Examining Chinese State-owned Enterprises' Immunities under the Customary International Law of Sovereign Immunity as Expressed in the *United Nations Convention on Jurisdictional Immunities of States and Their Property*, the United States *Foreign Sovereign Immunities Act*, and the United Kingdom *State Immunity Act*

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Abbreviation

ARSIWA: *Draft Articles on Responsibility of States for International Wrongful Acts*

CPC: Communist Party of China

ECtHR: European Court of Human Rights

US FSIA: United States *Foreign Sovereign Immunities Act*

HKCA: Hong Kong Court of Appeal

HKCFA: Hong Kong Court of Final Appeal

HKCFI: Hong Kong Court of First Instance

ICJ: International Court of Justice

ILC: International Law Commission

NPC: National People's Congress

OCMFA: Office of the Commissioner of the Ministry of Foreign Affairs

SASAC: State-owned Assets Supervision and Administration Commission

SCNPC: Standing Committee of the National People's Congress

UK SIA: United Kingdom *State Immunity Act*

SOE: State-owned Enterprise

SPC: Supreme People's Court

UNCSI: *United Nations Convention on Jurisdictional Immunities of States and Their Property*

Abstract

The People's Republic of China ("China") claims absolute immunity for itself but embraces a concept of state for immunity purposes that excludes state-owned enterprises ("SOEs"). This position has led to confusion and frustration in international litigation against China and Chinese SOEs, particularly when massive Chinese foreign investments are led by SOEs, including those made under China's Belt and Road Initiative. Yet, the immunity status of Chinese SOEs is unclear. Against this backdrop, this thesis examines Chinese SOEs' ability to claim sovereign immunity under the customary international law of restrictive immunity as expressed and built on in the 2004 *United Nations Convention on Jurisdictional Immunities of States and Their Property* ("*UNCSI*"), the 1976 United States *Foreign Sovereign Immunities Act* ("US *FSIA*") and the 1978 United Kingdom *State Immunity Act* ("UK *SIA*"). In investigating the immunity status of the 97 SOEs in which the Chinese central government has direct and full/majority ownership, this thesis answers two questions: (1) under what circumstances would these 97 Chinese SOEs be treated as part of the state for immunity purposes under the *UNCSI*, the US *FSIA* and the UK *SIA*; and (2) under what circumstances would these 97 Chinese SOEs attract jurisdictional and execution immunities thereunder.

A critical part of this analysis involves developing an understanding of Chinese SOEs' dual identity as defined by the Chinese political economy. Chinese SOEs' dual identity has two levels of meaning. First, it reflects the fact that some Chinese SOEs are categorized as commercial SOEs and others are categorized as public welfare SOEs in the current SOE reform. Secondly, commercial Chinese SOEs have a dual identity, *i.e.*, a commercial and a sovereign aspect in their operations. While commercial SOEs' primary goal is to pursue commercial interests, they also implement the state's social, political, and economic policy goals. This

sovereign aspect—primarily reflected as the sovereign purpose in their commercial transactions—adds complexity, but is necessary, to our assessment of Chinese SOEs' "state" status and immunity under the customary international law of sovereign immunity.

The three regimes studied in this thesis—the *UNCSI*, the US *FSIA*, and the UK *SIA*—not only take distinctive approaches toward the definition of the state, but also to the commercial exceptions to jurisdictional immunity and execution immunity. Their different analytical frameworks take us to different conclusions about Chinese SOEs' "state" status and immunity in some cases. Under the *UNCSI* and the UK *SIA*, in principle, Chinese SOEs are unlikely to acquire "state" status to claim immunity in their commercial capacity, and consequently, unable to attract jurisdictional immunity and execution immunity for their assets as separate entities. But public welfare SOEs and some commercial SOEs can potentially attract jurisdictional immunity and execution immunity for their assets because to the extent that the purposes of their conduct—which are often related to inherently sovereign functions like the military or the public welfare—are considered in the overall context, the nature of the commercial transaction could be converted into a sovereign one. Under the US *FSIA*, Chinese SOEs—either commercial or public welfare ones—are state agencies/instrumentalities for immunity purposes, thus, have "state" status. But, in contrast with the *UNCSI* and the UK *SIA*, Chinese SOEs are less likely to attract jurisdictional immunity for their commercial activities or execution immunity for their assets under the US *FSIA* because the US statute applies a broad commercial exception that only considers the nature of the conduct in characterizing whether a transaction is a commercial one.

This thesis's investigations and conclusions have commercial, sovereign, and policy implications for Chinese SOEs' international business transactions, China's sovereign immunity position, and litigation involving China and Chinese SOEs in jurisdictions where restrictive

immunity is upheld. First, in commercial terms, the analysis in this thesis will better enable commercial parties and states that have commercial relations with Chinese SOEs to understand the dual identity of Chinese SOEs defined by the Chinese political economy and understand under what circumstances Chinese SOEs can potentially attract jurisdictional and execution immunities. Second, in sovereign terms, my research enables states to assess their diplomatic and economic relationships with China from a foreign relations law perspective as China asserts absolute immunity in foreign domestic courts. As this thesis suggests, litigation against China and its emanations and execution against their assets in states where restrictive immunity is applied could give rise to sensitive political clashes in light of China's absolute immunity position. The ongoing pandemic litigation between the State of Missouri and China in the US court is an example. In line with its practice, China refused to appear in this and other similar cases. My thesis work could provide legal researchers and practitioners with a better informed legal perspective on these highly political disputes. Third, in policy terms, my Chapter on China's sovereign immunity and my findings that some commercial and public welfare SOEs can potentially attract jurisdictional and execution immunities under the *UNCSI* and the UK *SIA* provide China some reasons to not only embrace restrictive immunity but to clarify the definition of the state for immunity purposes thereunder. Ratifying the *UNCSI*, in my view, would allow China's position to conform to international law on the one hand; and allow China to contribute to the development of the law of sovereign immunity on the other hand.

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惠 坤

Urumqi, Xinjiang, China

20 January 2023

Chapter 1 Introduction

1. Research mandate

1.1 Research context: the origin of the thesis question, restrictive immunity and China's position on sovereign immunity

This thesis examines to what extent the 97 state-owned enterprises ("SOEs")[1] owned by the central government of the People's Republic of China ("China" or "Chinese state") attract sovereign immunity in international law. It concerns (1) under what circumstances these Chinese SOEs would be seen as part of the Chinese state for immunity purposes under the customary international law as expressed and built on in the 2004 *United Nations Convention on Jurisdictional Immunities of States and Their Property* ("*UNCSI*"),[2] the 1976 United States *Foreign Sovereign Immunities Act* ("US *FSIA*")[3] and the 1978 United Kingdom *State Immunity Act* ("UK *SIA*")[4]; and (2) the scope of these Chinese SOEs' jurisdictional and execution immunities under the *UNCSI*, the US *FSIA*, and the UK *SIA*.

Determining the circumstances under which an SOE is considered part of the state in international law is unsettled. This issue has drawn scholarly attention under the law of state

[1] The term "state-owned enterprises" used here encompasses Chinese enterprises that are directly owned by the Chinese government with full or majority ownership at central, provincial and municipal levels by way of State-owned Assets Supervision and Administration Commission ("SASAC"). As will be explained later in this introductory Chapter, it does not include their subsidiaries.

[2] *United Nations Convention on Jurisdictional Immunities of States and Their Property*, 2 December 2004, A/RES/59/38 (not in force) ["*UNCSI*"].

[3] *Foreign Sovereign Immunities Act*, 28 USC §§ 1330, 1391(f), 1441(d), and 1602-1611 (1976) ["*FSIA*"].

[4] *State Immunity Act 1978* (UK), c 33 ["*SIA*"].

responsibility in general,[5] and human rights law,[6] trade law,[7] and investment law[8] in particular. Under the broader question of the scope of the state and its relationship with SOEs in different areas of international law, the nature of the relationship between China and Chinese SOEs as a result of the state's ownership is often contested. The SOE issue in the "trade war" between the US and China is a contemporary example.[9] The thesis question attracted my attention when I was conducting my research regarding the execution of arbitral awards against China in investment law for my comprehensive exam at the beginning of my Ph.D. research. My initial question was under what circumstances a hypothetical creditor of China with a valid commercial or investment arbitral award could levy execution against Chinese SOEs' assets in the event China refuses to pay for the award, and *vice versa*—whether an SOE's creditor could execute against the Chinese state's assets. As my research progressed, I realized that question encompassed questions that exceed the scope of one thesis. It required a deep analysis of the relationship

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[5] Michael Feit, "Responsibility of the State Under International Law for the Breach of Contract Committed by a State-Owned Entity" (2010) 28:1 Berkeley J Intl L 142 [Feit, State Responsibility for SOEs].

[6] Judith Schönsteiner, "Attribution of State Responsibility for Actions and Omissions of State-Owned Enterprises in Human Rights Matters" (2019) 40: 4 U Pa J Intl L 895 [Schönsteiner, Attribution of State Responsibility for Actions and Omissions of SOEs].

[7] Ines Willemyns, "Disciplines on State-Owned Enterprises in International Economic Law: Are We Moving in the Right Direction?" (2016) 19 J Intl Econ L 657 [Willemyns, Disciplines on State-Owned Enterprises in International Economic Law]; Minwoo Kim, "Regulating the Visible Hands: Development of Rules on State-Owned Enterprises in Trade Agreements" (2017) 58:1 Harv Intl LJ 225 [Kim, Regulating the Visible Hands]; Ru Ding, "Interface 2.0 in Rules on State-Owned Enterprises: A Comparative Institutional Approach" (2020) 23 JIEL 637 [Ding, Interface 2.0]; Leonardo Borlini, "When the Leviathan goes to the market: A critical evaluation of the rules governing state-owned enterprises in trade agreements" (2020) 33 Leiden JIL 313; Jaemin Lee, "The 'Indirect Support' Loophole in the New SOE Norms: An Intentional Choice or Inadvertent Mistake" (2021) 20 Chinese J Intl L 63 [Lee, The 'Indirect Support' Loophole in the New SOE Norms]; Weihuan Zhou, "Rethinking the (CP)TPP as a Model for Regulation of Chinese State-owned Enterprises" (2021) 24 J Intl Econ L 572 [Zhou, Rethinking the (CP)TPP].

[8] Jean Ho, *State Responsibility for Breaches of Investment Contracts* (Cambridge: Cambridge University Press, 2018). Regarding SOEs' standing in investment arbitration, see *Beijing Urban Construction Group Co. Ltd. v. Republic of Yemen*, ICSID Case No. ARB/14/30, Decision on Jurisdiction, 31 May 2017; Jaemin Lee, "State Responsibility and Government Affiliated Entities in International Economic Law: The Danger of Blurring the Chinese Wall between 'State Organ' and 'Non-State Organ' as Designed in the ILC Draft Articles" (2015) 49:1 J World Trade 117; Mark McLaughlin, "State-Owned Enterprises and Threats to National Security Under Investment Treaties" (2020) 19:2 Chinese JIL 283; Victor Crochet & Vineet Hegde, "China's 'Going Global' Policy: Transnational Production Subsidies Under the WTO SCM Agreement" (2020) 23:4 J Intl Econ L 841 [Crochet & Hegde, China's 'Going Global' Policy].

[9] See Journal of International Economic Law, Special Issue on "Trade Wars" (2019) 22:4 J Intl Econ L 529.

between China and Chinese SOEs under the international law of state responsibility, sovereign immunity and relevant Chinese laws in addition to other issues related to execution of arbitral awards against sovereign states pursuant to the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* ("*New York Convention*")[10] and the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States* ("*ICSID Convention*").[11] Hence, at the thesis proposal stage, I fine-tuned my research to only scrutinize the relationship between China and Chinese SOEs and the scope of Chinese SOEs' immunity under the customary international law of sovereign immunity, which contemplates a restrictive stance (*i.e.*, only a state's sovereign conduct is immune in a foreign domestic court) that is addressed in different ways in the *UNCSI*, the US *FSIA*, and the UK *SIA*.

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[10] *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959) ["*New York Convention*"].

[11] *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 18 March 1965, 575 UNTS 159 (entered into force 14 October 1966) ["*ICSID Convention*"].

Sovereign immunity is a rule of customary international law[12] that is chiefly shaped by domestic court decisions,[13] domestic legislation[14] and international treaties.[15] The customary international law of sovereign immunity has evolved in the twentieth century from an absolute rule that a state could not be sued to a more restrictive rule that only immunizes a state's sovereign actions in another state's domestic courts. It remains a potent rule as it protects states from one another's adjudication and execution jurisdiction when it is found to apply.[16] The underlying rationale for the rise of restrictive immunity was the distinction made between a

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[12] See the ICJ's decisions that referred to sovereign immunity as a rule of customary international law: *Arrest Warrant of 11 April 2000 (Democratic Republic Congo v. Belgium)*, Judgment, [2002] ICJ Rep 3, para. 59 stating that states' domestic jurisdictions "in no way affect[] immunities under customary international law[.]" [*Arrest Warrant*]; *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, [2012] ICJ Rep 99, para. 54: "As between Germany and Italy, any entitlement to immunity can be derived only from customary international law" because there is no treaty applicable between the two states. [*Jurisdictional Immunities*]; *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Judgment [2018] ICJ Rep 292, paras. 93-96, discussing whether Article 4 of the *Palermo Convention* incorporates the "customary international rules on immunities of [s]tates and [s]tate officials." [*Immunities and Criminal Proceedings*]; *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, [2019] ICJ Rep 7, para. 58, discussing if Article IV of the *1955 Treaty of Amity, Economic Relations, and Consular Rights* between Iran and the US can be interpreted "as incorporating, by reference, the customary rules on sovereign immunities." [*Certain Iranian Assets*].

[13] Xiaodong Yang, *State immunity in International Law* (Cambridge: Cambridge University Press, 2012) 26-27, 42-44 [Yang]; Hazel Fox CMG QC & Philippa Webb, *The Law of State Immunity*, 3rd ed (Oxford: Oxford University Press, 2013) 17-18 [Fox and Webb]; Rosanne van Alebeek, "Domestic Courts as Agents of Development of International Immunity Rules" (2013) 26 Leiden J Intl L 559.

[14] Early domestic laws on sovereign immunity include: the US *FSIA*; the UK *SIA*; *State Immunity Act 1979* (Singapore), Ch 313 [Singapore *SIA*]; *State Immunity Ordinance* (Pakistan) *1981/6* (Pakistan *SIO*); *Foreign States Immunities Act* (S Afr), No 87 of 1981 [South Africa *FSIA*]; *State Immunity Act*, R.S.C. 1985, c. S-18 (Canada) [Canadian *SIA*], *Foreign States Immunities Act 1985/196* (Australia) [Australia *FSIA*]; *Immunity of Foreign States from the Jurisdiction of Argentinean Courts*, 24,488/1995 [Argentina]; *Foreign State Immunity Law 5769-2008* (Israel) [Israeli *FSIA*]. Domestic laws on or touched upon sovereign immunity enacted after 2010 include: *Japanese Act on Civil Jurisdiction over Foreign States* in 2010, documented in Fox and Webb, *ibid* at 324, footnote 152; French Law No. 2016-1681 of 9 December 2016, documented in Hazel Fox, "The Restrictive Rule of State Immunity – The 1970s Enactment and Its Contemporary Status", in Tom Ruys & Nicolas Angelet eds, *The Cambridge Handbook of Immunities and International Law* (Cambridge: Cambridge University Press, 2019) 31 [Fox "The Restrictive Rules of State Immunity"; Ruys & Angelet]; Russia Federal Law No. 297-FZ (3 November 2015), cited in Library of Congress, "Russian Federation: New Law Allows Seizure of Foreign Governments' Property", available online: <https://www.loc.gov/item/global-legal-monitor/2015-12-02/russian-federation-new-law-allows-seizure-of-foreign-governments-property/>.

[15] See *European Convention on State Immunity*, 16 May 1972, ETS No. 74 (entered into force 11 June 1976); *United Nations Convention on Jurisdictional Immunities of States and Their Property*, 2 December 2004, A/RES/59/38 (not in force). ["*ECSI*"]

[16] John H. Currie, *Public International Law*, 2nd ed (Toronto: Irwin Law, 2008) 364 [Currie]; Campbell McLachlan, *Foreign Relations Law* (Cambridge, Cambridge University Press, 2014) 477 [McLachlan].

state's public and private functions and the idea that a state's engagement in private acts such as commercial, tort and employment activities should not enjoy sovereign immunity.[17] Under restrictive immunity theory, the notion of two separate immunities from jurisdiction and execution was developed and each recognizes a commercial exception on a different basis—under the former a transaction/conduct/activity of the state that is commercial in nature may be the subject of a claim in a foreign domestic court and under the latter assets that are used by a state for a commercial purpose may be subject to execution. As early as the nineteenth century, states like Belgium, Italy and Switzerland began to apply the restrictive immunity theory in their courts.[18] Other states, following the examples of the US and the UK in the late 1970s and 1980s, have enacted domestic laws on sovereign immunity that uphold restrictive immunity, which also distinguish jurisdictional immunity and execution immunity.[19] The majority of scholars have concluded that the customary international law of sovereign immunity is now restrictive as opposed to absolute. They recognize that, while most states share the commercial exceptions rationale, there are still technical details that may differ in how they are applied.[20] Based on the authoritative work of the International Law Commission ("ILC"), whose mandate is to promote the codification and progressive development of international law,[21] the United Nations adopted the *UNCSI* in 2004. The *UNCSI* elevates the ILC's work to a multilateral treaty level and declares that it will "contribute to the codification of international law and the harmonization of practice in this area."[22] The *UNCSI* notably includes a commercial exception to both

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[17] See Chapter 2, Section 2.
[18] See Chapter 2, Section 2.
[19] See Chapter 2, Section 2.
[20] See Chapter 2, Section 2.
[21] Article 1(1) of the Statute of the International Law Commission provides that "The International Law Commission shall have for its object the promotion of the progressive development of international law and its codification."
[22] Preamble, *UNCSI*.

jurisdictional immunity[23] and execution immunity,[24] which shows the treaty endorses restrictive immunity as a rule of customary international law.[25] Contrary to this overwhelming trend favouring restrictive immunity in the international community, China objects to restrictive immunity as customary international law and has continued to take an absolute immunity stance.[26] In China's view, it does not matter whether a state was or is engaging in a sovereign or commercial conduct—it should be able to enjoy both immunities from jurisdiction and execution in a foreign domestic court.[27] China asserts that absolute and restrictive immunities co-exist in international law. As such, it has sovereign discretion to subscribe to one rule—absolute immunity—that suits its interest.[28] Under its absolute immunity position for states, China excludes SOEs from the scope of the state.[29]

But China's position is likely changing. On 27 December 2022, the Chinese legislator—the Standing Committee of the National People's Congress ("SCNPC")—hosted a meeting and reviewed several proposed or draft laws, including an *Explanation Note Regarding Foreign State Immunity Law of People's Republic of China (Draft)* ("*Explanation Note Regarding Foreign State Immunity Law (Draft)*"),[30] presented by the Vice Minister of the Ministry of Foreign

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[23] See Article 10 of the *UNCSI* on the exception of "commercial transaction" to jurisdictional immunity, discussed in Chapter 5.
[24] See Articles 18 of the *UNCSI* on "state immunity from pre-judgment measures of constraint" and Article 19 the *UNCSI* on "state immunity from post-judgment measures of constraint", discussed in Chapter 5.
[25] See Chapter 2, Section 2.
[26] See Chapter 3, Sections 2.1 and 2.2.
[27] See Chapter 3, Sections 2.1 and 2.2.
[28] See Chapter 3, Section 2.3.
[29] See Chapter 3, Section 3.
[30] National People's Congress (中国人大网), News Release, "十三届全国人大常委会第三十八次会议在京举行，审议立法法修正草案、野生动物保护法修订草案等 栗战书主持" (The 13th Standing Committee of the People's Congress hosted its 38th Meeting in Beijing and Reviewed *Legislation Law (Draft)*, Wild Animals Protection Law (Amendment Draft) and Other Laws, Chaired by Li Zhanshu), 27 December 2022, online: <http://www.npc.gov.cn/npc/kgfb/202212/62287d780e3c4783a652b8e8331ff39a.shtml>.

Affairs for the SCNPC's consideration.[31] On 30 December 2022, China published the *Foreign State Immunity Law (Draft)* for public consultation for 30 days until 28 January 2023.[32] In the postscript of the thesis, I will briefly lay out the legislative intent and key provisions of this law, which explicitly embraced restrictive immunity. Because it is uncertain whether this law will be passed, and if it is, to what extent it will be changed from this current version after the public consultation, I will not deal with this draft law in the thesis.

1.2 Research questions

Within the above context, I divided my thesis investigation into three groups of questions that are addressed in Chapters 2-7.

1.2.1 Where does customary international law of sovereign immunity stand? What is China's position, and is China's absolute immunity position consistent with the customary international law? [Chapters 2 and 3]

To assess Chinese SOEs' immunity—which encompasses the preliminary question of under what circumstances Chinese SOEs are part of the state for immunity purposes—under the law of sovereign immunity, the starting point is to understand where the current customary law stands, what is China's position and whether China's position is consistent with international law. Based on a survey of key state practice, the drafting of the *UNCSI*, leading international and domestic jurisprudence, and majority scholarly views, I conclude that the customary international law on sovereign immunity has crystalized as restrictive immunity. The general rule of restrictive

[31] See Standing Committee of the National People's Congress (全国人大常委会), "关于《中华人民共和国外国国家豁免法（草案）》的说明" [*Explanation Note Regarding Foreign State Immunity Law of People's Republic of China (Draft)*], 北大法宝 (pkulaw.com), 法宝印证 (pkulaw reference number): CLI.DL. 21983, December 2022, [SCNPC, *Explanation Re Foreign State Immunity Law (Draft)*]; the Chinese text of the *Foreign State Immunity Law* (Draft) can be found here: <https://npcobserver.com/wp-content/uploads/2022/12/Foreign-Sovereign-Immunity-Law-Draft.pdf> [China's *Foreign State Immunity Law (Draft)*].

