs' assessment of whether a state satisfies the requirements for being a sovereign state for these reasons, according to Article 18(1).[77]

A foreign state may directly or implicitly relinquish its protection from action, according to the Law. Article 4 says: 'Where a foreign state expressly submits to the jurisdiction of the courts of the People's Republic of China in respect of a particular matter or case in any following manner, that foreign state shall not be immune'.[78] By way of a treaty, a contract, a written submission, or another method, a foreign state may expressly relinquish its immunity.

A foreign state 'shall be deemed to have submitted to the jurisdiction of the courts of the People's Republic of China' in accordance with Article 5 if it brings a legal action in Chinese courts as a plaintiff, participates in a case as a defendant 'and makes a defence or submits a counterclaim on the substantive issues of the case', or participates as a third party.[79] A foreign state that joins as a plaintiff or third party is also presumed to have waived its immunity from counterclaims based on the same legal connection or circumstances, according to Article 5.[80] However, Article 6 states that a foreign state should not be judged to have submitted to jurisdiction by appearing in a Chinese court to claim

[73]GK Foster, 'When Commercial Meets Sovereign: A New Paradigm for Applying the Foreign Sovereign Immunities Act in Crossover Cases' (2014) 52(1) *Houston Law Review* 380.
[74]Ibid, 414.
[75]Law on Foreign State Immunity of the People's Republic of China, Article 3 <https://conflictoflaws.net/News/2023/03/Law-on-Foreign-State-Immunity-of-China-1.pdf> (hereinafter the Law).
[76]Ibid, Article 2.
[77]Ibid, Article 18(1).
[78]Ibid, Article 4.
[79]Ibid, Article 5.
[80]Ibid, Article 5.

its immunity, having witnesses testify on its behalf, or opting to have Chinese law rule a specific subject.[81]

A provision for commercial activity is included in the Law. According to Article 7, a foreign state is not exempt from legal action resulting from business dealings that 'take place in the territory of the People's Republic of China or take place outside the territory of the People's Republic of China but have a direct impact in the territory of the People's Republic of China'.[82] The 'commercial activity' is defined as 'any transaction of goods, services, investment or other acts of a commercial nature otherwise than the exercise of sovereign authority' under Article 7.[83] 'In determining whether an act is a commercial activity', the Law points out, 'the courts of the People's Republic of China shall consider the nature and purpose of the act'.[84]

The Law addresses the protection of foreign state property from 'judicial compulsory measures' in Articles 13 and 14.[85] Both pre-judgment steps to protect assets and post-judgment measures to carry out judgments are included in them. According to customary international law, immunity from suit is distinct from and typically broader than immunity from attachment and execution. It safeguards property owned by foreign states residing in the forum state, in this case property owned by foreign states residing in China.

With three exceptions, Article 13 states that a foreign state's property is exempt from judicially imposed coercive measures: (1) when a foreign state has explicitly renounced such immunity; (2) when a foreign state has chosen a specific piece of property to impose such measures; and (3) when the property is used for commercial purposes, it relates to the proceedings, and it is located in China, it can be used to execute judgments rendered by Chinese courts.[86] A waiver of immunity from jurisdiction is not the same as a waiver of immunity from judicially imposed restrictions, according to Article 13.[87]

The types of property that shall not be deemed to be used for commercial operations for the purposes of Article 13(3) are further defined in Article 14.[88] These include the bank accounts of diplomatic missions, items with a military theme, assets held by the central bank, items that are a part of the state's cultural heritage, items with a scientific, cultural, or historical value that are used for exhibition, and any other items that a Chinese court feels should not be regarded as being used for commercial purposes.[89]

Article 20 of the Law is one of its more intriguing aspects and it says:

> Where the immunity granted by a foreign court to the People's Republic of China and its property is inferior to that provided for by this Law, the courts of the People's Republic of China may apply the principle of reciprocity.[90]

As a result of the reciprocity clause in the Law, Chinese courts would have the authority to exercise jurisdiction over the United States and its property in any situation where American law would permit American courts to do the same for China and its property.

[81]Ibid, Article 6.
[82]Ibid, Article 7.
[83]Ibid, Article 7.
[84]Ibid, Article 7.
[85]Ibid, Articles 13 and 14.
[86]Ibid, Article 13.
[87]Ibid, Article 13.
[88]Ibid, Article 14.
[89]Ibid, Article 14.
[90]Ibid, Article 20.

IV. Comparing the Law with the FSIA and the UN Convention

After introducing the contents of the Law, this section mainly deals with two things. The first part is making a comparison among the Law, FSIA and UN Convention in related to some aspects. In this way, the unique feature of the Law can be analysed. The second part aims to discuss the impact of the Law. And it shows China's changing attitudes towards state immunity and may have a significant effect on the global economy.

A. The Law, FSIA and UN Convention

Although the Law has several similarities with FSIA and UN Convention, it does have some differences among them. For example, Article 2 of the Law has included natural persons[91] and Similar language is included in Article 2(1)(b) of the UN Convention, which defines 'State' as including 'representatives of the State acting in that capacity'.[92] However, natural persons are not covered by the US FSIA.