[32] National People's Congress（中国人大网）, 外国国家豁免法（草案）征求意见 (*Foreign State Immunity Law* (Draft) Public Consultation); online: <http://www.npc.gov.cn/flcaw/userIndex.html?lid=ff808181844232f70185613513b340d2>.

immunity is that states enjoy immunity unless their conduct falls into one of the exceptions to immunity, the most common of which is the exception for commercial acts.[33] Although domestic laws and treaties differ in technical details regarding the definition of the state and the contents of commercial exceptions to jurisdiction and execution immunities, these formulation differences do not prevent us from concluding that the customary international law is restrictive and not absolute.[34] Based on this conclusion, I will critically assess China's absolute immunity position and rationale it has maintained in Chapter 3. In this Chapter, I argue that China's absolute position is inconsistent with international law.[35]

1.2.2 What are Chinese SOEs' status and functions in the Chinese political economy? How do we characterize Chinese SOEs' activities therein? [Chapter 4]

As of December 2021, the State Council's[36] State-owned Assets Supervision and Administration Commission ("SASAC")[37] owned 97 SOEs.[38] Despite their small number,[39] they are some of the world's largest companies, once their subsidiaries' profits are taken into account.[40] In this regard, scholars have observed that China or the SASAC can be seen as the world's largest controlling

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[33] See Chapter 2, Section 2.
[34] See Chapter 2, Section 2.
[35] See Chapter 3, Sections 4.1 and 4.2.
[36] The State Council is the Chinese central government.
[37] The central SASAC is subdivision of the Chinese central government—State Council. The provincial and local governments also have their own SASACs. SASACs represent the Chinese central, provincial and local governments as state investors in enterprises. See Chapter 4 below.
[38] State-owned Assets Supervision and Administration Commission of the State Council, News Release, "央企名录" [The List of Central Enterprises] (23 December 2021), online: SASAC <http://www.sasac.gov.cn/n4422011/n14158800/n14158998/c14159097/content.html> [SASAC, "The List of Central SOEs"]; see also WTO, *Trade Policy Review, Report by the Secretary: China*, 15 September 2021, WTO Doc. WT/TPR/S/415, 15 September 2021, para 3.202.
[39] The central SASAC of the State Council controls 97 SOEs (central SASAC-SOEs). See Chapter 4.
[40] Mark Wu, "The 'China, Inc.' Challenge to Global Trade Governance" (2016) 57:2 Harv Intl LJ 261 [Wu, "The 'China, Inc.'"; Ming Du, "China's State Capitalism and World Trade Law" (2014) 63 ICLQ 409 at 410-411 [Du, China's State Capitalism]; Kim, Regulating the Visible Hands, *supra* note 7 at 231; WTO, *Trade Policy Review, Report by the Secretary: China*, *supra* note 38.

shareholder.[41] Regarding these SOEs' immunity, China contends that, because Chinese SOEs are independent corporate entities established pursuant to Chinese laws excluding them from the state when undertaking commercial activities, they cannot claim themselves to be part of the Chinese state for immunity purposes. Further, China argues that since Chinese SOEs have independent standing before international tribunals or foreign domestic courts for violations of legal obligations, they cannot incur state responsibility for China.[42] In its proposal for World Trade Organization ("WTO") reform in 2019, China submitted that "[SOEs] engaged in commercial competition are equal players in the market as other types of enterprises."[43] The basis of China's international stance regarding its relationship to Chinese SOEs rests upon the Chinese SOE's separate corporate personality as prescribed by Chinese laws.[44] The underlying rationale of China's position is that China seeks to set a boundary between itself and Chinese SOEs for both liability and immunity purposes.[45]

Despite China's position that SOEs are completely separate from the state, a major concern of the international business community derives from China's full or majority ownership of Chinese SOEs. For them, it is uncertain whether Chinese SOEs are independent corporations that pursue commercial interests, or whether they are China's tools for pursuing political and policy goals in the guise of a corporate form.[46] This is well reflected in the United States'

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[41] Li-Wen Lin & Curtis J. Milhaupt, "We Are the (National) Champions: Understanding the Mechanisms of State Capitalism in China" (2013) 65 Stan L Rev 697, 700 [Lin & Milhaupt, We Are the (National) Champions]; Wu, "The 'China, Inc.'", *ibid* at 271.
[42] See Chapter 3, Section 3.
[43] WTO, *China's Proposal on WTO Reform*, 13 May 2019, WTO Doc. WT/GC/W/773, para. 2.35.
[44] In WTO's 2021 Trade Policy Review on China, it noted that China is going through a mixed ownership reform, see WTO, *Trade Policy Review, Report by the Secretary: China*, *supra* note 34, Section 3.3.5.
[45] *TNB Fuel Services SDN BHD v. China National Coal Group Corporation* [2017] HKCFI 1016, para. 14 [*China National Coal*].
[46] Henry Gao & Weihuan Zhou, *Between Market Economy and State Capitalism: China's State-owned Enterprises and the World Trading System* (Cambridge: Cambridge University Press, 2022) at 6 stating that China "treats SOEs as the primary economic agents of the state and main instrument for implementing industrial and other national policies" [Gao & Zhou, *Between Market Economy and State Capitalism*].

submission to China's 2018 Trade Policy Review at the WTO. The US argued that China "exercise[s] control directly or indirectly over the allocation of resources through instruments such as government ownership and control of key economic actors".[47] Shixue Hu summarized China's and the US's opposing positions on Chinese SOEs in the trade law context as the following:

> The U.S. emphasizes the general characteristics of the institution in the domestic eco-political environment whereas China suggests ad hoc analyses of power-designation in specific activities of these entities, regardless of domestic political context. Simply, one side asks, "who are they?," and the other focuses on "what are they doing?"[48]

Hu succinctly summarized the distinction: the US focuses on the identity or status of Chinese SOEs in the Chinese political economy for who they are as a group of actors, whereas China relies on a case-by-case analysis on the nature, function and authority designated by the state of an individual SOE for what they do, without considering China's political economy.[49]

The US's emphasis on an SOE's ownership relationship with its home state in the trade law context is also reflected in its statutory approach taken in the US *FSIA*, which contemplates SOEs' status of being part of the state for immunity purposes on the basis of state ownership. Section 1603(b) of the US *FSIA* prescribes that a state's direct and majority ownership would render an SOE an effective part of the state for purposes of claiming immunity,[50] although

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[47] WTO, *China's Trade-Disruptive Economic Model: Communication from the United States*, 11 July 2018, WTO Doc. WT/GC/W/745, para 1.1; see also paras 1.6, 1.7-1.11.
[48] Shixue Hu, "Clash of Identifications: State Enterprises in International Law" (2019) 19:2 UC Davis Bus LJ 171, 198. [Hu, Clash of Identifications]
[49] Regarding the opposing views of China and the US on SOEs, see two WTO cases: Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WTO Doc. WT/DS379/AB/R, adopted on 11 March, 2011 [AB Report, DS379]; Appellate body Report, *United States – Countervailing Duty Measures on Certain Products from China Recourse to Article 21.5 of the DSU by China*, WTO Doc. WT/DS437/RW, adopted on 15 August 2019 [AB Report, DS437].
[50] Section 1603 (b) provides that "An 'agency or instrumentality of a foreign state' means any entity—(1) which is a separate legal person, corporate or otherwise, and (2) … a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and (3) which is neither a citizen of a State of the United States…, nor created under the laws of any third country."

whether the SOE as a state agency/instrumentality can successfully enjoy jurisdictional immunity or execution immunity in a particular case hinges upon the application of the commercial exceptions under Sections 1605 and 1610.[51]

In this thesis, I challenge the rationale of treating state ownership as *prima facie* evidence for state control and intervention in SOEs, such as argued by the US in the WTO context. I also challenge the rationale of China's counter-argument that because Chinese SOEs are corporate entities established under Chinese laws, there exists no state control, intervention or preferential treatment from the state in SOEs. In Chapter 4, I will show that neither argument of the US and China captures the full picture of Chinese SOEs' status and functions defined by the Chinese political economy. Section 2.2 below briefly discusses and Chapter 4 elaborates upon my argument that Chinese SOEs have a dual identity that exemplifies both commercial and sovereign identities in different situations as defined by the Chinese political economy. Chapter 4 shows the difficulty and the necessity of characterizing Chinese SOEs' commercial transactions in light of their dual identity defined by the Chinese political economy.[52] These findings will facilitate my assessment of Chinese SOEs' "state" status and immunities under the customary international law of sovereign immunity as discussed below in Section 1.2.3 and Chapters 5 to 7.

1.2.3 Under what circumstances would Chinese SOEs enjoy jurisdictional and execution immunities as set out in the *UNCSI*, the US *FSIA* and the UK *SIA* in light of my political economy analysis? [Chapters 5, 6 and 7]

Following my assessment of Chinese SOEs' status and functions under the Chinese political economy in Chapter 4, I will examine how the *UNCSI*, the US *FSIA* and the UK *SIA* determines

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[51] Section 1605 provides general exceptions to the jurisdictional immunity of a foreign state. Section 1605(a)(2) provides the crux of restrictive immunity—commercial exception. Section 1610 provides exceptions to a foreign state's immunity from execution. Section 1610(b)(2) addresses the commercial exception to a state agency/instrumentality's immunity from execution. For a detailed discussion of the two provisions, see Chapter 7.
[52] See Chapter 4, Sections 3.1.2 and 3.2.

Chinese SOEs' "state" status and immunity claims in Chapters 5-7. The three regimes take different analytical approaches toward the definition of the state and the commercial exception to jurisdictional immunity and lead us to different conclusions on Chinese SOEs' immunity in some cases. Under the *UNCSI* and the UK *SIA*: in principle, commercial Chinese SOEs are unlikely to attract either jurisdictional or execution immunity for their commercial activities. But public welfare SOEs and some commercial SOEs can potentially attract jurisdictional immunity and execution immunity for their assets, because the purposes of their conduct related to inherently sovereign functions like the military or the public welfare are considered under the two regimes. In contrast, under the US *FSIA*, Chinese SOEs—either commercial or public welfare ones—are state agencies/instrumentalities for immunity purposes. Although having "state" status, they are less likely to attract jurisdictional immunity for their commercial activities or execution immunity for their assets because the US *FSIA* applies a broad commercial exception that only considers the nature of the conduct in characterizing whether a transaction is a commercial one.[53]

2. Analytical framework, analytical tool and research method

2.1 Analytical framework—customary international law of sovereign immunity is restrictive, with a distinction made between jurisdictional immunity and execution immunity

Based on a survey of state practice, scholarly views, and international and domestic judicial adjudication, I conclude that the customary international law of sovereign immunity is restrictive in nature in Chapter 2.[54] In the development of restrictive immunity, the distinction between jurisdictional immunity and execution immunity became significant.[55] Jurisdictional immunity

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53 See Chapter 5, Sections 4; Chapter 6, Section 5; Chapter 7, Section 5.
54 See Chapter 2, Section 2.2.
55 Yang, *supra* note 13 at 350; Fox and Webb, *supra* note 13 at 479; Malcolm N. Shaw, *International law*, 8th ed (Cambridge: Cambridge University Press, 2017) 562 [Shaw]; *Jurisdictional Immunities*, *supra* note 12 at para. 113:

determines whether a foreign state can be immune from a domestic court's adjudication.[56] Execution immunity determines whether a state's assets can be immune from actual seizure and attachment in a foreign domestic court.[57] A consequence of distinguishing the two immunities is that a state and its emanations could, in principle, still claim and even attract execution immunity for their assets that are used for sovereign purposes in a foreign domestic court even though they do not have jurisdictional immunity because of their commercial activities.[58] For example, a state could be sued in a foreign domestic court for using a vessel for purposes like shipping agricultural products it bought for its armed forces. But it could resist having the vessel and its equipment seized for execution of a judgment because the items were used for sovereign purposes—tools to secure its military's food supply. In this situation, the state's creditor has to locate that state's assets that are used for commercial purposes.[59] As we will see in this thesis, less or no execution immunity is provided to state agencies/instrumentalities (part of the state) under the *UNCSI* and the US *FSIA*, or to separate entities (not part of the state) under the UK *SIA*.[60]

Important questions exist regarding SOEs' claims of execution immunity. For example, under what circumstances can SOEs claim execution immunity for their assets? Are an SOEs' assets part of its home state's immune assets? A claim of execution immunity, whether it is

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"The rules of customary international law governing immunity from enforcement and those governing jurisdictional immunity (understood *stricto sensu* as the right of a State not to be the subject of judicial proceedings in the courts of another State) are distinct and must be applied separately."

[56] Shaw, *ibid* at 523; *Jurisdictional Immunities*, *ibid*.

[57] Shaw, *ibid* at 562; Yang, *supra* note 13 at 343.

[58] Yang, *ibid* at 350.

[59] Yang, *ibid*; Fox and Webb, *supra* note 13 at 483; Jean-Marc Thouvenin and Victor Grandaubert, "The Material Scope of State Immunity from Execution" in Tom Ruys & Nicolas Angelet, eds, *The Cambridge Handbook of Immunities and International Law* (Cambridge: Cambridge University Press, 2019) at 245, 255-263. [Thouvenin and Grandaubert, The Material Scope of State Immunity from Execution]

[60] See Chapter 5, Sections 3.2; Chapter 6, Section 4.2; Chapter 7, Section 4.2.

successful or not, creates commercial risks and litigation hurdles for SOEs' business partners. Within this analytical framework of two immunities under the restrictive immunity theory, using conventional doctrinal analysis, this thesis will examine Chinese SOEs' jurisdictional and execution immunities under the customary international law of restrictive immunity as expressed in and built on the *UNCSI*, the US *FSIA* and the UK *SIA*.

2.2 Analytical tool: China's "market in the state" political economy

As indicated above, neither state ownership nor the SOE's corporate formality and legal standing is sufficient to give us a comprehensive understanding of the relationship between China and Chinese SOEs on the international and domestic planes. To study that relationship and Chinese SOEs' immunity under the law of sovereign immunity, I argue that a Chinese political economy analysis should be conducted to understand Chinese SOEs' status and functions in the Chinese political, legal and economic systems. I found inspiration for this argument in Yongnian Zheng and Yanjie Huang's "market in the state" political economy theory.[61] According to Zheng and Huang, the Chinese market in the state political economy encompasses the following traits. First, while there is a boundary between the state and the market, the market is not autonomous and it must live within the regulatory and policy boundaries set by the state and the Communist Party of China ("CPC").[62] Secondly, despite state domination, the market engages with the state's economic statism.[63] Zheng and Huang's theory correctly suggests that the relationship between China and Chinese SOEs cannot be explained only by state ownership or SOEs' corporate formality and legal standing. Elements such as the state's approach to market regulation and

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[61] Yongnian Zheng & Yanjie Huang, *Market in State: The Political Economy of Domination in China* (Cambridge: Cambridge University Press, 2018) [Zheng & Huang, *Market in the State*].
[62] Zheng & Huang, *Market in the State*, *ibid* at 32.
[63] *Ibid* at 127.

SOE reform, the state's planning and regulation of the SOE sector, SOEs' corporate governance, and SOEs' relationship to the SASAC and the CPC are all relevant.[64] The consideration of these additional elements in my assessment of the relationship between China and Chinese SOEs led me to conclude that Chinese SOEs have a dual identity in the Chinese political economy. First, Chinese SOEs' dual identity is reflected in China's categorization of Chinese SOEs as commercial SOEs and public welfare SOEs in 2015. Secondly, commercial SOEs have a dual identity. Commercial SOEs primarily pursue commercial interests in their business ventures, but they could also act as China's tools for providing public goods and services or pursue the state's sovereign goals, *i.e.*, acting as the state's "policy channeling" tools in a corporate form that carries out sovereign functions or purposes.[65] However, as we will see in Chapter 4, China never finished this categorization. As a result of this lack of policy clarity, the status and functions of 97 SOEs owned by central SASAC will have to be determined by their primary business and the purpose thereof, including whether they are in a national security sector identified by the CPC, and whether they have exercised sovereign authority on a case-by-case basis. In this thesis, an SOE will be treated as a "commercial SOE that is in industries and sectors that have an impact on national security and lifeline of national economy" if its primary business falls into a national security sector as identified by the CPC. Based on China's recent treaty practice with the European Union, if an SOE provides poverty relief or natural disaster relief to the public, it could fall into the category of "public welfare SOE." In other situations, an SOE is likely to fall into the category of "commercial SOEs that are in competitive businesses." In principle, we can say

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[64] See Gao & Zhou, *Between Market Economy and State Capitalism*, *supra* note 46 at 5-6 arguing that the ongoing Chinese SOE reform has strengthened the influence of the CPC in SOEs. In their view, although the CPC's influence on its own is not necessarily problematic, but when it is combined with other factors such as state subsidies and preferential regulatory treatment, CPC control could and often does result in anti-competitive effects.
[65] Chapter 4, Sections 3.1.2 and 3.2.

that all central SASAC-owned Chinese SOEs have a dual identity and the degree to which SOEs are engaged in carrying out public function or exercising sovereign authority may vary from one SOE to another SOE (*e.g.*, one is a commercial SOE and one is a public welfare SOE) and from one transaction or activity to another (*e.g.*, one transaction is importing mineral resources for a general industrial usage purpose and one transaction is importing semi-conductors for a military usage purpose). In light of commercial Chinese SOEs' extensive presence in foreign trade and investments, the thesis's focus will be the implications of their dual identity as defined by the Chinese political economy on their immunity claims under international law.[66]

Curtis J. Milhaupt used the term "policy channeling" to describe the phenomenon when a state uses its ownership of business enterprises to carry out non-financial objectives as contrasted with the use of regulation to accomplish those objectives.[67] These objectives range from providing employment to carrying out the state's industrial policies.[68] Such "policy channeling" function is well reflected in Chinese SOEs. For example, extensive Chinese overseas investments are made by SOEs, including those made under the umbrella of China's Belt and Road Initiative ("BRI"),[69] which have drawn extensive concerns.[70] Chinese SOEs' "policy channeling" function, or the sovereign aspect of their dual identity, is particularly challenging to our assessment of these commercial SOEs' sovereign immunity claims in foreign domestic courts. This is because

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[66] Chapter 4, Sections 3.1.2 and 3.2.
[67] Curtis J. Milhaupt, "The State as Owner—China's Experience" (2020) 36:2 Oxford Review of Economic Policy 362 [Milhaupt, The State as Owner].
[68] Milhaupt, "The State as Owner", *ibid* at 370.
[69] Heng Wang, "China's Approach to the Belt and Road Initiative: Scope, Character and Sustainability" (2019) 22:1 J Intl Econ L 29 [Wang, China's Approach to the BRI]; Jacob J Lew et al., "China's Belt and Road: Implications for the United States" (2021) Council on Foreign Relations Independent Task Force Report No. 79 [Lew et al., China's Belt and Road].
[70] Keith Bradsher, "China Renews Its 'Belt and Road' Push for Global Sway", The New York Times, (15 January 2020), online: <https://www.nytimes.com/2020/01/15/business/china-belt-and-road.html>; *cf* Deborah Brautigam, "Is China the World's Loan Shark", The New York Times, (26 April 2019), online <https://www.nytimes.com/2019/04/26/opinion/china-belt-road-initiative.html>.

under the customary international law of restrictive immunity, an entity's status and the nature of its conduct are the primary criteria to attract immunity. Distinguishing Chinese SOEs' commercial and sovereign status and functions is not black-or-white within the Chinese political economy given their dual identity.

Often, Chinese SOEs engage in ostensibly commercial activities with the coordination of the state, other state organs, state-owned banks, and/or other SOEs.[71] One example is Chinese state-owned banks and Chinese SOEs' participation in China's loans to African countries.[72] Seen on their own, they are commercial loans for profit made by banks and SOEs with corporate personalities, *i.e.*, they are commercial in nature. But seen in their context, they often involve the Chinese state organs' coordination, approval, and foreign policy calculations, which could change the nature of these loans to quasi-sovereign and even sovereign in nature, taking into account China's sovereign purposes.[73] Another example is Chinese SOEs' investments in ports, dams, and railways in BRI countries. Seen on their own, they look like commercial foreign investments made by SOEs. Seen in light of their context and purpose, they carry out the Chinese

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[71] Gregory Shaffer & Henry Gao, "A New Chinese Economic Order" (2020) 23:3 J Intl Econ L 607, 616-17.
[72] See Anna Gelpern et al., "How China Lends: A Rare Look into 100 Debt Contracts with Foreign Governments" (2021) Peterson Institute for International Economics Working Paper 21-7 [Gelpern et al., How China Lends]; see also Abdi Latif Dahir, "Kenya Discloses Part of Secret Railway Contract with China", The New York Times, (8 November 2022), online: < https://www.nytimes.com/2022/11/08/world/africa/kenya-china-railway-contract.html>. In his report, Dahir attached three loan contracts signed between Kenya and the Chinese state-owned Export-Import Bank of China, which was disclosed by the Kenya government. The first one is identified by a signature date of 11 May 2014 and a China EXIMBank PBC No. (2014) 13 Total No. (307): < https://int.nyt.com/data/documenttools/Kenya-China-Docs-1/98656a135ff762d3/full.pdf> [Kenya-Ex-Im Bank of China Agreement 1]; the second one is identified by a contract number 1410302052014210766: < https://int.nyt.com/data/documenttools/Kenya-China-Docs-2/e099c795dfcc47ce/full.pdf>[Kenya-Ex-Im Bank of China Agreement 2]; and the third one is identified by a contract number BLA201508: < https://int.nyt.com/data/documenttools/Kenya-China-Docs-3/e77decaa0b58d2e4/full.pdf> [Kenya-Ex-Im Bank of China Agreement 3].
[73] Jane Perlez, "Where China is Changing Its Diplomatic Ways (at Least a Little)", The New York Times, (25 July 2022), online: <https://www.nytimes.com/2022/07/25/world/asia/china-diplomacy-africa.html?searchResultPosition=1>, reporting that in the case of China's loans to Zambia only, nearly 20 different Chinese entities—including SOEs, governmental entities, and corporations are involved.

state's long-term geopolitical goals and strategies that are political in nature.[74] As one report from the New York Times noted, many Chinese BRI projects could have sovereign purposes:

> Large ports [built by Chinese SOEs] in Pakistan, Sri Lanka and Malaysia — three countries along a major oil and commerce route from the Mideast and Africa — could someday double as naval logistics hubs.[75]

Another piece from the same newspaper observed the following regarding China's military collaboration with Pakistan under the BRI umbrella:

> Chinese officials have repeatedly said the Belt and Road is purely an economic project with peaceful intent. But with its plan for Pakistan [to build military jets, weaponry and other hardware for China], China is for the first time explicitly tying a Belt and Road proposal to its military ambitions — and confirming the concerns of a host of nations who suspect the infrastructure initiative is really about helping China project armed might.[76]

These are extreme examples that illustrate the possible political and geopolitical backdrop of the BRI projects, but they illustrate the complexity of assessing the commercial character of Chinese SOEs and their business transactions. These issues are exemplified in the *FG Hemisphere 1* case that will be analyzed in Chapter 3, in which Chinese state-owned banks and SOEs were involved in China's international infrastructure-for-resources policy under an umbrella agreement signed between China and the Congo. This case study will help us to understand other BRI projects led by Chinese SOEs and Chinese state-owned banks because they often operate in the same or similar way. As Gregory Shaffer and Henry Gao observed, "[Chinese] [c]ompanies typically conduct BRI projects under the umbrella of a memorandum of understanding between China and receiving country, complemented by public and private contracts."[77] This was what happened in

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[74] Shaffer & Gao, "A New Chinese Economic Order", *supra* note 71 at 617.
[75] Derek Watkins et al., "The World, Built by China", The New York Times, (18 November 2018), online: <https://www.nytimes.com/interactive/2018/11/18/world/asia/world-built-by-china.html?action=click&module=RelatedLinks&pgtype=Article>.
[76] Maria Abi-Habib, "China's 'Belt and Road Plan' in Pakistan Takes a Military Turn", The New York Times, (19 December 2018), online: <https://www.nytimes.com/2018/12/19/world/asia/pakistan-china-belt-road-military.html>; see also Shaffer & Gao, "A New Chinese Economic Order", *supra* note 71 at 614.
[77] Shaffer & Gao, "A New Chinese Economic Order", *ibid* at 617.

the *FG Hemisphere 1* case. While weighing Chinese SOEs' dual identity as defined by the Chinese political economy adds difficulty to our characterization exercise, these examples show that it is necessary for a full and accurate assessment of Chinese SOEs' "state" status and immunity under the customary international law of sovereign immunity.

2.3 Research method: a comparative study

I apply a comparative method in this research: I choose the US *FSIA*, the UK *SIA* on the national plane and the *UNCSI* on the international plane that, to different extents, illustrate and supplement the customary international law of restrictive immunity. In Chapters 5 to 7, I investigate how the *UNCSI*, the US *FSIA*, and the UK *SIA* approach the unsettled issues such as the definition of the state for immunity purposes and the test for a commercial transaction for restrictive immunity purposes. The comparative analysis shows that the three regimes all recognize a commercial exception to immunity. However, their different approaches toward the definition of the state and the commercial exception to immunity lead to the different conclusions regarding Chinese SOEs' immunity: Under the *UNCSI* and the UK *SIA*, in principle, Chinese SOEs are unlikely to acquire "state" status to claim immunity in their commercial capacity, and consequently, unable to attract jurisdictional immunity and execution immunity for their assets as separate entities. But public welfare SOEs and some commercial SOEs can potentially attract jurisdictional immunity and execution immunity for their assets because the purposes of their conduct—which are often related to inherently sovereign functions like the military or the public welfare—can potentially convert their commercial transactions into sovereign ones if a court in the *UNCSI* jurisdiction or a UK court takes those purposes into account. Under the US *FSIA*, Chinese SOEs—either commercial or public welfare ones—are state agencies/instrumentalities for immunity purposes, thus, have "state" status. But, in contrast with the *UNCSI* and the UK *SIA*, Chinese SOEs are less likely to attract jurisdictional immunity

for their commercial activities or execution immunity for their assets under the US *FSIA* because the US statute applies a broad commercial exception that only considers the nature of the conduct in characterizing whether a transaction is a commercial one.

3. Scope of the thesis (inclusion and exclusion)

3.1 The choice of the *UNCSI*, the US *FSIA* and the UK *SIA*

In this thesis, I chose to examine Chinese SOEs' immunity under the law of sovereign immunity as expressed in the *UNCSI*, the US *FSIA* and the UK *SIA*.

As of 31 December 2022, a total number of 23 states have ratified the *UNCSI*. Benin ratified the treaty on 7 July 2022, rendering the treaty short of only seven states parties before it comes into force. Although the *UNCSI* probably will not come into force anytime soon, it does not prevent us from investigating whether the treaty is a codification of customary law and a signpost of where the customary law could be heading.[78] Further, the *UNCSI* was built upon the authoritative work of the ILC, the United Nations Sixth (Legal) Committee and an *Ad Hoc* Committee on Jurisdictional Immunities of States and Their Property with meaningful state participation.[79] Moreover, the *UNCSI* has been cited by both international and domestic courts as an expression of customary international law to different extents.[80]

I chose the US *FSIA* and the UK *SIA* for the following reasons. Firstly, the US *FSIA* and the UK *SIA* are the two dominant influencers of the customary international law on sovereign immunity.[81] From the inception of sovereign immunity law, the US's and the UK's absolute

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[78] See Chapter 2, Section 2.2.
[79] See Chapter 2, Section 2.2.
[80] See Chapter 2, Section 2.2.
[81] While the doctrine of the formation of customary international law is state practice + *opinio juris*, Craig Forcese argues that there is a "realpolitik" way for the formation of customary international law: "[C]ustom sometimes emerges when a single powerful state, or group of states, asserts novel rights in the face of opposition, until it obtains general acceptance aided by the support of powerful states." See Craig Forcese, *Destroying the Caroline: The Frontier Raid that Reshaped the Right to War* (Toronto: Irwin Law Inc, 2018) at 187. Although Forcese made

immunity practices influenced other Western states in the nineteenth century, and their codification of restrictive immunity by legislation in the 1970s was also immediately followed by many states.[82] Asian and African states were not able to contribute much to the development of customary international law on sovereign immunity.[83] While I will give attention to other states' practices in Chapter 2, the US's and UK's early judicial practice, their domestic laws and subsequent court decisions will make up a larger portion of my assessment of the law of sovereign immunity.[84]

There are other reasons for examining the US and the UK laws. Their laws have been used as models for other domestic legislation;[85] and have been vigorously litigated.[86] They also attract the most academic attention in public international law teachings.[87] An additional reason

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this observation in the context of self-defence against the use of force, as we will see in Chapter 2, this observation applies to the customary international law of sovereign immunity. The law of sovereign immunity was created and shaped by a handful of Western states. The US and the UK stand out in turning the tide of the sovereign immunity law toward a restrictive stance.

[82] See Chapter 2, Section 2.

[83] See Chapter 2, Section 2.

[84] See B. S. Chimni, "Customary International Law: A Third World Perspective" (2018) 112:1 AJIL 1, 12 arguing that a critical assessment of the current customary international law regime begins with the assessment of Western ideal of customary international law: "From a third world perspective, [customary international law] reveals the foundational role of the interests of European states, European legal consciousness, and European social and political theories in the making of modern international law. For that reason, the contestation of [customary international law] rules by non-western nations and scholars has to begin there."

[85] See Singapore *SIA*; Pakistan *SIO*; South Africa *FSIA*; Canadian *SIA*, Australia *FSIA*. Scholars have also noted the influence of the US and the UK laws' influence on the *UNCSI*, see Dickinson et al., at 333-34; The Right Honorable Lord Lloyd-Jones, "Forty Years On: State Immunity and the State Immunity Act 1978" (2019) 68 ICLQ 247 [Lord Lloyd-Jones, Forty Years On].

[86] See Andrew Dickinson, Rae Lindsay & James P. Loonam, eds, *State Immunity: Selected Materials and Commentary* (Oxford: Oxford University Press, 2004), Chapters 3 and 4 on the US *FSIA* and UK *SIA* [Dickinson et al.]; Joseph W. Dellapenna, *Suing Foreign Governments and Their Corporations*, 2nd ed (New York: Transnational Publishers, 2003) [Dellapenna]; Fox and Webb, *supra* note 13 at Chapters 7 and 8 UK *SIA* and US *FSIA*; John Norton Moore, ed, *Foreign Affairs Litigation in United States Courts* (Leiden: Martinus Nijhoff, 2013); Paul B. Stephan & Sarah A. Cleveland, eds, *The Restatement and Beyond: The Past, Present and Future of U.S. Foreign Relations Law* (Oxford, Oxford University Press, 2020).

[87] Anthea Roberts, *Is International Law International?* (Oxford: Oxford University Press, 2017) 181-185, finding that textbooks on public international law that she had surveyed overwhelmingly prioritize laws and court cases from the US and the UK on the topic of sovereign immunity. Little attention was given to other legislation or state practice. *Cf* Currie, *supra* note 16 at 392-403, which gives attention to Canadian *SIA*.

for choosing the US *FSIA* is that both China and Chinese SOEs—subjects of this thesis—have been parties to litigation in US courts where the US *FSIA* has been applied.[88]

While I will not provide a systematic examination of the Canadian *State Immunity Act* ("Canadian *SIA*"), I will examine two Canadian Supreme Court decisions in *Re Canada Labour Code*[89] and *Kuwait Airways Corp. v. Iraq* ("*KAC v. Iraq*")[90] in the UK *SIA* Chapter. This is because the Supreme Court of Canada applied a contextual approach in both cases in interpreting the commercial exception to jurisdictional immunity of the Canadian *SIA* with specific references to UK jurisprudence. In *Re Canada Labour Code*, the Supreme Court of Canada referred to *I Congreso*,[91] a UK decision that is still applied by the UK courts today in interpreting Section 3 of the UK *SIA*'s commercial exception to jurisdictional immunity. In *KAC. v. Iraq*, the Supreme Court of Canada referred to *Kuwait Airways Corporation v. Iraqi Airways Company and the Republic of Iraq* ("*KAC v. IAC*"),[92] a case in which the House of Lords gave great attention to Section 3 of the UK *SIA* while interpreting a separate entity's immunity under Section 14(2). Hence, the two Canadian Supreme Court decisions will be helpful in our understanding of the contextual approach that is applied by UK courts under the Section 3 of the UK *SIA*, which is often referred to by UK courts in their application of Section 14(2), which governs the scope of separate entities' jurisdictional immunity.

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[88] See Chapters 3 and 7.
[89] *The United States of America v. The Public Service Alliance of Canada, the Attorney General of Canada and the Canada Labour Relations Board*, [1992] 2 S.C.R. 50. [*Re Canada Labour Code*]
[90] *Kuwait Airways Corporation v. Republic of Iraq and Bombardier Aerospace*, 2010 SCC 40. [*KAC. v. Iraq*]
[91] *I Congreso del Partido*, (1981) 64 ILR 307 [*I Congreso*].
[92] *Kuwait Airways Corporation v. Iraqi Airways Company and the Republic of Iraq*, [1995] 103 ILR 340 [*KAC v. IAC*].

3.2 The scope of Chinese SOEs that are included and excluded in this thesis

The SOEs that will be examined in this thesis are the 97 SOEs that are directly owned by the central SASAC.[93] The provincial and local governments also have their equivalent SASACs, which also directly own a number of SOEs by full or majority ownership. Local SASACs are not branches of the central SASAC but are under the direct leadership of the governments that established them.[94] In other words, local SASACs are accountable to their corresponding governments, not the central SASAC. In light of this parallel relationship between central and local SASACs, I chose to limit the scope of the Chinese SOEs that will be examined in this thesis to central SASAC-owned SOEs because (1) the result of this research is applicable to other SOEs that are directly owned by the SASACs established by Chinese provincial and municipal governments and (2) the definition of the state under customary law of immunity includes central (or federal), provincial (or state), and municipal governments.[95] Such a choice makes my research more focused and efficient.

Further, to limit the scope of the thesis, I excluded an analysis of the relationship between the central SASAC and the 97 SOEs' subsidiaries and their subsidiaries and so on. The relationship between the central SASAC and subsidiaries of the 97 SOEs down the pipeline gives rise to various issues of sovereign immunity and state responsibility. For example, in the US Supreme Court decision *Dole Food*, subsidiaries of SOEs were excluded from the scope of the state for purposes of claiming sovereign immunity.[96] However, the issue of sovereign immunity

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[93] See Chapter 4, Section 3.1.1 below.

[94] See Ding, "Interface 2.0", *supra* note 7 at 647-648: "SASACs have a decentralized administrative structure, meaning that local SASACs are not branches of the SASAC on the central level. Local SASACs are under the direct leadership of their local governments."

[95] See Article 2(1)(b), *UNCSI*, Section 1603, US *FSIA*, and Section 14, UK *SIA*.

[96] *Dole Food Co. v. Patrickson*, 123 S.Ct. 1655 (2003) 1658 [*Dole Food*]. On the issue of "tiered" subsidiaries of SOEs and their status under the *FSIA*, see Dellapenna, *supra* note 86 at 83-88; Yang, *supra* note 13 at 264-273.

of an SOE's subsidiary is unclear under the *UNCSI* and the UK *SIA*. The sovereign immunity claim of SOEs' subsidiaries is an important issue since they carry out important functions for their parent companies—SASAC-owned SOEs. Given this issue's complexity and particular relevance to Chinese SOEs' activities in practice, it will form part of my postdoctoral research agenda as I will point out in my concluding Chapter.

3.3 Treating the intertwined issue of the state's international responsibility as peripheral

Litigation against a sovereign state in a foreign domestic court gives rise to a host of issues, including states' sovereign immunity, states' international responsibility and domestic liability under international and domestic laws, and execution against states and their emanations' assets. For state responsibility, on the international plane, the underlying causes of action[97] that give rise to a state's international responsibility and their implications in international law are central issues.[98] In domestic arenas, violations of domestic laws such as contract and tort laws (without incorporation of international law) are often the underlying causes of action that give rise to a state or its SOE's sovereign immunity claims.[99]

Although the underlying cause of action that can trigger a state's international responsibility can be a violation of an international law or a domestic law,[100] it can be studied in

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[97] On the term of "cause of action", see Chapter V of Ian Brownlie, *System of the Law of Nations: State Responsibility Part I* (Oxford: Oxford University Press, 1983) at 81, in which the late Professor Brownlie suggested that "perhaps it would be more natural to reserve the term 'claim' and 'cause of action' for cases involving issues of state responsibility."

[98] Brownlie, *System of the Law of Nations*, *ibid*; James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge: Cambridge University Press, 2002) [Crawford, *ILC's Articles* 2002]; James Crawford, *State Responsibility: The General Part* (Cambridge: Cambridge University Press, 2013) [Crawford, *State Responsibility* 2013].

[99] André Nollkaemper, *National Courts and the International Rule of Law* (Oxford: Oxford University Press, 2011), Chapter 2 on jurisdiction of domestic courts, Chapter 4 on applicable laws, and Chapter 5 on claimants' standing when they are suing a foreign state in a domestic court [Nollkaemper, *National Courts*].

[100] In holding states responsible for their violation of international law in domestic courts, see André Nollkaemper, "Internationally Wrongful Acts in Domestic Courts" (2007) 101 AJIL 760; in holding states responsible for their violation of international law on the international plane, see Section 3, Chapter V of Brownlie, *System of the Law of Nations*, *supra* note 89 at 59-81 on "A Calendar of Causes of Action".

a separate manner from the issue of sovereign immunity given the latter's procedural nature, as indicated by the ICJ in the *Jurisdictional Immunities* case in 2012.[101] Before the ICJ, Germany claimed, among other things, that Italy violated its right to jurisdictional immunity under customary international law by (1) allowing civil claims to proceed against Germany in Italian courts for a violation of international humanitarian law by the German Reich during World War II; and (2) by taking measures of constraint against German state property used for governmental, non-commercial purposes.[102] Given that it was not asked to decide on the legality of the complained actions of the German Reich, the ICJ determined that the issue was "whether or not, in proceedings regarding claims for compensation arising out of those acts [against Germany], the Italian courts were obliged to accord Germany immunity."[103] One of the key defense arguments of Italy was that the actions of the German Reich constituted a violation of *jus cogens*—peremptory norms of international law that cannot be derogated from by any state—that deprived Germany of its immunity in Italian courts.[104] In other words, Italy argued that a violation of peremptory norms constituted an exception to a state's sovereign immunity in a foreign domestic court. The ICJ dismissed Italy's *jus cogens* argument because it considered that the substantive rule of *jus cogens* and the procedural rule of sovereign immunity operate in two different universes without conflict.[105] The ICJ elaborated that the procedural nature of jurisdictional immunity enables the issue of sovereign immunity to be analyzed in a stand-alone manner without drawing a conclusion on the substance of a state's responsibility for a violation

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[101] On a critique of the ICJ's categorization of jurisdictional immunity as procedural in nature, see Claire E. M. Jervis, "Jurisdictional Immunities Revisited: An Analysis of the Procedural Substance Distinction in International Law" (2019) 30:1 EJIL 105. See also Matteo Sarzo, "The Dark Side of Immunity: Is there Any Individual Right for Activities *Jure Imperii*?" (2013) 26 Leiden JIL 105.
[102] *Jurisdictional Immunities*, *supra* note 12 at paras. 15-17, 37.
[103] *Ibid* at para. 53.
[104] *Ibid* at para. 80.
[105] *Ibid* at para. 93. For a critique of the ICJ's dismissal of Italy's *jus cogens* argument, see

of international law such as *jus cogens* or assessing the legality of the related state conduct.[106] In drawing this conclusion, the ICJ explained that:

> The two sets of rules [on *jus cogens* and immunity] address different matters. The rules of [s]tate immunity are procedural in character and are confined to determining whether or not the courts of one [s]tate may exercise jurisdiction in respect of another [s]tate. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful or unlawful…For the same reason, recognizing the immunity of a foreign [s]tate in accordance with customary international law does not amount to recognizing as lawful a situation created by the breach of a *jus cogens* rule[.][107]

The *Jurisdictional Immunities* case shows that the issue of state responsibility for violation of a rule of international law or domestic law that incorporates international law intertwines with the issue of sovereign immunity, yet they can be examined separately. The finding of the existence of a procedural right to sovereign immunity does not have an impact on the determination of the substantive issue of state responsibility.[108] Based on this distinction made by the ICJ, this thesis chose to tackle the Chinese SOEs' immunity as a procedural matter. This means that I will treat the underlying causes of action such as Chinese SOEs' liability for a violation an international or domestic law as peripheral in my analysis.

Nevertheless, the issue of state responsibility is addressed in the US *FSIA* and the *UNCSI* to different extents. Section 1606 of the US *FSIA* provides that "[a]s to any claim for relief with respect to which a foreign state is not entitled to immunity […] the foreign state shall be liable in the same manner and to the same extent as a private individual under like circumstance[.]"[109] But it further provides that "a foreign state except for an agency or instrumentality thereto shall not be liable for punitive damages[.]"[110] Section 1606 shows that one consequence of a foreign

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[106] *Ibid*.
[107] *Ibid*.
[108] Fox and Webb, *supra* note 13 at 38-48; McLachlan, *supra* note 16 at 515-17.
[109] Section 1606, US *FSIA*.
[110] *Ibid*.

state's lack of immunity in the US courts is that state will be liable as a private individual under US laws, but not for punitive damages. It makes clear that punitive damages—a substantive law issue—cannot be levied against a foreign state defendant in the US courts. The Understanding attached to the *UNCSI* provides that "Article 10, paragraph 3 [on state enterprise], does not prejudge the question of 'piercing the corporate veil', questions relating to a situation where a [s]tate entity has deliberately misrepresented its financial position or subsequently reduced its assets to avoid satisfying a claim, or other related issues."[111] Article 10(3) provides that a state's immunity shall not be affected by its SOE's commercial activities.[112] This Understanding clarifies that the assessment of "piercing the corporate veil" between a state and its SOEs for state responsibility/liability purposes under international and national laws would not be jeopardized by the state's immunity or the SOE's independent corporate status found in Article 10(3).[113]

Although Chinese SOEs could attempt to cloak themselves as part of the state for immunity purposes in the event that they have exercised sovereign authority, the *Jurisdictional Immunities* case, the US *FSIA* and the *UNCSI* show that their liabilities under international law or obligations under domestic law are not determined by their immunity claims. In other words, a finding of jurisdictional immunity in relation to a claim does not mean that an SOE is not responsible for its actions that are the subject of the dispute under international or domestic law.

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[111] Annex to the *UNCSI* relating to Article 10(3). Article 10 addresses commercial exception to jurisdictional immunity in the treaty. Article 10(3) provides "Where a State enterprise or other entity established by a State which has an independent legal personality and is capable of: (a) suing or being sued; and (b) acquiring, owning or possessing and disposing of property, including property which that State has authorized it to operate or manage, is involved in a proceeding which relates to a commercial transaction in which that entity is engaged, the immunity from jurisdiction enjoyed by that State shall not be affected.

[112] See Chapter 5, Section 3.1.2.

[113] On "piercing the corporate veil" between the state and SOEs, see Schönsteiner, "Attribution of State Responsibility for Actions and Omissions of SOEs", *supra* note 6.

Rather, a successful claim of sovereign immunity only means that there is no judicial redress against that Chinese SOE in a foreign domestic court. Other strategies—negotiation, economic sanctions, or barring that SOE from entering its market in the future—can be pursued, although economic sanctions come with high risks of creating political tensions with China.[114]

Regarding execution against states' and their emanations' assets in domestic courts, not only do international law (such as the *ICSID Convention* and the *New York Convention*) and domestic laws (including a nation's implementation of these two treaties) on execution play a role; they would also interact with the law of sovereign immunity if states and their emanations claim immunity in the enforcement and execution process. In domestic courts, when a creditor of an SOE seeks execution against a state's assets, the state could argue the SOE's liability cannot be attributed to it, and alternatively, it enjoys immunity from execution against its assets. When a creditor of a state seeks execution against an SOE's assets, the SOE could argue that it is not part of the state, thus, the state's liability cannot be attributed to it. Moreover, the SOE can argue its assets are independent from the state.[115] In these scenarios, distinctive yet related issues exist. The first attribution issue is to what extent the SOE's conduct is attributable to the state for responsibility purposes, or to what extent the state's conduct is attributable to the SOE.[116] The second attribution issue is to what extent the SOE is part of the state for immunity purposes so that the SOE is immune in a foreign domestic court, and are the SOE's assets immune from

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[114] To counter Western states' sanctions against China and Chinese entities, China enacted its anti-foreign sanctions law in June 2021. See 中华人民共和国反外国制裁法 [Anti-Foreign Sanctions Law of People's Republic of China], adopted at the 29th Session of the Standing Committee of the 13th National People's Congress on 10 June 2021 and came into effect immediately; see also Tom Ruys & Cedric Ryngaert, "Secondary Sanctions: A Weapon out of Control? The International Legality of, and European Response to, US Secondary Sanctions" (2020) The British Yearbook of International Law (advance article).
[115] See, for example, Chapter 3's discussion of the *FG Hemisphere 1* case and Chapter 6's discussion of the *Gécamines v. F.G. Hemisphere* case.
[116] Schönsteiner, "Attribution of State Responsibility for Actions and Omissions of SOEs", *supra* note 6.

execution?[117] The former is the primary issue to be considered for assessing whether a creditor of an SOE can execute against a state's assets for its SOE's conduct, or whether a creditor of a state can execute against an SOE's assets for the state's conduct, pursuant to substantive liability law, and sometimes rules of the *ICSID* and *New York Conventions* if arbitration awards enforcement is at stake. The first issue largely relates to liability that is outside the scope of the thesis. The aforementioned second issue, however, is the core issue to be studied in this thesis: under what circumstances a foreign domestic court will find an SOE is part of the state for immunity purposes, and consequently, under what circumstances that SOE will attract jurisdictional immunity in litigation and under what circumstances the SOE's assets are to be treated as immune state assets from execution.[118]

4. The thesis's contribution

This thesis joins the conversation regarding relationship between China and Chinese SOEs in international law.[119] What sets my research apart from other studies is that unlike this thesis, other work has been conducted within a particular area of substantive law area such as the WTO trade rules[120] or human rights law.[121] By contrast, my research is anchored in sovereign

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[117] Christina Binder & Stephan Wittich, "A Comparison of the Rules of Attribution in the Laws of State Responsibility, State Immunity and Custom" in Gábor Kajtár, Basak Çali & Marko Milanovic, eds, *Secondary Rules of Primary Importance in International Law: Attribution, Causality, Evidence and Standards of Review in the Practice of International Courts and Tribunals* (Oxford: Oxford University Press, 2022) 242.
[118] Gerhard Hafner and Ulrike Kölher, "The United Nations Convention on Jurisdictional Immunities of States and Their Property" (2004) 35 Netherlands YB Intl L 3, 16 arguing that the definition of the state for immunity purposes is not the same as the definition of the state for responsibility purposes from the perspective of a public—private law distinction [Hafner and Kölher, The UNCSI].
[119] Ding, "Interface 2.0", *supra* note 7; Zhou, "Rethinking the (CP)TPP", *supra* note 7; Crochet & Hegde, "China's 'Going Global' Policy", *supra* note 8; Wu, "The 'China, Inc.'", *supra* note 40; Lin & Milhaupt, "We Are the (National) Champions", *supra* note 41; Gao & Zhou, *Between Market Economy and State Capitalism*, *supra* note 46.
[120] Willemyns, "Disciplines on State-Owned Enterprises in International Economic Law", *supra* note 7; Kim, "Regulating the Visible Hands", *supra* note 7; Ding, "Interface 2.0", *supra* note 7; Lee, "The 'Indirect Support' Loophole in the New SOE Norms", *supra* note 7; Zhou, "Rethinking the (CP)TPP as a Model for Regulation of Chinese State-owned Enterprises", *supra* note 7; Gao & Zhou, *Between Market Economy and State Capitalism*, *ibid*.
[121] Schönsteiner, "Attribution of State Responsibility for Actions and Omissions of SOEs", *supra* note 6.

immunity law, which, as indicated by the *Jurisdictional Immunities* case discussed above, is separable from the merits issues regarding substantive state responsibility. While jurisdictional immunity and execution immunity can sometimes create hurdles for litigants suing SOEs and seeking execution against their assets, this does not mean the SOEs' legal obligations are negated by such successful immunity claims. Rather, they have to be dealt with by other legal or non-legal means. This procedural focus allows my findings to illuminate the relationship between China and Chinese SOEs in a general manner that could be referred to and applied in various substantive areas of law. While thus claiming the general applicability of part of my research results in other substantive areas of international law, I acknowledge that my research has also been immensely informed by the previous research conducted on the relationship between the state and SOEs in various areas of substantive law.[122]

Further, Chinese SOEs' status and immunity under the law of sovereign immunity is understudied. It has only been discussed in a limited way in some literature that deals with China's absolute immunity position.[123] Understanding the issues addressed by this thesis has become increasingly urgent since Chinese SOEs' presence is extensive in other countries. Moreover, Chinese SOEs' relationship with China and sovereign immunity have far-reaching implications in (1) commercial, (2) sovereign and (3) policy terms.

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[122] Willemyns, "Disciplines on SOEs" *supra* note 7; Kim, "Regulating the Visible Hands", *supra* note 7, Ding, "Interface 2.0", *supra* note 7; Lee, "The 'Indirect Support' Loophole in the New SOE Norms", *supra* note 7; Schönsteiner, "Attribution of State Responsibility for Actions and Omissions of SOEs", *supra* note 6; Zhou, "Rethinking the (CP)TPP", *supra* note 7; Gao & Zhou, *Between Market Economy and State Capitalism*, *ibid* at 13, Chapter 2: The Evolution of China's Reforms of State-Owned Enterprises (1978-2020)".

[123] Huang Jin & Ma Jingsheng "Immunities of States and Their Property: The Practice of the People's Republic of China" (1988) 18 Hague YB Intl Law 163 [Huang & Ma]; Dahai Qi, "State Immunity, China and Its Shifting Position" (2008) 7:2 Chinese J Intl L 307 [Qi, State Immunity, China]; Yilin Ding, "Absolute, Restrictive, Or Something More: Did Beijing Choose the Right Type of Sovereign Immunity for Hong Kong?" (2012) 26:2 Emory Intl L Rev 997 [Ding, "Absolute, Restrictive, Or Something More"]; Liying Zhang & Kuan Shang, "The Crown in the People's Republic: Chinese State Entities Enjoying Crown Immunity in Hong Kong" (2012) 9:1 Manchester J Intl Econ L 45 [Zhang & Shang, "The Crown in the People's Republic"]. See further discussion in Chapter 3.

From a commercial perspective, a proper understanding of the relationship between China and Chinese SOEs and Chinese SOEs' immunity under the law of sovereign immunity will clarify our understanding of what China's global economic presence[124] means when Chinese SOEs are at the forefront of Chinese overseas investments.[125] As discussed above, the international business community is concerned about China's full or majority ownership of Chinese SOEs. However, this research shows that the ownership relationship between China and Chinese SOEs alone does not provide an adequate picture of their relationship either in the Chinese political economy or under the law of sovereign immunity. The relationship between China and Chinese SOEs under the Chinese political economy and tests found in the *UNCSI*, the US *FSIA* and the UK *SIA*, look beyond ownership. Other elements—such as the nature of the underlying transaction, the Chinese state's and the CPC's directions and instructions, and SOEs' sovereign and political goals—also play critical roles.[126] The findings in this thesis will enable Chinese SOEs' commercial partners and states that host Chinese SOEs' investments to better

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[124] Jennifer Rudolph & Michael Szonyi, eds, *The China Questions: Critical Insights into a Rising Power* (Cambridge: Harvard University Press, 2018); Ka Zeng, ed, *Handbook on the International Political Economy of China* (Cheltenham: Edward Elgar, 2019); Huiyao Wang & Lu Miao, eds, *Handbook on China and Globalization* (Cheltenham: Edward Elgar, 2019); Heng Wang, "Selective Reshaping: China's Paradigm Shift in International Economic Governance" (2020) 23:3 J Intl Econ L 583 [Wang, Selective Reshaping].

[125] "中共中央、国务院关于深化国有企业改革的指导意见" [Guiding Opinions of the Central Committee of the Communist Party of China and the State Council on Deepening State-Owned Enterprise Reform], issued on 24 August 2015; see also Du, China's State Capitalism, *supra* note 36; Kim, "Regulating the Visible Hands", *supra* note 7 at 231-232; Peter T. Muchlinski, *Multinational Enterprises and The Law*, 3rd ed (Oxford: Oxford University Press, 2021) at 16, 69 [Muchlinski, *Multinational Enterprises*]. According to UNCTAD's latest data on SOEs that are multinational corporations, China has the most (five) number of the largest multinational SOEs. See UNCTAD, *World Investment Report 2019: Special Economic Zones* (New York, United Nations Publications, 2019) at 24. In 2021, UNCTAD did not update this data. See UNCTAD, *World Investment Report 2021: Investing in Sustainable Recovery* (New York, United Nations Publications, 2021).

[126] The CPC's role could become even more relevant in our future analysis of SOEs' relationship to China and SOEs' immunity in light of the recent District Court of Eastern District of Missouri Southeastern Division's decision issued on 8 July 2022. In this decision, the District Court held that the CPC is a foreign state or an equivalent one for immunity purposes, thus can be only sued under the US *FSIA*. See *The State of Missouri v. The People's Republic of China, et al. (Case: 1:20-cv-00099-SNLJ)*, 8 July 2022, Memorandum and Order, United States District Court of Eastern District of Missouri Southeastern Division, available online: <https://storage.courtlistener.com/recap/gov.uscourts.moed.179929/gov.uscourts.moed.179929.61.0.pdf>. [*Missouri v. China*]

assess their economic relationship to Chinese SOEs and their risks from a sovereign immunity law perspective and adopt appropriate risk management strategies, such as seeking a waiver of immunity.

Litigation against China and Chinese SOEs in foreign domestic courts where sovereign immunity is claimed also has sovereignty implications for China and other states. The US pandemic litigation is a good example. Shortly after the COVID-19 pandemic emerged in the US, individual claimants turned to the US courts to sue China and its emanations. They claimed damages based on China's alleged responsibility for the pandemic's proliferation since March 2020.[127] Chimène I. Keitner noted that by June 2020, at least twenty lawsuits, including two filed by state attorneys-general, had been filed against China and its related entities.[128] The US Senate Committee on the Judiciary even conducted a hearing on whether to strip China's sovereign immunity in the US courts for disputes related to the pandemic.[129] The discussion of stripping China's immunity in US courts directly confronts these questions of the relationship between the customary international law of sovereign immunity and the US *FSIA*, the US's compliance with customary international law of restrictive immunity, and the scope of the state for immunity purposes, including to what extent the Chinese state encompasses SOEs in addition to its political subdivisions.[130]

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[127] Chimène I. Keitner, "To Litigate a Pandemic: Cases in the United States Against China and the Chinese Communist Party and Foreign Sovereign Immunities" (2020) 19 Chinese J Intl L 229 [Keitner, To Litigate a Pandemic].

[128] Keitner, "To Litigate a Pandemic", *ibid* at 229. For details of some of these cases, see Chapter 3.