The Law's Articles 4–6 closely resemble the UN Convention's Articles 7–9.[93] A foreign state shall not be immune in any circumstance 'in which the foreign state has waived its immunity either expressly or by implication', according to US FSIA 1605(a)(1).[94] Counter-claims are likewise covered by a clause in Section 1607.[95] Contrary to the Law, US courts have ruled that applying US law to a contract automatically waives any claims to immunity from foreign states.

The Law appears to have taken inspiration from the commercial activities exception in the US FSIA in order to expand the commercial activities exception to operations that 'have a direct impact' in China. In addition to claims based on actions and activities in the United States, Section 1605(a)(2) of the FSIA also applies to actions taken overseas 'that act cause[] a direct effect in the United States'.[96]

While the FSIA uses a different definition of 'commercial activity', the Law does not. Chinese courts are instructed under the Law to take into account both 'the nature and purpose' of the act,[97] while § 1603(d) of the FSIA points out '[t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose'.[98] The UN Convention's Article 2(2) permits both strategies.[99] A government may claim immunity from lawsuits resulting from certain transactions, such as issuing government bonds or purchasing military equipment, more easily if the objective of the transaction were taken into account.

The protection of foreign state property against 'judicial compulsory measures', also known as 'measures of constraint' under the UN Convention and 'measures of attachment and execution' under the FSIA, is addressed in Articles 13 and 14 of the Law.[100]

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[91]Ibid, Article 2.
[92]The UN Convention, Article 2(1)(b).
[93]Ibid, Articles 7–9.
[94]FSIA 1605(a)(1).
[95]Ibid, 1607.
[96]Ibid, 1605(a)(2).
[97]The Law, Article 7.
[98]FSIA, § 1603(d).
[99]UN Convention, Article 2(2).
[100]The Law, Articles 13 and 14.

Articles 13 and 14 of the Law are quite similar to Articles 19 and 21 of the UN Convention. The key distinction can be seen in Article 13(3)'s exception for enforcing court judgments, which is specifically restricted to Chinese court judgments and necessitates that the property 'relates to the proceedings'.[101] Contrarily, Article 19(c) of the UN Convention does not restrict itself to state-level judgments where enforcement is sought and does not demand that the property be related to the proceedings. At first impression, the Law resembles the US FSIA's 1610(a)(2) more closely, which is specifically confined to US judgments and stipulates that the property must be employed for the economic activity that gave rise to the claim.

But upon thought, it seems that China's restriction of Article 13(3) of the Law to judgments of Chinese courts distinguishes it from both US practice and the UN Convention. In the United States, a party that holds a foreign judgment may ask a US court to recognize it, making it a US judgment. It is possible to seize property belonging to a foreign state in the United States in order to enforce a judgment rendered outside of the United States since the US judgment recognizing the foreign judgment is covered by 1610(a).[102]

The same appears to not apply in China, hence Article 13(3) cannot be utilized to enforce foreign decisions there. Since neither the United Nations Convention nor the United States FSIA are really in use, Article 13(3) appears to be restricted to decisions made by Chinese courts.

B. The impact of the Law

A significant advancement in the law of foreign state immunity would result from China's acceptance of the Law. For a long time, proponents of the absolute theory of foreign state immunity could use China as an example to show that the restrictive theory's standing as generally accepted international law was still in doubt. That stance will be very challenging to maintain if China embraces the restrictive theory. The Law is crucial for the fair and predictable operation of China's legal system, and to restore confidence in its international commercial dealings.

Under the former Chinese law, a foreign state or its government will enjoy absolute immunity from jurisdiction and execution of Chinese courts. However, based on the Law, the restrictive immunity will be applied. If an SOE is with an independent legal personality, it will not be entitled to invoke sovereign immunity at least for its commercial activities. However, when deciding the 'commercial activity', China considers both 'the nature and purpose' of the act.[103] In this condition, if the objective of the transaction were taken into account, the SOE may claim immunity from lawsuits resulting from some transactions.

Similar reciprocity clauses to the one China has in the Law are not found in the United Nations Convention or the United States FSIA. For instance, the FSIA contains exceptions for terrorism in sections 1605A and 1605B as well as 1605(a)(3) for expropriations that violate international law. Although none of these exemptions are included in the Law, its reciprocity provision would enable Chinese courts to hear American claims of

[101]Ibid, Article 13(3).
[102]FSIA, 1610(a).
[103]The Law, Article 7.

expropriation or terrorism. The same would apply if Congress amended the FSIA, as some members of Congress have suggested, to permit plaintiffs to bring claims against China based on Covid-19.[104]

Given the meteoric rise of the private sector in the Chinese economy and its substantial engagement in foreign investment – a trend particularly notable in the context of SOEs – the absolute immunity doctrine may no longer be suitable for China, a nation now occupying a prominent position in the global market. As China grows in economic stature and influence, allowing foreign sovereign entities to be sued in Chinese courts for commercial activities is becoming an issue of national interest. This is especially relevant given that many of China's main trading partners – including the US and European nations – adhere to the restrictive doctrine. If China continues to uphold absolute immunity, it could bar Chinese private entities from seeking legal redress in their own courts against foreign states. In contrast, initiating legal proceedings against foreign states in Chinese courts could prove instrumental in protecting the rights of aggrieved parties and enforcing Chinese law, thereby instilling confidence in both the Chinese and Hong Kong judicial systems.