[129] Testimony of Chimène I. Keitner, "The Foreign Sovereign Immunities Act, Coronavirus, and Addressing China's Culpability", United States Senate Committee on the Judiciary, at 4, 23 June 2020, available online:<https://www.judiciary.senate.gov/imo/media/doc/Keitner%20Testimony.pdf>; *cf* Written Statement of Prof. Russell A. Miller, "Hearing on the Foreign Sovereign Immunities Act, Coronavirus, and Addressing China's Culpability", United States Senate Committee on the Judiciary, 23 June 2020, available online:<https://www.judiciary.senate.gov/imo/media/doc/Miller%20Testimony1.pdf>.

[130] In these cases, China and its political subdivisions such as National Health Commission, the Ministry of Emergency Management, the Ministry of Civil Affairs, the provincial government of Hubei and the city of Wuhan were named as defendants. Notably, the Attorney-General of Missouri also named the CPC as one defendant.

While these are difficult legal issues, sovereign and political interests are at stake. China has a track record of contesting the US courts' jurisdiction through diplomatic channels in cases where China is a defendant.[131] Shortly after pandemic litigation was initiated in various US courts, the spokesperson of China's Ministry of Foreign Affairs declared that the litigation claims are "malicious and violate the basic principle of law. Based on the principle of sovereign equality in international law, all sovereign actions taken by different levels of the Chinese governments fall outside of the US courts' jurisdiction."[132] Huang Huikang, a current Chinese member of the ILC opined that the sovereign conduct of the Chinese government enjoys immunity under both absolute and restrictive immunity theories. Huang added that none of the exceptions to immunity stipulated by Section 1605 of the US *FSIA* apply to China's pandemic related measures.[133] On 8 July 2022, the District Court of Eastern District of Missouri Southeastern Division issued a memorandum and order—the first decision made among the many pandemic cases against China—in which the District Court dismissed the case in its entirety for lack of subject matter jurisdiction.[134] The District Court held that (1) all named defendants (including the CPC) are deemed immune as foreign states under the US *FSIA*; (2) commercial and tort exceptions to the US *FSIA* do not apply.[135] The Missouri Attorney-General

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Chinese SOEs so far have not been named as co-defendants according to Keitner's study. See Keitner, "To Litigate a Pandemic", *supra* note 127 at 230.

[131] See Chapter 3, Section 2.1.

[132] Zhu Chao, "外交部奉劝美方一些人:多把精力放在做好自己事情上" [Ministry of Foreign Affairs Warn Some Americans: Mind Your Own Business], 中共中央党校 (ccps.gov.cn) (23 April 2020), online: <https://www.ccps.gov.cn/zl/yqzjz/202004/t20200423_139733.shtml>.

[133] Huang Huikang, "平等者之间无管辖权—诬告滥诉难以逾越的法律程序屏障" [*Par In Parem Imperium Non Habet Imperium*—the Legal Procedural Barrier of Ferocious Claims], 光明网 (gmw.cn), (28 May 2020), online: <https://epaper.gmw.cn/gmrb/html/2020-05/28/nw.D110000gmrb_20200528_4-14.htm>.

[134] *Missouri v. China*, *supra* note 126.

[135] *Missouri v. China*, *ibid* at 38, also finding that the service-of-process issues, such as legal documents, are moot in this case.

appealed the decision on the same day.[136] The case will surely go on. The clashes between China and a US State government regarding a foreign state's immunity in a domestic court show that sovereign immunity is a legal issue that has significant political and foreign relations implications.[137] The findings of this research seek to better inform researchers and legal professionals in the area of sovereign immunity law on China and Chinese SOEs' status and immunity under customary international law and domestic laws such as the US *FSIA*.

From a policy perspective, I hope my arguments will encourage China to embrace restrictive immunity by showing that its absolute immunity position is inconsistent with the customary international law of restrictive immunity and China does not qualify to be a persistent objector. Implementing restrictive immunity by ratifying the *UNCSI* will allow China to conform to its obligations under the customary international law of restrictive immunity. As a late comer to this area of law in which Western states have laid down the groundwork, many areas of law, such as the scope of the state and the test for commercial exceptions to jurisdiction immunity, are unsettled in their applications to states and SOEs. It is in China's commercial and legal interests to embrace restrictive immunity, practice it, and contribute to the development of the law. Commercially, Chinese entities (just like US firms about five decades ago when the US *FSIA* was drafted) will acquire additional venues—Chinese courts—in which to resolve their disputes with foreign states and their emanations. Resolving commercial and investment disputes between Chinese entities and foreign states and their emanations through Chinese embassy-facilitated

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[136] *The State of Missouri v. The People's Republic of China, et al*. (Case: 1:20-cv-00099-SNLJ), Notice of Appeal, 8 July 2022, available online: <https://www.courtlistener.com/docket/17085710/state-of-missouri-v-peoples-republic-of-china/>.

[137] Anne Peters, "Immune against Constitutionalisation" in Anne Peters et al, eds, *Immunities in the Age of Global Constitutionalism* (Leiden: Brill Nijhoff, 2014) at 1: "Immunities are a messy affair. They oscillate between law, politics, and comity." [Peters et al., *Immunities in the Age of Global Constitutionalism*]

negotiations could politicize the disputes and attract international backlash. A restrictive immunity position—defining under what circumstances SOEs could be considered part of the state—would provide Chinese SOEs' commercial partners and states that host Chinese SOEs with a better understanding of where China stands on Chinese SOEs' immunity. My findings on Chinese SOEs' immunity in Chapters 5, 6, and 7 show that Chinese SOEs are unlikely to attract immunity for their commercial transactions in most circumstances. But in exceptional situations, public welfare SOEs and commercial SOEs can potentially attract immunity under the *UNCSI* and the UK *SIA*. These findings ensure Chinese SOEs' business partners that in most circumstances they can sue Chinese SOEs and execute against their assets when commercial disputes arise between them under the *UNCSI*, the US *FSIA*, and the UK *SIA*. If China adopts a restrictive immunity position, Chinese SOEs' creditors can also sue Chinese SOEs and execute against their assets in Chinese courts.

Legally, it is time for China to rethink its absolute immunity position. Arguing for absolute immunity for itself in foreign domestic courts where restrictive immunity is upheld does not serve China's legal interests. Adopting restrictive immunity neither erodes China's sovereignty nor strips away China's defense rights in foreign domestic courts. Instead, it provides China with a solid customary international law basis to defend itself on the basis that sovereign actions and sovereign properties of the state are immune under the customary international law of restrictive immunity, particularly it is the forum's law, not China's position, that determines China's sovereign immunity. Additionally, ratifying the *UNSCI* and thus accepting restrictive immunity would be consistent with China's position that SOEs are not immune.[138]

[138] See Chapter 3, Section 3.

However, this thesis acknowledges that opening Chinese courts' doors to Chinese and foreign private parties and embracing restrictive immunity for China would probably go against China's particular version of respecting sovereignty and sovereign equality, and its preference to conduct bilateral negotiations on states' rights and obligations in exchange for economic cooperation.[139] These policies of China—as demonstrated in the *FG Hemisphere 1* case that will be discussed in Chapter 3—explain China's hesitance, even resistance, to ratifying the *UNCSI*.[140] By analyzing these politically sensitive legal issues, this thesis seeks to contribute to the emerging studies of Chinese foreign relations law.[141]

5. Roadmap

This thesis is divided into eight Chapters. **Chapter 1** provides the research mandate, analytical framework, analytical tools, research method, the scope of the thesis, expected academic contribution and an outline of the thesis.

Chapter 2 articulates the thesis's analytical context: the customary law of sovereign immunity is "restrictive" meaning that only states' sovereign transactions are immune from jurisdiction and, even where jurisdiction and liability are established, only their assets used for sovereign purposes are immune from execution in foreign domestic courts. It shows how the customary rule of sovereign immunity has evolved from absolute immunity to restrictive immunity as evidenced by the work of the ILC, key state practice, jurisprudence and the work of scholars. This Chapter also highlights two critical issues that run through this thesis: (1) what is

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[139] See Chapter 3, Section 4.
[140] See Chapter 3, Section 2.2.
[141] See Congyan Cai, "International Law in Chinese Courts During the Rise of China" (2016) 110 AJIL 269; Congyan Cai, "Chinese Foreign Relations Law" (2017) 111 AJIL Unbound 336; Congyan Cai, *The Rise of China and International Law: Taking Chinese Exceptionalism Seriously* (Oxford: Oxford University Press, 2019) [Cai, *The Rise of China*]; Cai Congyan (蔡从燕), "中国对外关系法：一项新议程" [China's Foreign Relations Law: A New Agenda] (2022) 43 China Law Review (中国法律评论) 24.

the basis of SOEs' immunity claims in current customary international law? and (2) what is the test for the commercial exception to jurisdictional immunity? Moreover, the differences between jurisdictional immunity and execution immunity will be highlighted. This Chapter concludes that restrictive immunity has become customary international law but finds that no uniform tests have emerged regarding the relationship between the state and SOEs for immunity purposes and the commercial exception to jurisdictional immunity.

Within the analytical framework set in Chapter 2, **Chapter 3** critically assesses China's absolute immunity position and its rationale. It firstly illustrates the evolution of China's rationale for its absolute immunity position as found in cases China has participated in. It then examines China's claim that SOEs are excluded from the scope of the state for absolute immunity purposes, followed by an assessment of China's positions regarding states' and SOEs' immunity in light of the customary international law of restrictive immunity. This Chapter finds that, contrary to China's position, China's absolute immunity position for states could encompass Chinese SOEs in particular situations, and China's arguments in favour of absolute immunity are not convincing.

Chapter 4 investigates Chinese SOEs' status and functions in the Chinese "market in the state" political economy. It argues that Chinese SOEs exhibit a dual identity. The dual identity has two facets. First, China has characterized its SOEs as commercial SOEs or public welfare SOEs since a new SOE reform started in 2013. Secondly, even commercial SOEs have a dual identity. They primarily pursue commercial interests in their business ventures, but they could also act as China's tools for providing public goods and services or pursue the state's sovereign goals, *i.e.*, acting as the state's "policy channeling" tools in a corporate form that pursues sovereign purposes. Because China has not finished the categorization of which SOEs are

commercial ones and which are public welfare ones, the status and functions of 97 SOEs owned by central SASAC must be determined by their primary business and the purpose thereof, including whether they are in a national security sector identified by the CPC, and whether they have exercised sovereign authority on a case-by-case basis. My analytical focus in this thesis will be commercial Chinese SOEs' dual identity and its implications for Chinese SOEs "state" status and immunity under the law of sovereign immunity.

This Chapter concludes that when commercial Chinese SOEs pursue sovereign purposes and execute sovereign policies in their commercial ventures, particularly those closely related to inherently sovereign functions such as military and public welfare, they are effectively the state's "policy channeling" tools. As will be shown in the subsequent Chapters, this sovereign aspect of their dual identity can potentially trigger jurisdictional and execution immunities for their transactions and assets in some cases.

Chapter 5 examines Chinese SOEs' "state" status and immunity under the *UNCSI*. It finds that the Chinese SOEs, in most situations, are unlikely to be treated as state agencies/instrumentalities as prescribed in Article 2(1)(b)(iii) of the *UNCSI* when they engage in commercial transactions, even if they have carried out incidental sovereign purposes such as implementing the state's social, political and economic goals in their commercial activities. This is because the incidental sovereign purpose cannot convert an underlying inherently commercial transaction into a sovereign one. In this regard, SOEs are unable to attract jurisdictional and execution immunities for their commercial activities and assets, respectively.

In exceptional situations, public welfare SOEs and some commercial SOEs can potentially qualify as state agencies/instrumentalities as prescribed in Article 2(1)(b)(iii) of the *UNCSI* because the purposes of their transactions are closely related to their exercise of

sovereign authority, such as inherently sovereign military and public welfare authorities. In this event, they are also likely to attract jurisdictional and execution immunities for their transactions and assets used or to be used for sovereign purposes, respectively.

Because of the UK *SIA*'s closeness to the *UNCSI*, **Chapter 6** examines Chinese SOEs' "state" status and immunity under the UK *SIA*, before analyzing these issues under the US *FSIA* in the next Chapter. It finds that in most situations, Chinese SOEs do not fall into the scope of state organ or department of state, but under the category of separate entity under Section 14(1) of the UK *SIA*. Chinese SOEs are distinct from the state based on the common law "control + function" test established in *Trendtex* that continues to be relied on by UK courts in cases applying the UK *SIA*. Nevertheless, public welfare SOEs and some commercial SOEs can potentially become "state organs" if they have exercised sovereign authority.

Separate entities can attract immunity *ratione materiae* if they have exercised sovereign authority and a state would have been immune in the same circumstances under Section 14(2), UK *SIA*. To determine whether a separate entity has exercised sovereign authority under Section 14(2), the UK courts (and Canadian courts under the Canadian *SIA*) apply a contextual approach that examines the separate entity's conduct and purpose in the overall context. This approach is similar to the methodology provided in Section 2(2) of the *UNCSI* discussed in the previous Chapter. Both UK courts and the Supreme Court of Canada prioritize the role of the nature of the transaction and give only an incidental role to the purpose of the conduct in the overall context. In most circumstances, Chinese SOEs in their commercial capacity will be denied jurisdictional immunity under the UK *SIA* because it is primarily the nature of their commercial transactions, not their incidental sovereign purposes that is determinative to their immunity under Section 14(2). Consequently, they cannot claim execution immunity for their assets in UK courts.

In exceptional situations, public welfare SOEs and commercial SOEs can potentially attract jurisdictional immunity for their commercial transactions if the purposes of their transactions suggest that these transactions are closely related to SOEs' exercise of sovereign authority—such as inherently sovereign military and public welfare authorities—as demonstrated by their purposes. In the event they have acquired jurisdictional immunity, they are likely to attract execution immunity for their assets that are or intended to be used for a sovereign purpose under the UK *SIA*.

Chapter 7 examines Chinese SOEs' "state" status and immunity under the US *FSIA*. It finds that the 97 Chinese SOEs—whether they are commercial SOEs or public welfare SOEs—are state agencies/instrumentalities as prescribed by Section 1603(b) of the US *FSIA* as a result of the state's direct and majority ownership. This means that they enjoy presumptive immunity in US courts. Unlike the *UNCSI* and the UK *SIA*, which gives a certain role to the purpose of the transaction in determining whether a transaction is commercial or sovereign, Section 1605(a)(2) of the US *FSIA* only considers the nature of the transaction in applying the commercial exception to jurisdictional immunity. This exclusive nature of the transaction test denies a state agency/instrumentality's presumptive immunity if it has engaged in a commercial transaction despite also having some sovereign purposes. This means that Chinese SOEs, although having "state" status under the US *FSIA*, not only are unlikely to successfully claim jurisdictional immunity for their commercial activities under Section 1605(a)(2) and attract execution immunity for their assets under Section 1610(b)(2) under the US statute, but also have potentially less immunity thereunder compared to the *UNCSI* and the UK *SIA*.

Chapter 8 provides a summary of my key findings, my research contribution, a subsequent research agenda, and final words.

Chapter 2 The Law of Sovereign Immunity: Its Theories, Rationale and Implications

1. Introduction

This Chapter sets the thesis's analytical context by showing that the customary international law on sovereign immunity has evolved from an absolute to a restrictive stance. Section 2 shows that under restrictive immunity, a state is immune from jurisdiction in a foreign domestic court for its sovereign conduct and its assets are immune from execution so long as they are used for sovereign purposes. Following this description of the restrictive immunity framework, this Chapter briefly discusses two important questions that run through this thesis. The first is: What is the basis of SOEs' potential immunity (Section 3)? The second is the unsettled test for the commercial exception to jurisdiction immunity (Section 4). Section 5 concludes that while restrictive immunity has become customary international law, no settled tests have emerged regarding the state and the SOE's relationship for immunity purposes and the commercial exceptions to immunity.

2. From absolute immunity to restrictive immunity

2.1 Absolute immunity and its underlying rationale

The modern theory of absolute immunity for sovereign states and their property was first articulated in a domestic case by the US Supreme Court in 1812, in *The Schooner Exchange* case.[142] In this case, Chief Justice Marshall declared that sovereign equality, independence and

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[142] *The Schooner Exchange v. McFaddon*, 7 Cranch 116 (1812) [*The Schooner Exchange*]. See Yang, *supra* note 13 at 7-9; Fox and Webb, *supra* note 13 at 26-28; *cf* Gamal Moursi Badr, *State Immunity: An Analytical and Prognostic View* (The Hague: Martinus Nijhoff, 1984) 13, arguing that "*The Schooner Exchange* can be rightly said to be the harbinger of the restrictive theory of immunity rather than, as commonly maintained, the starting point of absolute theory." [Badr]

dignity constitute the foundation of absolute immunity.[143] The case arose when the French navy captured a private American ship called The Schooner Exchange and subsequently converted it into a warship. When the warship harbored in a US port as a result of harsh weather, the owners of the ship sought to attach it in the US District Court of District of Pennsylvania. The dispute eventually arrived at the US Supreme Court. For the Supreme Court, the key issue was "whether a public national vessel of France, coming into the United States to repair, is liable to be arrested upon the claim of title by an individual."[144] Chief Justice Marshall held that states enjoy absolute immunity in a foreign domestic court (the US court in this case) with limited exceptions. He held that a national court cannot exercise jurisdiction over a foreign state's (1) head of state; (2) foreign minister/ambassador and (3) its troops.[145] These exceptions operate on the basis of the host state's explicit and implicit consent.[146] Those exceptions—*i.e.*, sovereign immunity—extend to the public property of a sovereign state, such as warships.[147] As The Schooner Exchange served a public function and purpose for France as a warship, Chief Justice Marshall recognized the warship had absolute immunity.[148] *The Schooner Exchange* set the precedent that sovereign immunity not only extends to a state's agents, like the head of state or its ambassadors, but also to its material items, including war ships.

Another leading practitioner of absolute immunity in the nineteenth century was the UK.[149] In the 1880 case, the *Le Parlement Belge*, Justice Brett of the Court of the Appeal cited

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[143] *The Schooner Exchange*, *ibid* at 137: "This perfect quality and absolute independence of sovereigns … have given rise to a class of cases in which every sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction, which has been stated to be the attribute of every nation."
[144] *Ibid* at 122.
[145] *Ibid* at 137-142.
[146] *Ibid* at 143.
[147] *Ibid* at 142-143.
[148] *Ibid* at 144-146.
[149] Shaw, *supra* note 55 at 527. Following the English common law tradition, Canadian courts had applied absolute immunity until its adoption of the *State Immunity Act*, R.S.C. 1985, c. S-18., see Currie, *supra* note 16 at 392.

The Schooner Exchange to support his finding that a state's refusal to exercise territorial jurisdiction over another state was a result of "absolute independence of every sovereign authority and of international comity which induces every sovereign [s]tate to respect the independence and dignity of every other sovereign."[150] In the 1938 case of *The Cristina*, the House of Lords, citing *Le Parlement Belge*, confirmed that the rule of absolute immunity applies both to the suit against a state and execution against a state's assets in English courts.[151]

The above early US and the UK cases illustrate that the underlying rationale for absolute immunity was based in a combination of concepts relating to comity, dignity and statehood: the law reflected this as respect for sovereignty, independence and equality among states.[152] This position is captured in the maxim "*par in parem non habet imperium*": one sovereign state is not subject to the jurisdiction of another state.[153] In her studies on continental European countries' state practice in the nineteenth and early twentieth centuries, Eleanor Wyllys Allen found that European states such as Germany,[154] France,[155] Belgium,[156] Austria,[157] Hungary,[158] and Czechoslovakia[159] all applied absolute immunity in their courts at the time. However, although absolute immunity makes a sovereign impervious to litigation in foreign domestic courts, it was

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[150] *The Parlement Belge*, (1880) LR 5 PD 197, 214-215.
[151] *The Cristina*, [1938] AC 485, 490.
[152] Fox and Webb, *supra* note 13 at 26-28; Yang, *supra* note 13 at 44-58.
[153] See the Explanatory Report to the *European Convention on State Immunity*, stating that: "'[s]tate immunity' is a concept of international law, which has developed out of the principle *par in parem non habet imperium*, by virtue of which one [s]tate is not subject to the jurisdiction of another [s]tate." See also Alexander Orakhelashvili, "State Immunity from Jurisdiction: Between Law, Comity and Ideology" in Alexander Orakhelashvili, ed, *Research Handbook on Jurisdiction and immunities in International Law* (Cheltenham: Edward Elgar, 2015) at 158-159 [Orakhelashvili, "State Immunity from Jurisdiction"]; James Crawford, *Brownlie's Principles of Public International Law*, 8th ed (Oxford: Oxford University Press, 2012) 488.
[154] Eleanor Wyllys Allen, *The Position of Foreign States Before National Courts: Chiefly in Continental Europe* (New York: Macmillan Co., 1933) 57 [Allen].
[155] Allen, *ibid* at 149.
[156] *Ibid* at 187.
[157] *Ibid* at 265.
[158] *Ibid* at 275-76.
[159] *Ibid* at 276-77.

never fully absolute and at least two exceptions have always existed.[160] As noted by Chief Justice Marshall in *The Schooner Exchange*, a foreign state can waive its immunity explicitly.[161] Further, a foreign state is always subject to litigation that involves the immovable property of the forum state.[162] Scholars have argued that these two exceptions to absolute immunity facilitated the development of restrictive immunity.[163]

2.2 Restrictive immunity: Its underlying rationale and customary nature

2.2.1. The rise of restrictive immunity theory: From judicial practice to domestic legislation

Restrictive immunity emerged through a gradual and long process that was firstly and primarily practiced by Western European states,[164] then followed in US and UK judicial practice and eventually culminated with the US and UK legislative reforms in the 1970s.[165] Historically, Belgian and Italian courts were the first courts to apply restrictive immunity in the nineteenth century,[166] and Switzerland adopted restrictive immunity in the early twentieth century.[167] Belgian, Italian and Swiss court decisions helped to develop restrictive immunity theory by distinguishing between acts *jure imperii*, which focus on whether the state has engaged in a public or sovereign conduct and acts *jure gestionis*, which focus on whether the state has engaged in private or commercial dealings.[168] The test focused on the nature of the state's

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[160] Yang, *supra* note 13 at 10.
[161] *The Schooner Exchange*, *supra* note 142.
[162] Yang, *supra* note 13 at 10-11.
[163] Fox and Webb, *supra* note 13 at 139, 142-43.
[164] Badr, *supra* note 142 at 21, Chapter 2, Section 1: "The Restrictive Rule"; Yang, *supra* note 13 at 11-19, depicting the slow emergence of restrictive immunity in state practice; Fox and Webb, *ibid* at 131, Chapter 6: "The Restrictive Doctrine of State Immunity: Its Recognition in State Practice"; Dellapenna, at 3-14.
[165] W. Mark C. Weidemaier & Mitu Gulati, "Market Practice and the Evolution of Foreign Sovereign Immunity" (2018) 43 Journal of Law & Social Inquiry 496, 498-99; Hazel Fox, "The Restrictive Rule of State Immunity" in Ruys & Angelet, *supra* note 14 at 21.
[166] Allen, *supra* note 154 at 187-264; Badr, *supra* note 142 at 21-26; Yang, *supra* note 13 at 13-14; Fox and Webb, *supra* note 13 at 151-153; Shaw, *supra* note 49 at 529.
[167] Allen, *ibid* at 282.
[168] Yang, *supra* note 13 at 17.

transaction/conduct, and redefined the rationale of sovereign immunity on the basis that one state still could expect another state not to exercise national jurisdiction over its conduct, unless the conduct was not sovereign in nature.[169] In this regard, Alexander Orakhelashvili observes that the transition from absolute to restrictive immunity is a modification of our understanding of the maxim *par in parem non habet imperium*. It applies immunity "not just by virtue of the state being a sovereign entity, but would protect it from foreign adjudication only if, in addition to that, the act impleaded before the foreign court was an exercise of sovereignty", *i.e.*, the rationale of acts *jure imperii*.[170]

Domestic courts' embrace of restrictive immunity in Western states started to accelerate in the 1950s.[171] In 1950, the Supreme Court of Austria concluded that, in light of increased activities of states in the commercial arena, absolute immunity had lost its meaning and was no longer a rule of international law.[172] This Austrian case was endorsed by the leading German case that elaborated upon the scope of restrictive immunity—*Empire of Iran*—which was decided by the Federal Constitutional Court in 1963.[173] The *Empire of Iran* case further influenced the formulation of restrictive immunity in English courts[174] and signaled the broader trend toward restrictive immunity in the international community.[175] The dispute was contractual: a local company in Cologne repaired the heating system of the Iranian Embassy at the Ambassador's instruction. The Embassy refused to pay after the work was completed.[176] After

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[169] Orakhelashvili, "State Immunity from Jurisdiction", *supra* note 153 at 159; Yang, *supra* note 13 at 19-23, "The descent of the State".
[170] Orakhelashvili, *ibid*.
[171] Shaw, *supra* note 55 at 529.
[172] *Dralle v. Republic of Czechoslovakia*, 17 ILR, 155; see also Shaw, *ibid* at 529.
[173] *Claims Against the Empire of Iran*, (1962) 45 ILR 57. [*Empire of Iran*]
[174] See *Trendtex Trading Corporation v. Central Bank of Nigeria* [1977] 64 ILR 111. [*Trendtex*]
[175] Lord Lloyd-Jones, "Forty Years On", *supra* note 85 at 248, noting that after this German Constitutional Court decision, "the general trend worldwide was away from absolute immunity."
[176] *Empire of Iran, supra* note 173 at 57-58.

the District Court of Cologne declined to hear the case, the claimant brought the case to the Federal Constitutional Court and asked the Court to decide whether "under the generally recognized rule of international law, the plaintiff could institute proceedings against the defendant [s]tate in a German federal court."[177] The Constitutional Court first concluded that absolute immunity was no longer a general rule of international law and restrictive immunity had emerged as an applicable rule in international law demonstrated by state practice.[178] It explained that under restrictive immunity, state acts should be divided between sovereign and non-sovereign acts, and only the former acts are immune in a foreign domestic court.[179] It further held that it is the nature, not the purpose of the conduct, that determines whether a disputed state action is sovereign or non-sovereign in nature.[180] The German Federal Constitutional Court allowed the Cologne company to sue the Iran Embassy for their repairing contract because it found that signing the contract was an act that can be done by a private person, not an exercise of sovereign authority by Iran.[181] The German Federal Constitutional Court further concluded that denying Iran's immunity in this case would not prejudice its diplomatic rights and privileges because diplomatic immunity had no significance in this case.[182] The *Empire of Iran* case set two important precedents for restrictive immunity theory. First, it adopted the distinction made between acts *jure imperii* and acts *jure gestionis* in cases of sovereign immunity.[183] Second, it highlighted that the test to distinguish the acts *jure imperii* from the acts *jure gestionis* is not the purpose but the nature of the state's transaction/conduct.[184]

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[177] *Ibid* at 57-58.
[178] *Ibid* at 61-79, examining state practice, treaty provisions and scholarly writings.
[179] *Ibid* at 79-80.
[180] *Ibid* at 80.
[181] *Ibid* at 81.
[182] *Ibid* at 82.
[183] *Ibid* at 64-65.
[184] *Ibid* at 80.