China, given its significant economic influence and burgeoning role on the global stage, must consider an essential recalibration in its doctrine of sovereign immunity. The doctrine of limited immunity equitably deals with the private international law relationship between the state party and the foreign private party.[105] Although the state is still the sovereign when it engages in international civil and commercial activities, once it does so directly, it acquires the identity of the party to those relationships, or more specifically, it acquires the dual identity of the party and the sovereign of those relationships. The state should limit its sovereign status in order to avoid deviating from this fundamental principle, which is the principle of equal status of the parties in civil and commercial activities.[106] Since the state engages in private law relations, it should abide by the basic rules of private law, and enjoy rights and obligations and bear responsibilities equally with private parties.[107] Balancing the protection of its national interests and alignment with global trends requires a measured and balanced approach. Embracing the restrictive doctrine of sovereign immunity is one such strategic adjustment that can safeguard China's legal and economic interests on both domestic and international fronts.

V. Conclusion

Historically, China has often circumvented appearing in foreign courts by invoking the concept of absolute immunity via extrajudicial channels. Yet, it showcases a propensity for compromise and flexibility when it comes to crafting BITs with other nations, a strategic move aligned towards bolstering its economic position. Furthermore, it has openly conceded that Chinese SOEs, functioning as distinct legal entities, are indeed subject to the jurisdiction of courts abroad.

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[104] Chimène Keitner, 'China's Responsibility for COVID-19: Are Lawsuits the Answer?' *Illinois Global Institute* (2020) <https://cgs.illinois.edu/news/2020-10-21/chinas-responsibility-covid-19-are-lawsuits-answer>.

[105] 郭玉军, 徐锦堂, '论国家豁免的相对性' (Yujun Guo and Jintang Xu, 'On the Relativity of State Immunity') (2003) 3 <www.sinoss.net/uploadfile/2010/1130/2907.pdf>.

[106] 黄进,国际私法 (法律出版社, 1999) 195 (Jin Huang, *Private International Law* (Law Press, 1999) 195).

[107] Guo and Xu (n 105).

This approach, demonstrating adaptability and a degree of pragmatism, serves to moderate the rigidity of its hitherto steadfast adherence to the doctrine of absolute immunity. What's worse, maintaining an unwavering commitment to absolute immunity may threaten China's capacity to safeguard its rapidly growing private sector, particularly when entangled in legal disputes with foreign SOEs. Even though Chinese SOEs do not benefit from absolute immunity domestically, current sovereign immunity legislation in China and Hong Kong fails to offer sufficient redress for private parties adversely affected by disputes involving foreign SOEs.

In the past, the absence of national legislation specifically addressing sovereign immunity hindered the ability of Chinese courts to apply the doctrine appropriately and fairly in individual cases. The prevailing ideology that sovereign immunity primarily serves the interest of foreign relations further muddies the waters regarding the interpretation of laws on these issues. Consequently, private entities are advised to sidestep Chinese or Hong Kong courts in jurisdiction clauses when entering into contracts with foreign SOEs, especially in light of the Congo case, where a simple contractual waiver of immunity fell short. In contrast, it seems less arduous to bring a foreign SOE before the court under the provisions of the UN Convention and the FSIA, suggesting that they would find it challenging to dodge liability under these frameworks. However, with the Law, things can be changed. The Law applies to situations involving territorial torts or business-related activity, such as deals, investments, and loans. In line with customary Western procedures, this new legislation allows Chinese courts to consider complaints against foreign powers.

By adopting this shift, China could better defend its private sector and state-owned enterprises in international disputes, thus enhancing the credibility of its legal system and boosting confidence among stakeholders both domestically and internationally. The commitment to commercial integrity is integral to China's continued growth and prosperity. Through the adoption of the restrictive doctrine of sovereign immunity, China signals its commitment to fair and equitable application of legal principles in commercial affairs, thereby strengthening its reputation as a trustworthy and reliable player in the international commerce arena.

Moreover, upholding international commitments is paramount in maintaining China's diplomatic credibility and in fortifying its bilateral and multilateral relationships. China's ratification of the 2004 UN Convention was a significant step in this direction. However, fully embracing the restrictive doctrine of sovereign immunity would further demonstrate China's willingness to honour its commitments, fostering international cooperation and contributing to the harmonization of global legal norms. The Law has shown China's willingness.

In essence, the shift from absolute to restrictive immunity represents far more than a mere legalistic adjustment for China; it signifies a wider transformation towards a more balanced and nuanced engagement with the world. This shift embodies China's commitment to equitable legal principles, commercial integrity, and honouring international commitments. Given the mounting urgency of these imperatives, China's transition towards the restrictive doctrine becomes not just a suggested pathway, but a critical necessity for its continued rise on the global stage.

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ORCID

Xueliang Ji http://orcid.org/0000-0002-3279-9799