After the Second World War, both the US's and the UK's attitude toward absolute immunity started to change through executive and judicial efforts. Before the US *FSIA* was enacted, the US courts primarily relied on the US State Department's recommendations to determine foreign sovereign immunity claims.[185] In 1952, the US State Department announced its restrictive immunity position through the "Tate Letter,"[186] which was named after then Acting Legal Advisor of the State Department.[187] The Tate Letter provided the US judiciary with a roadmap in deciding foreign states' immunity claims. For example, in *Dunhill*, the US Supreme Court relied on the Tate Letter in rejecting Cuba's Act of State defence for its commercial conduct. The core issue in *Dunhill* was whether Cuba was immune from US litigation for its commercial transactions because of the Act of State doctrine, under which Cuba argued the claimants could not execute a judgment against the Cuban interests and profits in these particular commercial transactions.[188] In rejecting Cuba's Act of State defence, the Supreme Court held that however a state labels its defence it cannot be immune to US courts' jurisdiction for commercial conduct:

> For all the reasons which led the Executive Branch to adopt the restrictive theory of sovereign immunity, we hold that the mere assertion of sovereignty as a defense to a claim arising out of purely commercial acts by a foreign sovereign is no more effective if given the label of "Act of State" than if it is given the label of "sovereign immunity."[189]

In arriving the above decision, the US Supreme Court explained that it is important to subject foreign states to domestic courts for their participation in commercial conduct. This is because in their commercial capacities foreign governments do not exercise powers particular to sovereigns.

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[185] Dickinson et al., *supra* note 86 at 217.
[186] Reproduced in *Alfred Dunhill of London Inc. v. The Republic of Cuba*, 96 S.Ct. 1854 (1976), 1869-71 [*Dunhill*].
[187] Robert M. Jarvis, "The Tate Letter: Some Words regarding its Authorship" (2015) 55 Am J Leg Hist 465.
[188] *Dunhill*, *supra* note 186 at 1855-56.
[189] *Ibid* at 1866.

Holding states liable for their private conduct under the same rules of law that apply to private citizens is unlikely to touch very sharply on "national nerves."[190]

English courts also applied the restrictive immunity theory before the UK *SIA* was enacted. In their opinions in *Trendtex Trading Corporation v. Central Bank of Nigeria* ("*Trendtex*"),[191] after an extensive review of state practice, including the German Federal Constitutional Court's decision in the *Empire of Iran* case discussed above, Lord Denning and Justice Shaw each held that the distinction between acts *jure imperii* and acts *jure gestionis* is the underlying rationale of the restrictive immunity theory under customary international law.[192] As such, the English courts must apply this rule. They explained that because international law is part of English law and considering that there is no rule of precedent in international law, the English courts had to give effect to the current international law of immunity that is restrictive, not as it had been reflected in earlier English court decisions which was absolute.[193] In other words, they had to follow current international law as it was found to have evolved on the international plane, not outdated English precedent that applied absolute immunity. The two justices found that the current international law now applied restrictive immunity and distinguished between acts *jure imperii* and acts *jure gestionis*; only an act *jure imperii* is immune from scrutiny in English courts. To distinguish one from the other, they confirmed that it is the nature of the transaction rather than the motive behind the transaction that matters.[194]

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[190] *Ibid*.
[191] *Trendtex*, *supra* note 174.
[192] *Ibid* at 112.
[193] *Ibid*, at 128 per Lord Denning: "International law knows no rule of *stare decisis*. If this court today is satisfied that the rule of international law on a subject has changed from what it was 50 or 60 years ago, it can give effect to that change—and apply the change in our English law—without waiting for the House of Lords to do it" and 131 on the modern rule of restrictive immunity as reflected English cases; see also at 150-153 per Justice Shaw.
[194] *Ibid*, at 132 per Lord Denning: "If a government department goes into the market places of the world and buys boots or cement—as a commercial transaction—that government department should be subject to all the rules of the market place. The seller is not concerned with the purpose to which the purchaser intends to put the goods"; see also

Shortly after the above two landmark decisions were rendered, the US passed the *FSIA* and the UK passed the *SIA* in 1976 and 1978, respectively, both of which embody the restrictive immunity approach.[195]

The well-accepted formulation for the identification of customary law requires evidence reflecting both state practice and *opinio juris*.[196] This formulation was recently affirmed by the International Law Commission ("ILC") Rapporteur Sir Michael Wood in his Reports on the "Identification of Customary International Law."[197] In codifying their domestic laws, the US and the UK expressed their belief that restrictive immunity represents customary international law. In recommending that Congress should pass the *FSIA*, Mr. Flowers from the Committee on the Judiciary stated that:

> [T]he bill would codify the so-called "restrictive" principle of sovereign immunity, as presently recognized in international law. Under this principle, the immunity of a foreign state is "restricted" to suits involving a foreign state's public acts (*jure imperii*) and does not extend to suits based on its commercial or private acts (*jure gestionis*).[198]

Similarly in a State Immunity Bill presented to the House of Lords, Baroness Elles submitted the following opinion:

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at 153 per Justice Shaw. *Cf I Congreso*, *supra* note 83 at 267, in which the House of Lords applied a contextual approach, which will be discussed in Chapter 7.

[195] See a section-by-section analysis of the two statutes in Dickinson et al., *supra* note 86 at 217, 329.

[196] *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands*, Judgment, [1969] ICJ Rep 3, at para. 77 provides that for a rule to crystalize as a custom, "[n]ot only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it."

[197] For Michael Wood's extensive work on "identification of customary international law" as a Special Rapporteur for the International Law Commission, see International Law Commission's Analytical Guide on this matter, available online: <https://legal.un.org/ilc/guide/1_13.shtml>. His Third Report gives particular attention to the relationship between the two constituent elements of customary international law—state practice and *opinio juris*, see Michael Wood, "Third Report on Identification of Customary International Law", International Law Commission, Sixty-seventh Session, Geneva, 4 May – 5 June and 6 July – 7 August 2015, UN Doc. A/CN.4/682.

[198] *Jurisdiction of United States Courts in Suits Against Foreign States*, 94th Cong, 2nd Sess. (1976), House of Representative Report No. 94-1478, 7 [*Jurisdiction of United States Courts in Suits Against Foreign States*, HR Rep No 94-1487].

> The introduction of this Bill confirms the view that adherence to the principle of absolute immunity has certainly become outdated, and a change is to be welcomed to bring our laws more into line with those of other nations. Already in 1952, as indeed the noble and learned Lord indicated, at the time of the famous "Tate letter" it appeared that most, if not all, [s]tates were applying the principle of restrictive immunity.[199]

Following the enactment of the US's and the UK's legislation, Singapore (1979),[200] Pakistan (1981),[201] South Africa (1981),[202] Canada (1982),[203] Australia (1985),[204] Argentina (1995),[205] and Israel (2008)[206] enacted their laws on state/sovereign immunity. A key feature is that they all have included a commercial transaction/activity exception, the crux of restrictive immunity. Three states that have ratified the *UNCSI*—Sweden, Japan and France—also enacted laws giving effect to the treaty or incorporated part of the treaty in their domestic legal systems. Sweden enacted a law using precisely the same terms as the Swedish version of the *UNCSI*.[207] Japan enacted the *Japanese Act on Civil Jurisdiction over Foreign States* in 2010.[208] France incorporated part of the *UNCSI* on measures of constraint in its domestic law on anti-corruption and transparency.[209] The Russian Federation—which has signed yet not ratified the *UNCSI*—

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[199] *State Immunity Bill* [H.L.] (Hansard, 17 January 1978). The Bill became *State Immunity Act 1978* (UK), c 33 [UK *SIA*].

[200] *State Immunity Act 1979* (Singapore), Ch 313, reproduced in Dickinson et al., *supra* note 86 at 504 [Singapore *SIA*].

[201] *State Immunity Ordinance* (Pakistan) *1981/6*, reproduced in Dickinson et al., *ibid* at 496 [Pakistan *SIO*].

[202] *Foreign States Immunities Act* (S Afr), No 87 of 1981, reproduced in Dickinson et al., *ibid* at 513 [South Africa *FSIA*].

[203] *State Immunity Act*, R.S.C. 1985, c. S-18 (Canada), available online: <https://laws-lois.justice.gc.ca/eng/acts/S-18/page-1.html>, with the latest amendment in 2012 on terrorist activity exception [Canadian *SIA*].

[204] *Foreign States Immunities Act 1985/196* (Australia), available online: <https://www.legislation.gov.au/Details/C2016C00947>, with the latest amendment in 2016 [Australia *FSIA*].

[205] *Immunity of Foreign States from the Jurisdiction of Argentinean Courts*, 24,488/1995, translated into English reproduced in Dickinson et al., *supra* note 86 at 465.

[206] *Foreign State Immunity Law 5769-2008* (Israel), available online: <https://www.coe.int/t/dlapil/cahdi/Source/state_immunities/Israel%20Immunities%20January%202009.pdf> [Israel *FSIL*].

[207] Documented in Fox and Webb, *supra* note 13 at 328.

[208] Documented in Fox and Webb, *ibid* at 324, footnote 152.

[209] French Law No. 2016-1681 of 9 December 2016. Documented in Fox, "The Restrictive Rule of State Immunity", in Ruys & Angelet, *supra* note 14 at 31.

enacted a law on sovereign immunity in November 2015, which came into force in January 2016.[210] With this law, Russia abolished absolute immunity and adopted restrictive immunity by including a commercial transaction exception in Article 8.[211] In European countries where there is no domestic legislation on sovereign immunity,[212] courts have nevertheless applied restrictive immunity theory as they considered it a rule of customary international law.[213] While Western states' practices have been instrumental in shaping the development of both absolute and restrictive immunity, Asian states (other than Singapore in 1979, Pakistan in 1981, Japan in 2010 as mentioned above) have barely contributed to the development of this area of law through their state practice.[214] One important reason is that while the law of sovereign immunity was in formation and development during the nineteenth and early twentieth centuries, many Asian states did not have independent state status and lacked opportunity to do so.[215] In some Asian states—including China—Western states and their nationals were above or outside of the jurisdiction of local judicial authorities. They did not even need to assert sovereign immunity in Asian courts.[216]

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[210] Federal Law No. 297-FZ (3 November 2015), cited in Library of Congress, "Russian Federation: New Law Allows Seizure of Foreign Governments' Property", available online: <https://www.loc.gov/item/global-legal-monitor/2015-12-02/russian-federation-new-law-allows-seizure-of-foreign-governments-property/>; see also Fox, "The Restrictive Rule of State Immunity", *supra* note 14 at 32.
[211] Federal Law No. 297-FZ (3 November 2015), *ibid.*
[212] See Council of Europe's "Pilot Project on State Practice regarding State Immunities": <http://www.cahdidatabases.coe.int/Search/Index/1>, which collects European Union states practices and some non-European Union states practices, most of which do not have a domestic law on sovereign immunity.
[213] Allen, *supra* note 154 at 187 on Belgium, 221 on Italy, 282 on Switzerland; Yang, *supra* note 13 at 13-15 on states practices of Belgium, Italy, Switzerland, Greece, France; Shaw, *supra* note 55 at 529 on Austria; *Empire of Iran* (Germany), *supra* note 173; see also August Reinisch, "European Court Practice Concerning State Immunity from Enforcement Measures" (2006) 17: 4 EJIL 803.
[214] Sompong Sucharitkul, "Jurisdictional Immunities in Contemporary International Law from Asian Perspectives" (2005) 4:1 Chinese JIL 1 at 8-9 [Sucharitkul].
[215] Sucharitkul, *ibid.*
[216] *Ibid*; Zhou Gengsheng (周鲠生), 国际法 [International Law], (Wuhan, Wuhan University Press, 2009 Reprint) 251-61 [Zhou, *International Law*]; A lack of contribution from the African continent—in the same time period—largely owes to Western states' colonization, with the exception of the Egyptian courts, see Badr, *supra* note 132 at 28.

Against this background of unbalanced state practice regarding sovereign immunity among Western states and other states, Pierre-Hugues Verdier and Erik Voeten concluded in 2015 that 76 states have adopted restrictive immunity either by legislation or judicial practice and 45 states continued to apply absolute immunity.[217] Among the latter 45 states, the most prominent one is China.[218] In 2022, can we conclude that the customary law of sovereign immunity has become restrictive today while 45 states—including China—still hold on to absolute immunity? The answer should be yes.[219] First, that number is shrinking. The Russian Federation was counted among the 45 states at the time of the Verdier's and Voeten's writing. But as noted above, Russia has adopted a law in 2016 that applies restrictive immunity. They also incorrectly put Romania and Iran—two states that have ratified the *UNCSI* in 2007 and 2008—as practitioners of absolute immunity in 2015. Secondly, the international consensus on restrictive immunity has firmly formed as noted by the late Professors Brownlie and Crawford:

> Independently of the [*UNCSI*], the restrictive theory of immunity is now very widely, although not unanimously, accepted. But at a certain point, the respondent state's adherence to 'absolute' immunity is not the issue: the question is whether a forum state is free to adopt a regime of restrictive immunity. Of that there seems no doubt. Though adoption of the restrictive immunity theory does not avoid the problem of determining its precise boundaries, a broad consensus exists as to the type of exceptions.[220]

The practical consequence of a choice between absolute and restrictive immunities among states, as indicated by Brownlie and Crawford, is about what is the scope of a defendant

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[217] Pierre-Hugues Verdier & Erik Voeten, "How Does Customary International Law Change? The Case of State Immunity" (2015) 59: 2 International Studies Quarterly 209; see also Shaw, *supra* note 55 at 531 highlighting China and Brazil as supporters for absolute immunity.
[218] China's absolute immunity position, rationale and whether it is consistent with customary international law will be examined in Chapter 3.
[219] *Cf* Brownlie, *supra* note 153 at 505: "China's…proclaimed acceptance of absolute immunity…and its anomalous position on its signature of the [*UNCSI*] create an obstacle to the consolidation of the customary rule of restrictive immunity."
[220] Brownlie, *ibid* at 490; see also Fox and Webb, *supra* note 13 at 131-164; Yang, *supra* note 13 at 11-19; Shaw, *supra* note 55 at 531.

state's sovereign immunity in the forum court as a matter of private international law, or conflict of laws.[221] A state, such as China has done, can authorize foreign states absolute immunity in its own courts or argue for absolute immunity for itself on the international plane. But when it is sued in a foreign domestic court that applies restrictive immunity, such as in UK courts, the defendant's absolute immunity position must yield to the forum court's restrictive immunity law.[222] This is because the forum law—which often declares that it incorporates customary international law—governs the defendant state's immunity in the forum court.[223] In other words, a state can assert absolute immunity in principle, but it must defends itself according to restrictive immunity if it is sued in a court that applies restrictive immunity. Hence, although there are still states, like China, that continue to assert absolute immunity, their absolute immunity position cannot provide them with a legal basis for defense in a foreign domestic court that applies restrictive immunity. This is particularly important because litigation against states mostly happen in courts where restrictive immunity is upheld.[224] States that assert absolute immunity cannot contribute much to the development of the law of sovereign immunity. It is states that apply restrictive immunity in their domestic courts that will more actively shape this area of law.[225]

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[221] On the application of the forum law on sovereign immunity (UK *SIA*) to a foreign state from the perspective of conflict of laws, see Lord Collins of Mapesbury, ed (with specialist editors), *Dicey, Morris & Collins on The Conflict of Laws*, 15th ed (London: Sweet & Maxwell, 2012) Chapter 10 at 337 [*Dicey, Morris & Collins on The Conflict of Laws*].
[222] *Dicey, Morris & Collins on The Conflict of Laws*, *ibid* at 340-41.
[223] *Ibid* at 340.
[224] Most litigation against states that involve the states' sovereign immunity are conducted under the US *FSIA* and the UK *SIA* in US and UK courts, see Chapter 1, Section 3.1.
[225] See Nollkaemper, *National Courts*, *supra* note 99 at 1 arguing that it is "national courts of a substantial number of states (but representing probably not more than half of the states in the world) [that] have become a major institutional force in the protection of the international rule of law" through their judicial practice.

This proposition that restrictive immunity has become customary international law as practiced by some (not all) states is supported by the work of the ILC, the United Nations General Assembly's Sixth (Legal) Committee ("Sixth Committee") and its successor the *Ad Hoc* Committee on Jurisdictional Immunities of States and Their Property that led up to the conclusion of the *UNCSI* in 2004.[226] The *UNCSI* has been cited by international and domestic courts' decisions as an expression of customary international law to different extents. Many scholars also take the view that the customary law of sovereign immunity is restrictive, as will be discussed next.

2.2.2. The crystallization of customary international law of restrictive immunity on the international plane as expressed in the *UNCSI*

The formation of customary international law is complex and there is an in-depth literature exploring the subject from different perspectives.[227] For the purposes of this Chapter as well as this thesis, we will explore how legal experts have been able to conclude that restrictive immunity has developed as customary international law, including the work at the ILC. As a result of state participation in the drafting process of the *UNCSI*, as well as references to it by international and domestic adjudication bodies, the codification of restrictive immunity in the *UNCSI* should be treated as a significant development of the law on the international plane,

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[226] See also *Jurisdictional Immunities*, *supra* note 12, para. 55: "[s]tate practice of particular significance is to be found in … the statements made by [s]tates, first in the course of the extensive study of the subject by the International Law Commission and then in the context of the adoption of the [*UNCSI*]."

[227] Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter: Evolutions in Customary Law and Practice* (Cambridge, Cambridge University Press, 2010); Curtis A. Bradley, ed, *Custom's Future: International Law in a Changing World* (Cambridge: Cambridge University Press, 2016); Patrick Dumberry, *The Formation and Identification of Rules of Customary International Law in International Investment Law* (Cambridge: Cambridge University Press, 2016); Brian D. Lepard, ed, *Reexamining Customary International Law* (Cambridge: Cambridge University Press, 2017). More recent contributions include Monica Hakimi, "Making Sense of Customary International Law" (2020) 118:8 Mich L Rev 1487; Jean d'Aspremont, *The Discourse on Customary International Law* (Oxford: Oxford University Press, 2021); Francesca Iurlaro, *The Invention of Custom: Natural Law and the Law of Nations, ca 1550-1750* (Oxford: Oxford University Press, 2021).

further supporting these expert views that customary international law on sovereign immunity has crystalized as restrictive.

The International Court of Justice ("ICJ") in the *Case Concerning the Continental Shelf* opined that "multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them."[228] Two important treaties—one regional and one international—exist on the topic of sovereign immunity. The regional *European Convention on State Immunity* ("*ECSI*") was concluded in 1972 and entered into force in 1976.[229] The multilateral *UNCSI* was concluded in 2004.[230] Although the *ECSI* is a regional treaty, it has influenced state practice and the development of customary law. For example, it shaped the UK *SIA* to a large extent: one purpose of enacting the *SIA* by the UK was to facilitate the UK's ratification of the *ECSI*.[231] The *ECSI* also served as one of the material bases for the ILC's work.[232]

In 1977, the United Nations General Assembly invited the ILC to commence work on the topic of jurisdictional immunities of states and their property.[233] The ILC considered the topic of sovereign immunity from its Thirty-first to Thirty-eighth and from its Forty-first to Forty-third Sessions, from 1977 to 1986 and from 1989 to 1991.[234] In 1991, a revised "second reading" draft

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[228] *Case Concerning the Continental Shelf (Libyan Arb Jamahiriya v. Malta)*, Judgment, [1985] ICJ Rep 13, para. 27.

[229] *European Convention on State Immunity*, 16 May 1972, ETS No. 74 (entered into force 11 June 1976). The Council of Europe returned to the question of immunity in 2001 and initiated the "Pilot Project on State Practice regarding State Immunities", see Hafner et al. The project has since been maintained by the Council of Europe, available online: <http://www.cahdidatabases.coe.int/Search/Index/1>.

[230] *United Nations Convention on Jurisdictional Immunities of States and Their Property*, 2 December 2004, A/RES/59/38 (not in force).

[231] Dickinson et al., *supra* note 86 at 332; Fox and Webb, *supra* note 13 at 116.

[232] Gerhard Hafner, "Historical Background to the Convention" in Roger O'Keefe & Christian J. Tams, eds, *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (Oxford: Oxford University Press, 2013) 4 [O'Keefe & Tams].

[233] GA Resolution A/RES/32/151 (1977), para. 7.

[234] Professor Sompong Sucharitkul was appointed Special Rapporteur and between 1979 and 1986 he produced eight reports and proposals for draft articles. For Professor Sucharitkul's reports, see International Law Commission,

set of articles was adopted by the ILC and submitted to the United Nations General Assembly.[235] Following the submission of the ILC draft articles, the General Assembly decided to establish an open-ended Working Group under the Sixth Committee.[236] Many states participated in the Sixth Committee Working Group's consultation in 1994 and expressed a favorable view of the ILC draft articles.[237] In 1998, the General Assembly decided to deploy two Working Groups under the auspices of the Sixth Committee[238] and the ILC[239] to push forward the work on sovereign immunity, both of which were chaired by Professor Gerhard Hafner. In 2000, the Sixth Committee Working Group was converted into an *Ad Hoc* Committee on Jurisdictional Immunities of States and Their Property ("*Ad Hoc* Committee") by General Assembly Resolution 55/150.[240] Although some old controversies resurfaced in 2002 under the auspices of the *Ad Hoc* Committee, these issues were settled under the leadership of Professor Hafner and

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"Analytical Guide to the Work of the International Law Commission: Jurisdictional Immunities of States and Their Property", available on line: < https://legal.un.org/ilc/guide/4_1.shtml>; Professor Motoo Ogiso of Japan took over as Special Rapporteur in 1988 and produced three reports. For Professor Ogiso's reports, see International Law Commission, "Analytical Guide to the Work of the International Law Commission: Jurisdictional Immunities of States and Their Property", available online: <https://legal.un.org/ilc/guide/4_1.shtml>. Burkhard Heß, "The International Law Commission's Draft Convention on the Jurisdictional Immunities of States and Their Property" (1993) 4 EJIL 269, 270 [Heß, ILC's Draft]; see also Hafner, "Historical Background to the Convention", *supra* note 232 at 5-6.

[235] Heß, "The ILC's Draft", *ibid* at 270; Hafner, "Historical Background to the Convention", *ibid* at 6.

[236] GA Resolution A/RES/46/55 (1991), para. 4. The mandate of the Working Group was to examine "issues of substance arising out of the draft articles" in light of the governments' written comments and views and convene an international conference to conclude the convention. The conference never happened. The Six Committee Working Group held two sessions in 1992-1993, followed by "informal consultations" in 1994.

[237] Yang, *supra* note 13 at 449, footnote 69, documenting the following states' approval of the ILC draft articles: Brazil, Poland, Australia, Germany, France, Ireland, Belarus, Cyprus, Spain, Switzerland, Uruguay, Angola, Venezuela, USSR, Madagascar, Iceland for Nordic countries, Austria, Bulgaria, Colombia, Ukraine, Nigeria, Bahrain, Indonesia, Turkey, Argentina, Algeria, Russia, Belgium, Japan, China, Canada, New Zealand, Czech Republic, South Korea, US, India, Israel, Argentina, Lebanon, Qatar.

[238] Gerhard Hafner, *Report of the Chairman of the Working Group for Convention on Jurisdictional Immunities of States and Their Property*, UNGA, fifty-fourth session, UN Doc A/C.6/54/L.12 (1999) [Chairman of the Sixth Committee Report 1999]; Gerhard Hafner, *Report of the Chairman of the Working Group for Convention on Jurisdictional Immunities of States and Their Property*, UNGA, fifty-fifth session, UN Doc A/C.6/55/L.12 (2000) [Chairman of the Sixth Committee Report 2000].

[239] "Report of the Working Group on Jurisdictional Immunities of States and Their property" (UN Doc A/CN.4/L/576) in *Yearbook of International Law Commission 1999*, vol II, part 2 (New York: UN, 1999) 150, 154, para. 1 [ILC Working Group Report 1999].

[240] GA Resolution A/RES/55/150 (2000), paras. 3-4.

the final version of the *UNCSI* came to fruition on 2 December 2004,[241] 26 years after the ILC began its work.[242] Compared to eight ratifications of the *ECSI*, more states—with various legal systems and geographical backgrounds—participated in the ILC's work leading to the ILC draft articles.[243] States engaged in extensive and meaningful debates on the ILC draft articles before the Sixth Committee Working Group and the *Ad Hoc* Committee, which produced several reports that were critical to the adoption of the *UNCSI*.[244] As of December 2022, a total number of 23 states[245] have ratified the *UNCSI* and 30 states in total[246] have signed it. Benin became the

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[241] GA Resolution A/RES/59/38, para. 3 and the Annex; Hafner and Kölher, "The UNCSI", *supra* note 118 at 19.
[242] For a historical account of these various bodies, see Gerhard Hafner, "Historical Background to the Convention" in O'Keefe and Tams, *supra* note 232 at 1.
[243] 18 states responded to the ILC Questionnaire, see International Law Commission, "Jurisdictional Immunities of States and Their Property: Information and Materials Submitted by Governments", A/CN.4/343, available online: <https://legal.un.org/ilc/documentation/english/a_cn4_343.pdf>. Additional 11 states submitted materials but did not respond to the Questionnaire, see International Law Commission, "Jurisdictional Immunities of States and Their Property: Information and Materials Submitted by Governments Addendum", A/CN.4/343/Add.2, available online: <https://legal.un.org/ilc/documentation/english/a_cn4_343_add2.pdf>. 29 states submitted comments on draft articles, see International Law Commission, "Jurisdictional Immunities of States and Their Property: Comments and Observations Received from Governments", A/CN.4/410 and Add.1-5, available online: <https://legal.un.org/ilc/documentation/english/a_cn4_410.pdf>. 57 states in total responded to ILC's different requests for comments and observations. They are Argentina, Australia, Austria, Barbados, Belgium, Brazil, Bulgaria, Burma, Byelorussia, Cameroon, Canada, Chile, China, Colombia, Czechoslovakia, Demark, Ecuador, Egypt, Finland, France, German Democratic Republic, Federal Republic of Germany, Greece, Hungary, Iceland, Italy, Japan, Kenya, Lebanon, Madagascar, Mexico, Netherlands, Norway, Pakistan, Philippines, Poland, Portugal, Qatar, Romania, Senegal, Singapore, South Africa, Spain, Sudan, Suriname, Sweden, Switzerland, Syria, Thailand, Togo, Trinidad and Tobago, Tunisia, USSR, UK, US, Venezuela, Yugoslavia. See Yang, *supra* note 13 at 447, footnote 49.
[244] See Chairman of the Sixth Committee Report 2000, *supra* note 228; see also the three reports of the *Ad Hoc* Committee on Jurisdictional Immunities of States and Their Property: *Report of the Ad Hoc Committee on Jurisdictional Immunities of States and Their Property*, UNGAOR, 57th Sess, Supp No 22, UN Doc A/57/22 (2002) [Ad Hoc Committee Report 2002]; *Report of the Ad Hoc Committee on Jurisdictional Immunities of States and Their Property*, UNGAOR, 58th Sess, Supp No 22, UN Doc A/58/22 (2003) [Ad Hoc Committee Report 2003]; *Report of the Ad Hoc Committee on Jurisdictional Immunities of States and Their Property*, UNGAOR, 59th Sess, Supp No 22, UN Doc A/59/22 (2004) [Ad Hoc Committee Report 2004].
[245] 23 states that have ratified the *UNCSI* are: Austria (2006), Benin (2022), Czech Republic (2015), Equatorial Guinea (2018), Finland (2014), France (2011), Iran (2008), Iraq (2015), Italy (2013), Japan (2010), Kazakhstan (2010), Latvia (2014), Lebanon (2008), Liechtenstein (2015), Mexico (2015), Norway (2006), Portugal (2006), Romania (2007), Saudi Arabia (2010), Slovakia (2015), Spain (2011), Sweden (2009), Switzerland (2010).
[246] 14 states that have signed but not ratified the *UNCSI* are: Belgium, China, Denmark, Estonia, Iceland, India, Madagascar, Morocco, Paraguay, Russian Federation, Senegal, Sierra Leone, Timor-Leste, United Kingdom.

23rd states to ratify the treaty on 7 July 2022. The *UNCSI* requires 30 states to ratify it before it will enter into force.[247]

Paragraph 3 of the *UNCSI*'s preamble declares that the treaty seeks to codify, develop the law and harmonize the state practice in this area:

> [A]n international convention on the jurisdictional immunities of [s]tates and their property would …contribute to the codification and development of international law and the harmonization of practice in this area[.][248]

Although it is unclear which part of the treaty codifies the existing customary international law and which part of the treaty develops this area of law, Christian J. Tams opines that this paragraph not only emphasizes sovereign immunity is a recognized rule of customary international law, but also a developing rule that has undergone changes that recognize the growing restrictions, *i.e.*, exceptions made to a state's immunity in international law.[249]

Since the *UNCSI* came into existence, international tribunals[250] and domestic courts[251] have referred to it for guidance in their adjudication, even though the treaty has not yet come into force.[252] In *Jurisdictional Immunities* rendered in 2012, the ICJ referred to the *UNCSI* despite the fact that the treaty had not come into force and was inapplicable to the parties to the dispute.[253] In this case, the ICJ declared in the context of sovereign immunity law, domestic court decisions,

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[247] Article 30, *UNCSI*.
[248] Paragraph 3, Preamble, *UNCSI*.
[249] Christian J. Tams, "Preamble", in O'Keefe & Tams, *supra* note 232 at 30.
[250] *Jurisdictional Immunities*, *supra* note 12; *Case of Oleykinov v. Russia* (Application no. 36703/04), 14 March 2013 [*Oleykinov v. Russia*]; *Case of Jones and Others v The United Kingdom* (Applications nos. 34356/06 and 40528/06) 14 January 2014) [*Jones v. United Kingdom*].
[251] *AIG Capital Partners Inc v. Republic of Kazakhstan*, [2005] EWHC 2239 (Comm); *Jones v. Minister of Interior*, [2006] UKHL 26; *Svenska Petroleum Exploration AB v. Government of the Republic of Lithuania*, [2006] EWCA Civ 1529; *Belhaj and another v. Straw and others*; *Rahmatullah (No. 1) v. Ministry of Defence and another*, [2017] UKSC 3; *Benkharbouche v. Secretary of State for Foreign and Commonwealth Affairs*, [2017] UKSC 62.
[252] Even though it seems improbable that the *UNCSI* will come into force shortly as a treaty, 22 ratifications—two-thirds of 30 states required for ratification—"surely rank the *UNCSI* as a significant current source of international law", see Fox, "The Restrictive Rule of State Immunity", *supra* note 14 at 31.
[253] *Jurisdictional Immunities*, *supra* note 12 at paras. 69 and 116.

national legislation, the ILC's work, the *UNCSI*, and states' claims to and grants of sovereign immunity in domestic courts may all constitute evidence of state practice and *opinio juris*:

> State practice of particular significance is to be found in the judgments of national courts faced with the question whether a foreign State is immune, the legislation of those States which have enacted statutes dealing with immunity, the claims to immunity advanced by States before foreign courts and the statements made by States, first in the course of the extensive study of the subject by the International Law Commission and then in the context of the adoption of the United Nations Convention. *Opinio juris* in this context is reflected in particular in the assertion by States claiming immunity that international law accords them a right to such immunity from the jurisdiction of other States; in the acknowledgment, by States granting immunity, that international law imposes upon them an obligation to do so; and, conversely, in the assertion by States in other cases of a right to exercise jurisdiction over foreign States.[254]

The ICJ cautiously added that the provisions of the *UNCSI* are "relevant … in so far as their adoption and implementation shed light on the content of customary international law."[255]

The influence of the *UNCSI* in international and domestic courts is significant even though it has not come into force. In 2013, the European Court of Human Right ("ECtHR") in *Oleykinov v. Russia* held that the ILC draft articles and the *UNCSI* reflect customary international law. Particularly, the ECtHR found that the *UNCSI* is applicable to Russia under customary international law since Russia has signed and not opposed the treaty:

> [T]he International Law Commission's 1991 Draft Articles, as now enshrined in the 2004 [*UNCSI*], apply under customary international law, even if the [s]tate in question has not ratified that convention, provided it has not opposed it either…For its part, Russia has not ratified it but has not opposed it: on the contrary, it signed the [*UNCSI*] on 1 December 2006.
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> […]

[254] *Jurisdictional Immunities*, *ibid* at para. 55.
[255] *Jurisdictional Immunities*, *ibid* at para. 66.

> Consequently, it is possible to affirm that the provisions of the 1991 [ILC draft articles] and the 2004 [*UNCSI*] apply to [Russia], under customary international law.[256]

In *Jones v. United Kingdom* decided in 2014, the ECtHR also considered the *UNCSI* while noting that the United Kingdom has signed but not ratified the treaty and Saudi Arabia acceded to the *UNCSI* in 2010.[257]

Acknowledging that the UK has not ratified the *UNCSI* and has its own domestic law,[258] English courts have also referred to the *UNCSI* in their decisions.[259] In the *Jones v. Minister of Interior* case decided in 2007, Lord Bingham of the House of Lords, relying on *AIG Capital Partners v. Kazakhstan*,[260] stated that:

> [The *UNCSI*'s] existence and adoption by the UN after the long and careful work of the International Law Commission and the UN Ad Hoc Committee on Jurisdictional Immunities of States and Their Property, powerfully demonstrates international thinking on the point.[261]

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[256] *Oleykinov v. Russia*, *supra* note 250 at paras. 66, 68. *Cf* Riccardo Pavoni, "The Myth of the Customary Nature of the United Nations Convention on State Immunity: Does the End Justify the Means?" in Anne van Aaken & Iulia Motoc, eds, *The European Convention on Human Rights and General International Law* (Oxford: Oxford University Press, 2018) 264, 265 [Pavoni, "The Myth of the Customary Nature of the *UNCSI*"].

[257] *Jones v. United Kingdom*, *supra* note 250 at paras. 75-80. For ECtHR's approach toward sovereign immunity, see Philippa Webb, "A Moving Target: The Approach of the Strasbourg Court to Immunity" in Anne van Aaken & Iulia Motoc, eds, *The European Convention on Human Rights and General International Law* (Oxford: Oxford University Press, 2018) 251.

[258] To what extent the *UNCSI* reflects customary international law on the definition of the state and commercial exceptions to jurisdiction and execution immunities will be addressed in Chapter 5. The relationship between the UK *SIA* and customary international law will be addressed in Chapter 6.

[259] See *Benkharbouche v. Secretary of State for Foreign and Commonwealth Affairs*, *supra* note 251 at para. 12: "For the most part, [the *UNCSI*] is consistent with the [UK *SIA*], which indeed was one of the models used by the [*UNCSI*'s] draftsmen."

[260] *AIG v. Kazakhstan*, *supra* note 251 at para. 80: "First, I regard the *UN Convention on Jurisdictional Immunities of States and their Property*, adopted by the General Assembly, as a most important guide on the state of international opinion on what is, and what is not, a legitimate restriction on the right of parties to enforce against State property generally. I accept that the Convention does not constitute a *jus cogens* in international law. I recognise that the Convention has not yet been adopted by any States. But its existence and adoption by the UN after the long and careful work of the International Law Commission and the UN Ad Hoc Committee on Jurisdictional Immunities of States and Their Property, powerfully demonstrates international thinking on the point."

[261] *Jones v. Minister of Interior*, *supra* note 251 at para. 8. See also *Svenska Petroleum v. Lithuania*, *supra* note 251 at para. 132, citing *Jones v. Ministry of Interior*: "The distinction drawn in section 3 of the *State Immunity Act* between a commercial transaction and a transaction entered into by a state in the exercise of its sovereign authority is drawn in almost identical terms in Article 2.1(c) of the *United Nations Convention on Jurisdictional Immunities of States and Their Property*, which, although not yet in force, has been recognised as reflecting current international thinking on the subject."

Lord Bingham went on to state that what was not included (in this case the torture or the *jus cogens* exception) in the treaty strongly suggests that no such consensus has been formed on the international plane. To the contrary, the treaty includes authoritative evidence of rights and obligations for states under international law:

> Despite its embryonic status, this Convention is the most authoritative statement available on the current international understanding of the limits of state immunity in civil cases, and the absence of a torture or *jus cogens* exception is wholly inimical to the claimants' contention.[262]

In 2017, Lord Mance of the UK Supreme Court made a qualification to Lord Bingham's aforementioned comments, declaring that not all rules of the *UNCSI* can be taken as codification of customary international law. In *Belhaj and another v. Straw and others*; *Rahmatullah (No. 1) v. Ministry of Defence and another*,[263] the United Kingdom Supreme Court was asked to interpret whether the terms "interests or activities" used in *UNCSI*'s Article 6(2)(b)[264] indicated that sovereign immunity should be understood as extending beyond claims affecting property or other rights; and if so, how far it represents "the current consensus of nations."[265] Lord Mance said:

> The [*UNCSI*] is not yet in force, lacking a sufficient number of ratifications, including any from the United Kingdom… [Lord Bingham's statement was] made expressly about the "limits" of state immunity in the context of an issue whether the legal liability of a state official fell outside the scope of such immunity. That was a fundamental question which the [*UNCSI*], however embryonic, could be expected to cover. To attach equivalent relevance to the use in a Convention with no binding international status of the ambiguous terminology of article 6(2)(b) is to take Lord Bingham's words out of context.[266]

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[262] *Jones v. Minister of Interior*, *ibid* at para. 26.
[263] *Belhaj and another v. Straw and others*; *Rahmatullah (No. 1) v. Ministry of Defence and another*, *supra* note 251.
[264] Article 6(2)(b) of the *UNCSI* provides that "A proceeding before a court of a [s]tate shall be considered to have been instituted against another [s]tate if that other [s]tate […] is not named as a party to the proceeding but the proceeding in effect seeks to affect the property, rights, interests or activities of that other [s]tate."
[265] *Belhaj and another v. Straw and others*; *Rahmatullah (No. 1) v. Ministry of Defence and another*, *supra* note 251, at para. 195.
[266] *Ibid* at para. 25. See also O'Keefe & Tams, *supra* note 232 at xli: "The [UNCSI's] significance, …, extends beyond the instrument's quality as a treaty. There can be little doubt that the process of the [UNCSI's] elaboration

Although the customary international law status of all provisions of the *UNCSI* is unsettled as Lord Mance has observed, an *opinio juris* that customary international law is restrictive has been formed among some states, particularly regarding the commercial exception to immunity.[267] The commercial exceptions to both jurisdictional and execution immunities are also well reflected in the *UNCSI*. Further, restrictive immunity has been affirmed by international and domestic courts, although divergent views exist regarding their technical details in application, such as the determination methodology of what constitutes a commercial transaction.

In light of the above state participation in the *UNCSI*'s drafting, the conclusion of the *UNCSI*, and international and domestic courts' reference to the *UNCSI* in their adjudication, we can say, with caution, that the *UNCSI*—even if not all of its provisions such as Article 6(2)(b)[268]—can be treated as a codification of the customary law of restrictive immunity and harmonization of state practice in this area,[269] despite the fact that it is not in force.[270] Although the *UNCSI*'s restrictive immunity position—as supported by state practice and *opinio juris*—is found to be customary international law, Chapters 5 to 7 will show that the test to commercial

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has, through the close involvement of [s]tates, revealed, and where not simply revealed then crystallized, the content of the contemporary customary international law of [s]tate immunity. This is not to say that each and every substantive provision in its entirety is necessarily consonant with custom. But far more than simply the essence of each is, … both national and international courts have already looked to the [UNCSI] as persuasive evidence of today's customary rules on point."

[267] *Cf Jurisdictional Immunities*, *supra* note 12 at paras. 117-18, while the ICJ considered it was unnecessary to make a decision on whether "all aspects of Article 19 [of the *UNCSI* on measures on constraint for execution immunity purposes] reflect current customary international law", it held that "it suffices for the [ICJ] to find that there is at least one condition that has to be satisfied before any measure of constraint [for execution immunity purposes] may be taken against property belonging to a foreign State: that the property in question must be in use for an activity not pursuing government non-commercial purposes[.]"

[268] O'Keefe & Tams, *supra* note 232 at xli; *Belhaj and another v. Straw and others*; *Rahmatullah (No. 1) v. Ministry of Defence and another*, *supra* note 251, at para. 25.

[269] Paragraph 3 of the Preamble, *UNCSI*.

[270] See also Currie, *supra* note 16 at 371; Brownlie, *supra* note 153 at 489-90; Yang, *supra* note 13 at 446-54, particularly at 449 and 454; Fox and Webb, *supra* note 13 at 284-330; *cf* Pavoni, "The Myth of the Customary Nature of the *UNCSI*", *supra* note 256 at 265.

exception to jurisdictional immunity found in the *UNCSI*, the US *FSIA*, and the UK *SIA* are inconsistent. So far, no uniform test on commercial exception to jurisdictional immunity has emerged in state practice.[271]

2.2.3. Scholarly views on restrictive immunity

A number of scholars such as Badr,[272] Schreuer,[273] Dellapenna,[274] Currie,[275] Fox and Webb,[276] Yang,[277] Brownlie,[278] Brierly,[279] Dicey, Morris & Collins,[280] Shaw,[281] and Rothwell et al.,[282] in their treatises on public international law, private international law, or the law of sovereign/state immunity have concluded that the current international law on sovereign immunity is restrictive.[283] However, disagreeing views exist. For example, Ernest K. Bankas—writing in 2005—argued that:

> Today, no one can say with much candour or exactitude as to whether there is *usus* respecting the doctrine of restrictive immunity. […] A careful review of the law, however, shows that the practice of states is quite scanty and conflicting. And comments or replies of governments to the International Law Commission's questionnaires clearly indicate that the divergence between the restrictive school and the absolute school is far from over. […] The current state of the law is not clear-cut and evidence shows that restrictive immunity lacks the necessary condition *i.e. repetitio facti* or '*diuturnitas*' – uniformity of

[271] Shaw, *supra* note 55 at 533 suggesting that it will be difficult for a comprehensive international consensus to emerge on the characterization of acts *jure imperii* and acts *jure gestionis* given states' different characterization of what are sovereign acts in their respective political systems.
[272] Badr, *supra* note 132 at 41.
[273] Christoph H. Schreuer, *State Immunity: Some Recent Development* (Cambridge: Grotius Publications, 1988) 2 [Schreuer].
[274] Dellapenna, *supra* note 86 at 5.
[275] Currie, *supra* note 16 at 366; see also John H. Currie, Craig Forcese, Joanna Harrington & Valerie Oosterveld, *International Law: Doctrine, Practice, and Theory* 3rd ed (Toronto: Irwin Law, 2022), Chapter 8.
[276] Fox and Webb, *supra* note 13 at 131.
[277] Yang, *supra* note 13 at 3.
[278] Brownlie, *supra* note 153 at 490.
[279] Andrew Clapham, *Brierly's Law of Nations: An Introduction to the Role of International Law in International Relations* 7th ed. (Oxford: Oxford University Press, 2012) 277-79.
[280] *Dicey, Morris & Collins on The Conflict of Laws*, *supra* note 221 at 339.
[281] Shaw, *supra* note 55 at 531.
[282] Donald R. Rothwell, Stuart Kaye, Afshin Akhtar-Khavari, Ruth Davis & Imogen Saunders, *International Law: Cases and Materials with Australian Perspectives* 3 ed. (Cambridge: Cambridge University Press, 2018) 366, 371, 374.
[283] Chinese scholars' views on where the customary international of sovereign immunity stands will be examined in detail in Chapter 3 when I examine their views on China's immunity position.

> conduct, and the conviction that the said emerging rule is juridically mandatory on states.[284]

Orakhelashvili also challenged the crystallization of a restrictive immunity theory. He argued that the US and the UK approaches to sovereign immunity are not representative among the states that have legislation on sovereign immunity.[285] He further argued that there is no single interpretative approach towards the exact nature of the conduct at issue.[286] He claimed that the competing and mutually incompatible approaches to state immunity show that a general rule on the scope of immunity cannot be feasibly agreed upon by states. Therefore it is unlikely that the doctrine of sovereign immunity has the force of binding law.[287] He concluded that it is more appropriate to consider sovereign immunity as a reflection of international comity, not international law.[288] Wenhua Shan and Peng Wang also expressed their doubts about the binding effect of restrictive immunity as a general rule of customary international law.[289] In their view, there is only a general trend in the international community for accepting restrictive immunity without states' agreement on key issues such as the threshold tests for the commercial and other exceptions.[290] They argued that:

> The determinacy of the restrictive doctrine has not yet been coherently established and universally accepted. The degree of restrictiveness and the boundary of the core concept of commerciality remain unclear. The method to delimit the scope of exceptions to immunity is yet to be universally established. Issues of reciprocity further complicate the picture and diminish the certainty of the rules underlying the restrictive doctrine.[291]

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[284] Ernest K. Bankas, *The State Immunity Controversy in International Law: Private Suits Against Sovereign States in Domestic Courts* (Berlin: Springer, 2005) 324-26.
[285] Orakhelashvili, "State Immunity from Jurisdiction", *supra* note 153 at 164.
[286] Orakhelashvili, "State Immunity from Jurisdiction", *ibid* at 164.
[287] *Ibid* at 165.
[288] *Ibid* at 165-166.
[289] Wenhua Shan & Peng Wang, "Divergent Views on State Immunity in the International Community" in Ruys & Angelet, at 61 [Shan & Wang, Divergent Views]. Shan and Wang's view represents the majority of Chinese scholars' view, see Chapter 3.
[290] Shan & Wang, "Divergent Views", *ibid* at 62, 65.
[291] *Ibid* at 78.

Bankas, Orakhelashvili, and Shan and Wang correctly highlight the divergent approaches among states that have embraced restrictive immunity toward the technical details such as exceptions to sovereign immunity. But such differences do not negate the customary nature of restrictive immunity, including the underlying rationale of the commercial exception. As the ICJ has opined in the *Nicaragua* case, state practice that gives rise to customary international law does not need to be perfectly consistent or universal.[292] Put differently, so long as states have treated commercial exception to jurisdiction and execution immunity a rule of customary international law with *opinio juris*, a customary rule forms or exists, even though states' practices vary in details.[293] In his book review on the book Shan's and Wang's article appeared, Roger O'Keefe made a similar point. He viewed that Shang and Wang:

> usefully highlight, although arguably overstate, the confounding implications for the ascertainment of the customary rules of restrictive immunity of the persistence of absolute immunity in China, including Hong Kong, and in certain other states; of national variation in the identification and formulation of exceptions to state immunity; and of the continuing roles in certain states of considerations of reciprocity and of intervention by the executive.[294]

Leading authorities were content with the crystallization of restrictive immunity and recognized that further work could be done to articulate and harmonize rules thereunder in application.[295]

Based on the above examination of state practice, including their judicial practice, the ILC's work on the *UNCSI*, decisions of international courts, and scholarly views, we can

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[292] *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment*, [1986] ICJ Rep 14, para. 186: "It is not to be expected that in the practice of [s]tates the application of the rules in question should have been perfect…The Court does not consider that, for a rule to be established as customary, the corresponding practice must be in absolutely rigorous conformity with the rule."
[293] See HR Rep No 94-1487, at 14: "Although the general concept of sovereign immunity appears to be recognized in international law, its specific content and application have generally been left to the courts of individual nations."
[294] Roger O'Keefe, Book Review of *The Cambridge Handbook of Immunities and International Law* by Tom Ruys & Nicolas Angelet, (2021) 32 EJIL 699 at 711.
[295] Brownlie, *supra* note 153 at 490; Fox and Webb, *supra* note 13 at Chapter 6 on "The Restrictive Doctrine of State Immunity: Its Recognition in State Practice) at 131-164; Yang, *supra* note 13 at Chapter 1 Section 3 on "The emergence of the doctrine of restrictive immunity" at 11-19; *Dicey, Morris & Collins on The Conflict of Laws*, *supra* note 221 at 337; *Shaw*, *supra* note 55 at 531.

conclude that the rule of customary law on sovereign immunity has become restrictive.[296] Premised on this conclusion, the rest of this Chapter will briefly discuss two questions that are central to this thesis: (1) What is the basis for SOEs' potential immunity under the customary international law of restrictive immunity: immunity *ratione personae* or immunity *ratione materia* (Section 3)?; (2) What is the scope of the test for the commercial exception to jurisdictional immunity (Section 4)?

3. The unsettled basis of SOEs' immunities under the customary international law of restrictive immunity

Whether it is under absolute or restrictive immunity, it is mainly states that enjoy sovereign immunity as prescribed by customary international law.[297] Thus, having the "state" status matters—often a prerequisite—for an entity that seeks sovereign immunity in a foreign domestic court.[298] This is particularly so under absolute immunity: being a state is the decisive factor for an entity's successful immunity claim.[299] Under restrictive immunity, this general principle is qualified. States enjoy sovereign immunity in a foreign domestic court as prescribed by customary international law, but, only to the extent that they have engaged in sovereign conduct,

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[296] *Cf* Jasper Finke, "Sovereign Immunity: Rules, Comity, or Something Else?" (2010) 21:4 EJIL 853, arguing that "[s]overeign immunity is best understood not as a specific rule of customary international law, but as a legally binding principle." Viewing sovereign immunity as a principle—Finke argues—would allow states to frame and define the scope and limits of sovereign immunity within their legal orders so long as they observe the boundaries set by other principles of international law.

[297] Distinctive from sovereign/state immunities enjoyed by states, international organizations and diplomats also enjoy immunities under the customary international law. Regarding international organizations' immunity, see August Reinisch, *The Privileges and Immunities of International Organizations in Domestic Courts* (Oxford: Oxford University Press, 2013); regarding diplomatic immunity, see Eileen Denza, *Diplomatic Law: Commentary on the Vienna Convention on Diplomatic Relations* 4th ed (Oxford: Oxford University Press, 2016).

[298] Gabe Shawn Varges, "Defining a Sovereign for Immunity Purposes: Proposals to Amend the International Law Association Draft Convention" (1985) 26:1 Harv Int'l L J 103 [Varges, Defining a Sovereign for Immunity Purposes]; Schreuer, *supra* note 273 at 93; Currie, *supra* note 16 at 366; Marcelo G. Kohen, "Definition of 'State'" in Gerhard Hafner, Marcelo G. Kohen & Susan Breau, eds, *State Practice Regarding State Immunities La Pratique des Etats concernant les Immunités des Etats* (Leiden: Martinus Nijhoff Publishers, 2006) 2-3, 6, 20 [Kohen, "Definition of 'State'; Hafner et al.].

[299] Schreuer, *ibid*; Kohen, "Definition of 'State'", *ibid*.

i.e., by carrying out sovereign authority.[300] Hence, to successfully attract sovereign immunity as part of the state under restrictive immunity, an entity—in principle—must fulfill a two-step test to demonstrate that: (1) it is a part of the state (*ratione personae*); and/or (2) it has undertaken a sovereign act that does not fall into any exceptions to restrictive immunity (*ratione materiae*).[301] Immunity *ratione personae*, used in a strict sense, speaks to the immunity of the state itself and its key representatives, such as the head of the state.[302] It is used here to address the immunities enjoyed by states for being states in a broader sense. The scope of the state here includes state organs, departments, agencies/instrumentalities, in addition to heads of the state.[303] Immunity *ratione materiae* speaks to official acts of the foreign state rather than the persons representing it.[304] Immunity *ratione materiae* is often determined by the nature of the conduct rather than the identity of the actor, which means that an act can attract immunity even if it was performed by an *ad hoc* agent of the state who would not normally be entitled to immunity *ratione personae*, so long as the act is found to be sovereign.[305] Between the two parts of the test, some scholars suggest that immunity *ratione materiae* is more important than immunity *ratione personae* under restrictive immunity. In this regard, Marcelo G. Kohen noted that:

> The distinction between immunity *ratione personae* or *ratione materiae* has lost most of its importance since the general acceptance of the restrictive approach to immunity…What should really be the key element is the performance of the

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[300] See Section 2.2 above. See also Fox and Webb, at 335; Yang, at 230-231. *Cf* the UK *SIA*'s exclusion of separate entities in the form of corporations from the scope of the state, yet, allow them to enjoy immunity for what they have done if stipulated criteria in Sections 14(1) and 14(2) are met.
[301] *Cf* Kohen, "Definition of 'State'" in Hafner et al., *supra* note 298 at 5-6, arguing that the *ratione personae* issue should no longer matter, the focus should be on the *ratione materiae* issue.
[302] Currie, *supra* note 16 at 366; Shaw, *supra* note 55 at 554.
[303] Kohen, "Definition of 'State'" in Hafner et al., *supra* note 298 at 2, noting that that immunity *ratione personae* can also speak to what entities can claim immunity in a foreign domestic court in a general sense.
[304] Currie, *supra* note 16 at 367.
[305] Currie, *ibid*.

> sovereign activity, either by an organ of the [s]tate *stricto sensu* or even by an agency or entity not having such a character.[306]

Based on this observation of Kohen, any enquiry regarding an entity, such as an SOE's immunity, should be focusing on what the SOE has done.

A look at the *UNCSI*, the US *FSIA* and the UK *SIA*—the three regimes that are examined in this thesis—show that they approach SOEs' immunity in different manners. Under the UK *SIA* discussed in Chapter 6, SOEs generally fall into the scope of "separate entities," and thus, are excluded from the scope of the state. According to Section 14(1) of the UK *SIA*, a separate entity is "distinct from the executive organs of the government of the [s]tate and capable of suing or being sued."[307] When they are separate entities as defined by Section 14(1) of the UK *SIA*, SOEs cannot have immunity *ratione personae*. However, SOEs can attract immunity *ratione materiae* if they have exercised "sovereign authority" in a particular situation and a state would have been immune in the same circumstances according to Section 14(2).[308] If SOEs demonstrate they are state organs or departments of states under Section 14(1), they would have immunity *ratione personae*, and subsequently, immunity *ratione materiae* if no exceptions—such as the commercial exception—apply. The disjunctive approach regarding the two-step test taken by Section 14 of the UK *SIA* allows an SOE to attract immunity by either way. The weight Section 14 gives to the assessment of what the SOE has done under either approach aligns with what Kohen suggested above: it is the SOEs' immunity *ratione materiae* instead of their immunity *ratione personae* that is determinative.[309]

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[306] Kohen, "Definition of 'State'" in Hafner et al., *supra* note 298 at 5-6. See also Fox and Webb, *supra* note 13 at 352-353.
[307] Section 14(1) of the UK *SIA*.
[308] Sections 14(1) and 14(2). See also Kohen, "Definition of 'State'" in Hafner et al., *supra* note 298 at 14, 18.
[309] On the UK's approach, see Chapter 6.

Under the *UNCSI* and the US *FSIA*, the two-part of the test is carried out conjunctively. The court must first consider whether an SOE has state status to claim immunity *ratione personae* before assessing that SOE's immunity *ratione materiae* in a particular case. However, a closer look at the *UNCSI* shows that the threshold tests of SOEs' immunities *ratione personae* and *ratione materiae* overlap, although the treaty seeks to separate the two issues. Article 10(3)—a provision of Part III of the *UNCSI* that is entitled "proceedings in which state immunity cannot be invoked"—suggests that SOEs cannot invoke immunity *ratione personae*—since they are designed to be independent juridical persons that pursue commercial interests. According to Article 10(3), an SOE cannot invoke immunity if it has the following characteristics: (1) it has an independent legal personality; (2) it is capable of suing and being sued; and (3) it is capable of acquiring, owning or possessing and disposing of property.[310] Article 10(3) suggests that SOEs are excluded from the scope of the state for purposes of claiming immunity status. However, this exclusionary effect of Article 10(3) would be overcome by Article 2(1)(b)(iii). An SOE is a "state agency/instrumentality or other entity," thus attracting immunity *ratione personae*, if the requirements set therein are satisfied.[311] Article 2(1)(b)(iii) provides that:

> (b) "State" means:
>
> (iii) agencies or instrumentalities of the [s]tate or other entities, to the extent that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the [s]tate[.][312]

Per Article 2(1)(b)(iii), an entity that is entitled to perform and is actually performing "acts in the exercise of sovereign authority of the [s]tate" is deemed to be a state agency/instrumentality or

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[310] Article 10(3) of the *UNCSI*. See further discussion on Article 10(3) in Chapter 5.
[311] ILC Commentary 1991, draft article 2(1)(b)(iv), para. 15: "'[t]he concept of "agencies or instrumentalities of the [s]tate or other entities' could theoretically include [s]tate enterprises … established by the [s]tate performing commercial transactions[.]"; Fox and Webb, *supra* note 13 at 352.
[312] Article 2(1)(b)(iii) of the *UNCSI*.

other entity for purposes of enjoying presumptive immunity according to Article 5 of the *UNCSI*.[313] As Article 10(3) is an exception to the presumptive immunity enjoyed by the state, including the state agency/instrumentality, as defined by Article 2(1)(b), an overlap arises when it comes to SOEs' immunity assessment. Put differently, an SOE is presumed not to be part of the state by Article 10(3), yet Article 2(1)(b)(iii) provides that an SOE could nevertheless become a state agency/instrumentality or other entity by actually performing sovereign authority as a general rule.

The two steps of the test provided by the *UNCSI* invariably give rise to a question of precedence—which branch comes first? As will be further discussed in Chapter 5, the *UNCSI* takes a functional approach which examines the actual performance of an entity for the purposes of the definition of the "state agency/instrumentality or other entity."[314] To determine the function of an entity, a court often will consider the state's purpose in establishing the entity and the nature of the transaction/conduct the entity has carried out.[315]

This test to determine whether an entity has exercised sovereign authority based on the nature and the purpose of the conduct partly overlaps with the test a court applies to determine if the conduct of a state agency/instrumentality or other entity is sovereign or commercial in nature under Article 10's commercial transaction exception.[316] When an SOE claims immunity under

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[313] Article 5 of the *UNCSI* provides that: "A [s]tate enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another [s]tate subject to the provisions of the present Convention."
[314] See *ILC Final Draft Articles and Commentary on Jurisdictional Immunities for States and Their Property*, reproduced in Dickinson et al., *supra* note 78 at 81, draft article 2(1)(b)(iv), para. 14: "Thus, in the case of an agency or instrumentality or other entity which is entitled to perform acts in the exercise of sovereign authority as well as acts of private nature, immunity may be invoked only in respect of acts performed in the exercise of sovereign authority." [ILC draft articles and commentaries 1991]. See also Hafner and Kölher, *supra* note 118 at 15.
[315] See *Trendtex*, *supra* note 174 at 116-17 on the Central Bank of Nigeria's powers, functions, and its relationship to the government of Nigeria as exemplified in the degree of control and supervision exercised by the Nigerian state.
[316] Article 2(2) of the *UNCSI* provides that: In determining whether a contract or a transaction is a "commercial transaction"[,] reference should be made primarily to the nature of the contract or transaction, but its purpose should also be taken into account if the parties to the contract or transaction have so agreed, or if, in the practice of the

the *UNCSI*, the criteria for determining an SOE's immunity *ratione personae* under Article 2(1)(b)(iii) would be applied in the first place. If the function test—which looks at the entity's actual performance—under Article 2(1)(b)(iii) is met, the entity, such as an SOE, would have been undertaking sovereign activities and exercising sovereign authority. This arguably renders a further assessment of immunity *ratione materiae* under Articles 10 (commercial transactions exception), 2(1)(c) (the definition of commercial transactions) and 2(2) (methodology of determining what constitutes a commercial transaction) repetitive, as that step is already subsumed in the first step analysis. Upon determining that the entity is undertaking sovereign activities and exercising sovereign authority, the activities are unlikely to be commercial.

As will be explained in Chapter 7, the aforementioned overlap that happens in the *UNCSI* is less likely to occur when an SOE is seeking immunity under the US *FSIA*. The US *FSIA* generally follows a two-step test in deciding an SOE's immunity. First, an agency/instrumentality is part of the state under the second part of Section 1603(b)(2) if the state has direct and majority ownership.[317] Whether it has carried out sovereign authorities does not matter at this stage. The nature of its conduct only matters at a later stage when determining if the commercial exception to that presumptive immunity exists. Thus, unlike the *UNCSI*, the overlapping issue of the determination of whether an SOE is part of the state and the test for the commercial exception will not occur.

The overlapping issue appearing under the *UNCSI* could happen under the US *FSIA*, however, when an entity that is not directly owned by the state, such as a subsidiary of an SOE

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[s]tate of the forum, that purpose is relevant to determining the non-commercial character of the contract or transaction.

[317] Sections 1603(b)(2) of the US *FSIA*, see discussion in Chapter 7.

that is directly owned by the state,[318] argues that it is an organ of the state under Section 1603(b)(2) of the US *FSIA*. The first half of Section 1603(b)(2) provides that:

> (b) An 'agency or instrumentality of a foreign state' means any entity—
>
> (2) which is an organ of a foreign state or a political subdivision thereof…

According to Joseph W. Dellapenna, the term "organ" here "can loosely be defined as an entity that either performs a government function or which is ultimately controlled by the state."[319] He summarized the following features of organs:

> (1) whether the foreign state created the entity for a national purpose;
>
> (2) whether the foreign state actively supervises the entity;
>
> (3) whether the foreign state requires the hiring of public employees and pays their salaries;
>
> (4) whether the entity holds exclusive rights to some right in the country; and
>
> (5) how the entity is treated under the foreign law (that it was established).[320]

When we assess whether an entity—such as an SOE's subsidiary—is an organ so that it could acquire the status of a state agency/instrumentality, we apply a function test that examines the purpose and performance of that entity under Section 1603(b)(2)'s first part. Like the *UNCSI*, this would require a court to assess, among other things, an entity's functions, including the nature of its conduct. Such an approach would overlap with the nature of the conduct test to be carried out in the commercial activity exception provided in Section 1605(a)(2) of the US *FSIA*.

From the perspective of SOEs' "state" status for immunity purposes, the different approaches taken by the *UNCSI*, the US *FSIA* and the UK *SIA* show that no settled threshold test

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[318] Subsidiaries of SOEs are out of the scope of this thesis. Yet, their abilities to claim the status of being an organ of the state, and subsequently qualifying as a state agency/instrumentality for immunity purposes under the US *FSIA* deserves further examination.
[319] Dellapenna, *supra* note 86 at 72.
[320] *Ibid*.

has come into existence regarding the state's relationship to the SOEs under customary international law. This issue will be further explored in Chapters 5 to 7.

4. The inconsistent test to commercial exception to jurisdictional immunity

As noted in Section 2 above, the gist of restrictive immunity is premised on a distinction between acts *jure imperii* and acts *jure gestionis*, *i.e.*, whether the action undertaken by a state is sovereign or non-sovereign in nature.[321] Only the former conduct—an act *jure imperii*—of a state attracts immunity.[322] The latter conduct—an act *jure* gestionis—does not. Actions *jure* g*estionis* are private acts that include commercial transactions, actions causing personal injury or damage to property, and contracts of employment.[323] The commercial exception that forms the basis of restrictive immunity can be found in domestic laws,[324] the *ECSI*,[325] the ILC draft articles[326] and the *UNCSI*.[327] Although the commercial exception in principle has been widely accepted by states that adhere to restrictive immunity, its application is diverse and the criteria by which it is determined are differently formulated. It prevents a conclusion that a version of commercial exception that is acceptable to all states that adopt restrictive immunity exists.[328]

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[321] Currie, *supra* note 16 at 372-74; Dellapenna, *supra* note 86 at 351; Schreuer, *supra* note 273 at 10; Bankas, *supra* note 284 at 209; Yang, *supra* note 13 at 75; Fox and Webb, *supra* note 13 at 394.
[322] *Jurisdictional Immunities*, *supra* note 12 at para. 77; see ICJ's more recent confirmation on this point in *Certain Iranian Assets*, *supra* note 12 at 26, para. 62: "Article XI, paragraph 4, which solely excludes from all 'immunity' publicly owned enterprises engaging in commercial or industrial activities, does not affect the immunities enjoyed under customary international law by [s]tate entities which engage in activities *jure imperii*."
[323] See, for example, Articles 10-17 of the *UNCSI*. *Cf* the terrorist activity exception found in the US *FSIA* and Canadian *SIA*.
[324] For example, Section 1605(a)(2), US *FSIA*; Section 3, UK *SIA*; Section 11, Australian *FSIA*, Section 5, Canadian *SIA*, Section 5, Pakistan *SIO*, Section 5, Singapore *SIA*; Section 4, South African *FSIA*; Section 3, Israeli *FSIA*.
[325] Article 7(1), *ECSI*: "A Contracting State cannot claim immunity from the jurisdiction of a court of another Contracting State if it has on the territory of the State of the forum an office, agency or other establishment through which it engages, in the same manner as a private person, in an industrial, commercial or financial activity, and the proceedings relate to that activity of the office, agency or establishment."
[326] Draft Article 10(1), ILC Draft Articles 1991.
[327] Article 10(1), *UNCSI*.
[328] See Schreuer, *supra* note 273 at 10, Chapter 2, "Commercial transactions"; Dellapenna, *supra* note 86 at 351; Bankas, *supra* note 284 at 209, Chapter 8, State Immunity and Certain Unresolved Problems; Currie, *supra* note 16 at 384; Fox and Webb, *supra* note 13 at 395; Yang, *supra* note 13 at 75, Chapter 3, "Commercial activity"; Stefan

Two competing tests for the commercial exception exist—nature and purpose—with the nature test being the dominant one in state practice.[329] The nature test focuses on the nature of the conduct at issue—thus considered objective; whereas the purpose test focuses on the state's involvement in that disputed conduct—thus considered subjective. A third contextual test is primarily found in the UK[330] and the Canadian[331] judicial practice. The contextual approach focuses on the nature of the conduct but considers state purposes in the larger context. Although the *UNCSI* does not use the terminology of "contextual" approach as applied in UK and Canadian courts, the treaty does take into account both the nature and the purpose of conduct in examining what constitutes a commercial transaction in Article 2(2) for purposes of determining commercial transaction exception found in Article 10 of the *UNCSI*.[332] It thus can be said that the UK's and Canada's practice are consistent with the *UNCSI*'s.[333] Commenting on the *UNCSI*'s approach, Malcolm N. Shaw took the view that "[i]t would […] be unhelpful if the purpose criterion were to be adopted in a manner which would permit it to be used to effect a considerable retreat from the restrictive immunity approach."[334] Similarly, Christoph Schreuer noted that:

Oeter, "The Law of Immunities as a Focal Point of the Evolution of International Law" in Peters et al, *Immunities in the Age of Global Constitutionalism*, *supra* note 137 at 5.

[329] Yang, *ibid* at 86; *cf* Anne van Aaken, "Blurring Boundaries between Sovereign Acts and Commercial Activities: A Functional View on Regulatory Immunity and Immunity from Execution" in Peters et al, *Immunities in the Age of Global Constitutionalism*, *ibid* at 131, 133, noting that "nature, purpose and sometimes overall context [have been] altogether assessed by courts for both phases [of immunities from jurisdiction and execution] of legal conflict with different emphasis."

[330] The UK contextual approach will be examined in Chapter 6. See also Yang, *supra* note 13 at 103-07; Fox and Webb, *supra* note 13 at 408.

[331] The Canadian contextual approach will be examined in Chapter 6. See also Currie, *supra* note 16 at 396-97; Shaw, *supra* note 55 at 534.

[332] Articles 2(2) and 10 of the *UNCSI*.

[333] Currie, *supra* note 16 at 397, stating that by adopting a contextual approach that considers both nature and purpose in interpreting what constitutes "commercial activity" referred in Section 2 of the Canadian *State Immunity Act*, the Canadian judicial approach is "more or less in line with that espoused in Article 2(2) of the [UNCSI]."

[334] Shaw, *supra* note 55 at 533.

> The problem with the purpose test is, of course, that once we start inquiring into the underlying motives of the [s]tate partner to a transaction we will most probably end up with some political purpose somewhere…The purpose test is therefore likely to enlarge the area of a [s]tate's immune activities dramatically or even to undermine the entire commercial activities exception.[335]

Despite the subjectivity of the purpose test, scholars have expressed their dissatisfaction to a test that only looks at the nature of the activity. In their view, a consideration of the state purpose is necessary in characterizing actions of modern states in light of their evolving functions in societies.[336] Even Shaw, after making the above critical comments on the purpose test incorporated in the *UNCSI*, cautiously added that "[t]his is not to say, however, that no consideration whatsoever of the purpose of the transaction in question should be undertaken."[337] Regarding the function of the purpose test in detecting whether a conduct or a transaction should be considered commercial, Schreuer insightfully stated that the core issue is to decide to what extent we would look at the state purpose since all actions of human beings have a purpose:

> On the other hand, it is unrealistic to try and exclude purpose altogether. Every human activity can only be described in a legally meaningful way by reference to some purpose…The question is rather how far we are prepared to look [at the purpose]; how much of the purpose surrounding any particular activity we are prepared to accept as legally relevant.[338]

A few examples well illustrate the need for a balance between the nature and purpose tests. An often-used textbook example is when a government buys boots for its army. Is the government simply making a contract (a private act in light of the nature only test) as any private business might do or is it providing support for national defense or aggression (a public act with

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[335] Schreuer, *supra* note 273 at 15.
[336] Dellapenna, *supra* note 86 at 360-369; Yang, *supra* note 13 at 87; Fox and Webb, *supra* note 13 at 406-11; see also opinion of Justice La Forest in *Re Canada Labour Code*, *supra* note 81 at 70: "As will become apparent, the law in this area reveals a consistent pattern of development that has arrived at a point where state activity can be characterized only after appreciating its entire context. Rigid dichotomies between the 'nature' and 'purpose" of state activity are not helpful in this analysis."
[337] Shaw, *supra* note 55 at 533.
[338] Schreuer, *supra* note 273 at 16.

an eye on the state purpose)?[339] According to the US *FSIA* legislative history, this is a pure commercial activity based on a sole nature of the conduct test. As drafters of the US *FSIA* explained in the *Report on Jurisdiction of United States Courts in Suits against Foreign States*:

> As the definition [of commercial activity] indicates, the fact that goods or services to be procured through a contract are to be used for a public purpose is irrelevant; it is the essentially commercial nature of an activity or transaction that is critical. Thus, a contract by a foreign government to buy provisions or equipment for its armed forces…constitutes a commercial activity.[340]

Now, let's tweak this hypothetical situation a bit in light of the ongoing war in Ukraine. Russia and its companies had been importing technology, transportation equipment, spare parts for airplanes, drones, software for drones, and other products from European Union ("EU") member states. Immediately following Russia's invasion in Ukraine, the EU imposed a series of sanctions, including export controls on the aforementioned goods to Russia.[341] Some of these goods such as drones and software for drones—as explicitly indicated by the EU—can be used for military purposes. In this hypothetical situation, the EU applied a purpose test to drones and software used for drones in the sanction regime. But under the US *FSIA*, these import purchasing contracts would be treated as commercial ones because any individual can buy those things on the market as the US *FSIA*'s drafters would have argued, even though they could be used in Russian military activities judged by their purposes.[342] This hypothetical example shows the

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[339] Schreuer, *ibid* at 15; Dellapenna, *supra* note 86 at 360.
[340] *Jurisdiction of United States Courts in Suits Against Foreign States*, HR Rep No 94-1487, *supra* note 198 at 16; see also *Trendtex*, *supra* note 174, para. 132 per Lord Denning, rejecting the usefulness of state purpose in determining the character of a boots or cement contract signed by a state department.
[341] European Council, News Release, "EU Sanctions against Russia Explained", online, https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-against-russia-over-ukraine/sanctions-against-russia-explained/#sanctions.
[342] See *KAC v. IAC*, *supra* note 92, discussed in Chapter 6 about KAC's assistance of Iraq's expropriation of IAC during Iraq's invasion in Kuwait.

purpose does make a difference for our characterization of a commercial transaction in the larger context.[343]

From a general international law perspective, scholars have nudged us to rethink how to define the boundary of states' sovereign functions in international law with an increasing privatization of those functions.[344] Taking the day-to-day operation of nuclear weapons as an example, Frédéric Mégret asked us to imagine the following situations:

> [A]s part of a massive overhaul of its military strategy, State A decides to entrust its nuclear weapons to Company W, a major defense and utility corporation that has a track record of managing public infrastructure projects. Although the decision to launch nuclear weapons remains in the hands of the head of state, every other aspect of management of the weapons is in the hands of the company; or imagine that the decision to use the weapons (and, in effect, go to war) is effectively outsourced to a privately maintained computer.[345]

Mégret's illustration shows that commercial actors, whether a private company or an SOE, can be given sovereign authority that is traditionally exercised by the state itself but operating them in commercial manners.[346]

Clearly, these are extreme examples relate to some inherently sovereign activities such as the use of force and the operation of nuclear weapons. In Chapters 5 to 7, we will examine to what extent an SOE's purpose in implementing the state's political and policy goals would

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[343] See Schreuer, *supra* note 273 at 15, Schreuer also used the purchase of army boots as an example and posed the question of what if we take into account of state purposes behind the purchase contract; see also ILC Working Group Report 1999, *supra* note 239 at para. 52: "It may also be important to examine the activity in the context of all the relevant circumstances, for example, the entire course of conduct, to determine whether it is a sovereign or commercial activity. Thus the purchase of services may appear on its face to be a commercial activity but looked at in context it may be apparent that it is a non-commercial activity."

[344] Tullio Treves, *The Expansion of International Law* (2019) 398 Recueil de cours 9, 69 Chapter III "Expansion to entities different from states"; Frédéric Mégret, "Are There 'Inherently Sovereign Functions' in International Law?" (2021) 115:3 AJIL 452; Symposium on "Are There 'Inherently Sovereign Functions' in International Law?" (2021) 115 AJIL Unbound 299.

[345] Mégret, "Are There 'Inherently Sovereign Functions' in International Law?", *ibid* at 471. Another example Mégret used in his article is the Western states' increasing usage of private military and security companies ("PMSCs") in their use of force, *ibid* at 476-77; see also Treves, *The Expansion of International Law*, *ibid* at 72-73.

[346] See also Harlan Grant Cohen, "Nations and Market" (2020) 23 J Intl Econ L 793; Alberto Oddenino & Diego Bonett, "The Issue of Immunity of Private Actors Exercising Public Authority and the New Paradigm of International Law" (2020) Global Jurist 1.

convert that SOE's commercial transaction into a sovereign one, thus, be immune in a foreign domestic court. The *UNCSI* and the UK *SIA* give some role to the purpose when it comes to the determination of whether an SOE's conduct is sovereign or commercial in nature; whereas under the US *FSIA*, the purpose should not be considered at all. This division shows that although the consensus on the existence of a commercial exception to jurisdictional immunity under restrictive immunity has formed, no consensus has been reached regarding the exact test for applying the commercial exception to jurisdictional immunity on the international plane.[347]

5. Conclusion

This chapter has explored the history and theory of sovereign immunity and shown how we have arrived at its current restrictive status in customary international law, even though some states such as China object to it. On the international level, the not-yet-in-force *UNCSI* represents the international community's effort to codify the customary international law of restrictive immunity. Its significance goes beyond its role as a treaty. The *UNCSI*'s drafting process has revealed and even crystalized some important aspects of the customary international law of restrictive immunity—such as the existence of commercial exception to jurisdictional and execution immunity, but not their technical details. Sections 3 and 4 illustrated two unsettled yet critical issues in customary international law that run through this thesis. The first one being what is the basis of SOEs' immunity claim? The second one being what elements should we consider when we assess the commercial exception to jurisdictional immunity in a case? Section 3 showed that SOEs' immunities are determined in different ways under the *UNCSI*, the US *FSIA* and the UK *SIA*. It suggests that no uniform test regarding the relationship between a state and SOEs for immunity purposes has been formed in customary international law. Section 4

[347] See Brownlie, *supra* note 153 at 495-96; Fox and Webb, *supra* note 13 at 393; Shaw, *supra* note 55 at 533.

briefly laid out another unsettled issue in customary international law, whether it is the nature, purpose or both that determines the character of a conduct/transaction for commercial exception to jurisdictional immunity purposes. The exposition of this debate suggests that no uniform test on this matter has been formed under customary international law either.

Having set the analytical context of this thesis and pointed out some related questions that are central to this thesis, I will turn to assess China's absolute immunity position and its rationale in Chapter 3 in light of the customary international law of restrictive immunity, including whether it may be considered a persistent objector to and so not bound by the customary international law of restrictive immunity.

Chapter 3: China's Position on Sovereign Immunity

1. Introduction

Chapter 2 sketched out the landscape of the law of immunity and discussed how the customary international law of sovereign immunity has developed, including the shift from absolute to restrictive immunity, even though divergent state practice exists regarding key issues such as the definition of the state and the commercial exception to immunity. While many states have embraced restrictive immunity as a rule of customary international law, China asserts absolute immunity for states—but with a narrow definition of the state that excludes SOEs—and their property. China's rationale is that SOEs are independent juridical entities established by Chinese laws (discussed in Chapter 4), and thus, are not part of the state for immunity purposes under international law. Despite China's position, Chinese SOEs have successfully characterized themselves as part of the state in the US Federal courts under the US *FSIA* in 2016.[348] In 2017, a wholly state-owned Chinese SOE also claimed Crown immunity in the Hong Kong Court of First Instance ("HKCFI"). In this case, China intervened and affirmed its position that Chinese SOEs are not part of the state for both sovereign and Crown immunity purposes in foreign domestic courts or Hong Kong courts, and no immunity was found by the HKCFI.[349] This Chapter critically assesses China's position and its rationale for states' absolute immunity and excluding its SOEs from the scope of the state.

China does not have domestic legislation on states' sovereign immunity.[350] As we will see below in Section 2, China's absolute immunity position is predominantly documented in

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[348] *In Re: Chinese-Manufactured Drywall Products Liability Litigation* 168 F. Supp.3d 918 (E.D.La. 2016). [*Chinese-Manufactured Drywall Products*]
[349] *China National Coal*, *supra* note 45.
[350] China enacted a law on the central bank's immunity in 2005, see *Laws of People's Republic of China on Judicial Immunity from Compulsory Measures Concerning the Property of Foreign Central Banks* [中华人民共和国中央银

cases where China was sued in the US, or where China has intervened in Hong Kong courts. In line with China's absolute immunity position, Chinese courts in mainland China have not heard cases against sovereign states.[351] The analytical material of this Chapter comes from the aforementioned litigation, China's statements made in its participation in the *UNCSI*, and scholarly materials.[352]

This Chapter is organized as follows. Section 2 examines China's absolute immunity position and rationale as expressed in litigation in US courts and Hong Kong courts. Section 3 examines China's position on Chinese SOEs' immunity as articulated in the *China National Coal* case.[353] Section 4.1 enquires into China's contemporary rationale for its absolute immunity position. Section 4.2.1 finds that China is not a persistent objector to the customary international law of restrictive immunity under the criteria set by the ILC. Section 4.2.2 argues that restrictive immunity position, compared to its current absolute immunity position, is preferable for China to take. Section 5 concludes.

行豁免法], adopted at the 18th Meeting of the Standing Committee of the Tenth National People's Congress on October 25, 2005.

[351] See Supreme People's Court, "Notice on the Relevant Issues Concerning the Acceptance by the People's Courts of Civil Cases involving Privileges and Immunities", Fa [2007] No 69, ILDC 2756 (CN 2007), 22 May 2007, Oxford Reports on International Law, online: <http://opil.ouplaw.com/view/10.1093/law:ildc/2756cn07.case.1/law-ildc-2756cn07?rskey=DNPhFB&result=1&prd=ORIL>.

[352] See Gong Renren, 国家豁免问题的比较研究:当代国际公法、国际私法和国际经济法的一个共同课题 [*A Comparative Study of State Immunity: A Common Issue in Public International Law, Private International Law and International Economic Law*], (Beijing: Peking University Press, 1993, reprinted in 2005) [Gong, *A Comparative Study on State Immunity*]; Ye Yan, "限制的绝对豁免：中国国家豁免的实践特色与立法路径" [Restrictive Absolute Immunity: China's Practice on Sovereign Immunity and Legislative Approach] (2022) 1 Journal of International Economic Law (国际经济法学科) 15 [Ye, Restrictive Absolute Immunity].

[353] *China National Coal*, *supra* note 45.

2. China's absolute immunity position

2.1 China's claim of absolute immunity in foreign domestic courts

China for the first time expressed its "absolute" position on sovereign immunity when it was sued in the landmark US case *Jackson v. China* decided by the 11th Circuit Court in 1986.[354] About two decades later, China affirmed its absolute position in the *Morris v. China* case litigated before the District Court for the Southern District of New York in 2007.[355] The two cases arose from unpaid bonds issued by the Chinese government's predecessors—the Imperial Chinese government and the government of the Republic of China—in the early twentieth century. While they primarily dealt with the issue of state responsibility in the context of state continuity of debts of previous governments, China explicitly claimed that it should enjoy absolute immunity in the US courts in both cases through diplomatic and legal means,[356] in addition to its argument that "under the principle of non-liability for 'odious debts'[,] China bears no responsibility for the bonds."[357] The following sections provide the background of the

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[354] *Jackson v. People's Republic China*, 794 F.2d 1490 (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 [Sgro, "China's Stance on Sovereign Immunity"]; Huang & Ma, "Immunities of States and Their Property", *supra* note 123 at 163.

[355] Exhibit A, *Memorandum of Law in Support of the People's Republic of China's Motion to Dismiss*, *Morris v. The People's Republic of China*, 478 F. Supp.2d 561 (S.D.N.Y. 2007), 2006 WL 1792563.

[356] There are also two known cases against Chinese provincial governments in the US courts that were litigated under the *FSIA*. See *Rong v. Liaoning Province Government*, 452 F.3d 883 (D.C.Cir. 2006) and *Big Sky Network Canada, Ltd. v. Sichuan Provincial Government*, 533 F.3d 1183 (10th Cir. 2008). For purposes of analyzing the Chinese state's position on its immunity, I will be focusing on the two cases against the central Chinese government in this Chapter. In other cases, China was impleaded as a co-respondent in which Chinese SOEs or Chinese banks were involved. See *Walters (Appellants) v. Industrial and Commercial Bank of China Ltd., Bank of China Ltd., China Construction Bank Corporation (Respondents-Appellees) and the People's Republic of China (Defendant)*, 651 F.3d 280 (2nd Cir. 2011) [*Walters v. China*]; *Cybersitter, LLC, d/b/a Solid Oak Software, v. The People's Republic of China et al.*, 805 F.Supp.2d 958 (C.D.Cal. 2011 [*Cybersitter v. China*]); *First Investment Corporation of the Marshall Islands v. Fujian Mawei Shipbuilding and People's Republic of China*, 703 F.3d 742 (5th Cir. 2012) [*First Investment v. Fujian Mawei and China*].

[357] *Jackson v. China*, *supra* note 354 at 1495; *Morris v. People's Repubic of China*, 478 F.Supp.2d 561 (S.D.N.Y. 2007) at 565, citing China's repeated position that "[t]he Chinese government recognizes no external debts incurred by the defunct Chinese governments", which was first submitted in *Jackson v. China*. [*Morris v. China*].

cases before providing a brief assessment of China's arguments and participation in the two cases.

2.1.1. *Jackson v. China*

The Imperial Chinese government issued bonds in 1911 to finance railway construction. Soon after the issuance of the bonds, the government of the Republic of China succeeded the Imperial Chinese government through revolution. The government of the Republic of China made a few payments before it defaulted in the mid-1930s. But China never made any payment.[358] Some bondholders sued China in District Court for the Northern District of Alabama ("Northern District Court of Alabama") in 1979. These bondholders asserted that the jurisdiction of the Northern District Court of Alabama was granted by the US *FSIA*.[359] China refused to appear in any court proceedings in the Northern District Court of Alabama and claimed absolute immunity through diplomatic channels.[360] In 1982, the Northern District Court of Alabama held that it had subject matter jurisdiction and China was liable to pay the plaintiff for the bonds.[361] Following this judgment, China sent a diplomatic note to the court in January 1983, stating that the Northern District Court of Alabama judgment violated "basic norms of international law" and "should the court proceed with the default judgment against China and attach China's properties in the United States, the Chinese government reserved its right to take 'corresponding measures.'"[362] In mid-1983, the plaintiffs launched execution proceedings against China in the

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[358] *Jackson v. China*, *ibid* at 1491.
[359] *Ibid* at 1492. See *Argentine Republic v. Amerada Hess Shipping Corp*, 109 S.Ct. 683 (1989), 685: "The *FSIA* provides the sole basis for *obtaining* jurisdiction over a foreign state in United States courts[.]" [emphasis added] See also the legislative history of the *FSIA*, which provides that: "The purpose of the proposed legislation [US *FSIA*]…is to provide *when* and *how* parties can maintain a lawsuit against a foreign state or its entities in the courts of the United States and to provide when a foreign state is entitled to sovereign immunity." See *Jurisdiction of United States Courts in Suits Against Foreign States*, HR Rep No 94-1487, *supra* note 198 at 6. [emphasis added]
[360] *Ibid*.
[361] *Ibid*.
[362] *Ibid*.

same court.[363] China appeared in the case for the first time in summer 1983 and filed a motion to vacate the default judgment pursuant to US Federal Civil Procedural Rules, on the basis that jurisdictional questions are required to be determined in adversarial proceedings to protect interests of justice.[364] During this process, the US Departments of State and Justice submitted statements of interest to support China's motion to dismiss the case.[365] These claims did not end up being tested, because the Northern District Court of Alabama eventually dismissed the case for lacking temporal jurisdiction: the claim was time barred. It held that the US *FSIA* did not have retroactive effect to confer subject matter jurisdiction over transactions that predated 1952.[366] As the Northern District Court of Alabama found that it lacked jurisdiction, it did not further evaluate China's absolute immunity position or China's state responsibility regarding the bonds.

The plaintiffs appealed the case to the 11th Circuit Court. In the appeal, China filed a brief but instructed its counsel not to appear at the hearing.[367] As noted earlier, China put forward two arguments. One was that it has no liability for odious debts imposed by Western states to its predecessor.[368] The other was that it enjoys absolute immunity.[369] China elaborated that absolute immunity is based on the notion of state sovereignty and declared that customary international law on sovereign immunity has not crystallized as restrictive.[370] The 11th Circuit Court did not address the important issue of where the law of sovereign immunity stands in international law

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[363] *Ibid*.
[364] *Ibid* at 1490 and 1492.
[365] *Ibid* at 1492.
[366] *Ibid*. The 11th Circuit Court also noted that "the United States has asserted that the FSIA was not intended to apply to transactions that predate 1952", *ibid* at 1497.
[367] *Ibid* at 1492.
[368] *Ibid* at 1495.
[369] *Ibid* at 1494.
[370] *Ibid*.

because it—like the lower court—considered that the US *FSIA*'s temporal scope effectively time barred the dispute.[371] The decision nevertheless documented China's position on sovereign immunity.[372] In China's view, there were only a few states that embraced restrictive immunity in the late 1970s and early 1980s, so it did not signal a significant change in the international law of absolute immunity.[373] Moreover, these nations did not include developing countries because restrictive immunity was not in their interest. [374] On the customary status of the restrictive immunity theory, China argued that although it may be a developing rule of customary international law, it was not binding upon states who disagreed with it, such as China.[375] The 11th Circuit Court agreed with the lower court and dismissed the case for lack of subject matter jurisdiction under the US *FSIA*, as the exceptions found in the US *FSIA* did not apply to the bonds in this dispute which matured in 1951, long before the US *FSIA* was enacted in 1976.[376] The 11th Circuit Court explained that the US *FSIA*—a statue that codifies restrictive immunity—should not be applied retroactively because it "was not intended to affect the 'substantive law of liability'"[377] given that the bonds matured in 1951, at a time when both China and United States expected almost universal application of absolute immunity.[378]

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[371] *Ibid* at 1497.
[372] *Ibid* at 1494.
[373] *Ibid* at 1494.
[374] *Ibid* at 1494.
[375] *Ibid* at 1494.
[376] *Ibid* at 1497-1499.
[377] *Ibid* at 1497. This reasoning echoes with what the ICJ said in *Jurisdictional Immunities* that sovereign immunity is a procedural bar that does not affect the substantive claim in a dispute. See the *Jurisdictional Immunities* case discussed in Chapter 1, Section 3.3.
[378] *Ibid* at 1497-1498.

2.1.2. *Morris v. China*

Morris v. China is another bond dispute arising from outstanding bonds issued by the Republic of China in 1913 to an international consortium of banks.[379] The government of the Republic of China ceased to pay the interest on the bonds in 1939. When the current Chinese government became the effective government in 1949, it never paid any interest or the principal when the bonds matured in 1960.[380] Before the District Court for Southern District of New York, Morris—a bond holder—argued that the current Chinese government was a successor to its predecessor's defaulted bonds and had failed to pay the debts, claiming $90 billion in damages.[381] Morris further argued that because the transaction fell within the commercial exception of the Section 1605(a)(2) of the US *FSIA*, China did not enjoy sovereign immunity from jurisdiction.[382] China's primary argument was that it enjoyed immunity in the US courts and none of the exceptions in the US *FSIA* applied.[383] The District Court found that the issuance of the bonds was a commercial activity in light of the Supreme Court decision in *Weltover*.[384] But the District Court held that the commercial activity exception did not apply as the direct effect with the US specified by Section 1605 was not met. Firstly, the bond sales have no direct effect on the plaintiff who bought the long-defaulted bonds in a "collectibles" market for a few hundred dollars and could not demonstrate loss.[385] Moreover, there was no direct effect sustained on US soil.[386] Like the 11th Circuit Court, the District Court for Southern District of New York also

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[379] Huang Jin & Li Qingming (黄进，李庆明), "2007 年莫里斯诉中华人民共和国案评述" [A Case Comment of the 2007 Case of *Morris v. People's Republic of China*] (2007) 9 Legal Science (法学) 60.
[380] *Morris v. China*, *supra* note 357 at 563-564.
[381] *Ibid*.
[382] *Ibid* at 566-67.
[383] *Ibid* at 563. China also argued that the claims should be barred by the *International Claims Settlement Act between China and United States* and time-barred by the *FSIA*.
[384] *Republic of Argentina v. Weltover*, 112 S.Ct. 2160 (1992) [*Weltover*].
[385] *Morris v. China*, *supra* note 357 at 567.
[386] *Ibid* at 569-571.

held that the claim should be time-barred pursuant to the applicable forum law—New York's civil procedural laws—in this dispute.[387] As a result, the District Court did not address China's immunity position under international law or the US *FSIA* as it dismissed the case on grounds other than sovereign immunity.

2.1.3 Comments on China's absolute immunity position expressed in *Jackson v. China* and *Morris v. China*

In both cases, China adopted a combined strategy of diplomacy and litigation in its defense before the US courts. Diplomatically, the Chinese Ministry of Foreign Affairs communicated with the US Departments of State and Justice in many instances and notably delivered two *Aides Memoires* to express its position in the two cases.[388] The *Aide Memoire* in *Jackson v. China* emphasized China's reliance on sovereign equality that is ensured by the *Charter* of the United Nations to support its absolute immunity position.[389] The *Aide Memoire* in *Morris v. China* affirmed China's absolute immunity position.[390] Notably, in *Jackson v. China*, China preferred to use diplomatic means and limited its appearance before the US courts.[391] China refrained from appearing before the US courts so as not to be taken as consenting to the US court's jurisdiction.[392] In the *Morris* case on the other hand, China's US counsel actively participated in the proceedings before the District Court of Southern District of New York and argued immunity

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[387] *Ibid* at 571-573.
[388] People's Republic of China, "Aide Memoire of the Ministry of Foreign Affairs" (1983) 22:1 ILM 75 at 81 [PRC, Aide Memoire in *Jackson*]; People's Republic of China, "中国外交部就莫里斯案提交的法律备忘录" [*Aide Memoire* of the Ministry of Foreign Affairs in the *Morris* case], in Treaty and Law Bureau of Ministry of Foreign Affairs of People's Republic of China (中华人民共和国外交部条约法律司), ed, 中国国际法实践案例选编 [Selected Practices and Cases of China in International Law] (Beijing: World Knowledge Press, 2018) 407-411 [PRC, *Aide Memoire* in *Morris*; Treaty and Law Burea].
[389] PRC, *Aide Memoire* in *Jackson*, *ibid* at 81, para. 3.
[390] PRC, *Aide Memoire* in *Morris*, in Treaty and Law Bureau, *supra* note 388 at 408.
[391] Ni Zhengyu, 淡泊从容莅海牙 [With Ease in The Hague], (Beijing, Law Press, 1999) at 178, 194 [Ni, *With Ease in The Hague*].
[392] Huang and Ma, *supra* note 123 at 179.

for China based on the argument that the commercial exception of the US *FSIA* does not apply.[393] Although China continues to assert absolute immunity for itself as a principle, its actions in the *Morris* case show that it has strategically defended itself pursuant to the US *FSIA* in the US courts, the commercial exception of which reflects the foundational ideal of restrictive immunity. This mix of diplomatic and legal approaches to defending a case against China in foreign domestic court seems to have become a recognized practice by Chinese officials. Sun Ang, a Chinese diplomat, welcomed this practice:

> [T]he Chinese government has a right to communicate with the US government through diplomatic channel, assert absolute immunity before the US courts based on absolute immunity and deliver such position to the public in the battle of public discourse. On the other hand, while China maintains absolute immunity, the US courts will not change its application of its own conflict of rules and will continue to apply the US *FSIA*, which reflects restrictive immunity, in cases involving China.[394]

To resolve the conflict between China's absolute immunity and the US's restrictive immunity in litigation against China in US courts, Sun suggested that while the Chinese government can assert absolute immunity by diplomatic means to the US and in the media, it is in China's interest to defend itself pursuant to the US *FSIA*—the applicable law on sovereign immunity in the forum which applies restrictive immunity when China is sued in the US.[395]

China's continued absolute immunity position for itself in foreign domestic courts has been relevant in the rise of pandemic litigation against China and Chinese entities in the US

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[393] In Exhibit A, Memorandum of Law in Support of the People's Republic of China's Motion to Dismiss, China argued that it "reserve[d] its right to maintain its absolute defence of sovereign immunity." 2006 WL 1792563.

[394] Sun Ang, "国家豁免的法律适用问题研究—在司法与外交复合语境中探讨" [Study on the Applicable Law Issue in State Immunity—Within the Context of Judicial and Diplomatic Conversations] (2021) 2 Chinese Review of International Law (国际法研究) 3 at 18-20 [Sun, Study on the Applicable Law Issue in State Immunity]; see also Treaty and Law Bureau, *supra* note 388 at 388-390.

[395] Sun, *ibid*; see also Gong, Comparative Study of State Immunity, *supra* note 325 at 122.

courts.[396] It is reported that in 2020 alone, at least 20 cases have been brought against China and other Chinese entities—including 18 by private litigants and two by state attorneys-general.[397] In these cases, China and its political subdivisions such as the National Health Commission, the Ministry of Emergency Management, the Ministry of Civil Affairs, the provincial government of Hubei and the city of Wuhan were named as defendants.[398] The most prominent one is brought by the Attorney-General of Missouri, which also named the CPC as a co-defendant.[399] At the time of writing, the case that was brought by the Attorney-General of Missouri is ongoing. On 8 July 2022, the District Court of Eastern District of Missouri Southeastern Division issued a memorandum and order, in which the District Court dismissed the case in its entirety for lack of subject matter jurisdiction.[400] The District Court held that (1) all named defendants (including the CPC) are deemed foreign states under the US *FSIA*; (2) commercial and tort exceptions to immunity under the US *FSIA* do not apply, and (3) the issue of the service of legal documents is moot.[401] The Missouri Attorney-General appealed the decision on the same day.[402] In China, the scholarly discussion has focused on the US' violation of the international law of immunity by permitting US courts to hear cases against China and its political subdivisions related to the

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[396] Li Qingming (李庆明), "美国新冠疫情诬告滥诉的违法性分析" [The Illegality Analysis of the Ferocious Claims Related to the United States COVID-19 Breakout] (2020) 21 Journal of Law Application (法律适用) 59; Gong Baihua & Ding Botao, "中国政府在美国被诉引用主权豁免抗辩的法律探析" [A Study on China's Reference to Sovereign Immunity as a Defence in the United States Litigation] (2020) 6 Shanghai College of Political Science and Law Journal (上海政法学院学报) 1, 13-18 [Gong & Ding]; Keitner, "To Litigate a Pandemic" *supra* note 127.
[397] Keitner, "To Litigate a Pandemic" *ibid* at 230.
[398] Keitner, *ibid*.
[399] *The State of Missouri v. The People's Republic of China* (Case: 1:20-cv-00099), 21 April 2020, available online: <https://storage.courtlistener.com/recap/gov.uscourts.moed.179929/gov.uscourts.moed.179929.1.0_1.pdf>.
[400] *Missouri v. China*, *supra* note 126.
[401] *Missouri v. China*, *ibid* at 38. Section 1608(a) provides how sovereign states should be served and Section 1608(b) provides how state agencies/instrumentalities should be served in US courts under the US *FSIA*.
[402] *The State of Missouri v. The People's Republic of China, et al*. (Case: 1:20-cv-00099-SNLJ), Notice of Appeal, 8 July 2022, available online: <https://www.courtlistener.com/docket/17085710/state-of-missouri-v-peoples-republic-of-china/>.

pandemic,[403] and how China should respond to these cases by using the doctrine of absolute immunity.[404] This pandemic-related litigation saga shows that China's absolute immunity position continues to provide a source of legal conflict with other nations, such as the US, that apply restrictive immunity in their courts.[405]

These cases are important as China was forced to develop its immunity position as a litigation defendant in foreign domestic courts. In cases discussed above, China sought to use absolute immunity to preserve China's "sovereignty and significant [state] interests".[406] In China's view, absolute immunity can shield China from being sued and its assets from being executed against in a foreign domestic court no matter what the merit of the case is. China has carried forward this absolute immunity position to the 21st century after it signed the *UNCSI* in 2005, as shown in the *FG Hemisphere 1* case discussed next.

2.2 Foreign states' absolute immunity in Chinese courts reflected in the *FG Hemisphere 1* case

The *FG Hemisphere 1* decision rendered by the Hong Kong Court of Final Appeal ("HKCFA") in 2011 offered China the first opportunity to articulate its absolute immunity position in its own

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[403] Huang Huikang, "平等者之间无管辖权—诬告滥诉难以逾越的法律程序屏障" [*Par In Parem Imperium Non Habet Imperium*—the Legal Procedural Barrier of Ferocious Claims], 光明网 (gmw.cn), (28 May 2020), online: <https://epaper.gmw.cn/gmrb/html/2020-05/28/nw.D110000gmrb_20200528_4-14.htm>; Zhang Naigen, "美国国内恶诉违背习惯国际法" [[Allowing] Ferocious Claims in American Courts Violate Customary International Law], 人民网 (people.cn), (27 June 2020), online:<http://world.people.com.cn/n1/2020/0627/c1002-31760147.html>; see also Li, "The Illegality Analysis of the Ferocious Claims Related to the United States COVID-19 Breakout", *supra* note 396 at 59.

[404] Li, "The Illegality Analysis of the Ferocious Claims Related to the United States COVID-19 Breakout", *ibid*; Gong & Ding, "A Study on China's Reference to Sovereign Immunity as a Defence in the United States Litigation", *supra* note 369.

[405] Sun, "Study on the Applicable Issue in State Immunity", *supra* note 394 at 10, in which Sun observed that "regarding the customary law of sovereign immunity, China and the US has obvious differences, China holds on to the absolute theory and the US holds on to the restrictive theory."

[406] Treaty and Law Bureau, *supra* note 388 at 411 on *Morris v. China*.

courts.[407] In this landmark decision, the HKCFA invited the Chinese legislative body—the Standing Committee of the National People's Congress ("SCNPC")—to interpret certain provisions in the Hong Kong *Basic Law* on what position Hong Kong should take on sovereign immunity. Taking this opportunity, the SCNPC elaborated upon China's absolute immunity position and its rationale in light of its overseas foreign investment and diplomatic policies. Below, I will firstly provide the lower court proceedings as the context of the appeal before the HKCFA in Subsection 2.2.1. In Section 2.2.2, I will summarize the analysis of the majority decision of the HKCFA, which considered the SCNPC's interpretation and provide a brief critique of the HKCFA's majority decision.

2.2.1. Factual background and decisions of the Hong Kong Courts of First Instance and Appeal

a. Factual Background

This case arose from complex circumstances involving valid arbitral awards rendered against the Congo and one Congolese SOE, the assignment of the awards' enforcement right by their creditor, a state-to-state agreement between China and the Congo, international investment agreements between the Congo and Chinese SOEs, and assignments of these agreements to other SOEs and subsidiaries of SOEs. In its defense before Hong Kong courts, the Congo claimed absolute immunity for fees payable by Chinese SOEs' subsidiaries to the Congo and a Congolese SOE—another party to the international agreements signed between the Congo and Chinese SOEs.

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[407] *Democratic Republic of the Congo and FG Hemisphere Associates LLC (No 1)*, (2011) 14 HKCFAR 95 [*FG Hemisphere 1*]; Bo Lingjia, "国家豁免原则在香港特区的适用问题：刚果（金）案件述评" [The Application of Sovereign Immunity in Hong Kong Special Administrative Region: A Review of the *Congo* Case] (2013) 13 Peking University International and Comparative Law Review (北大国际法与比较法评论) 282; Shen Wei, "*FG Hemisphere Associates v. Democratic Republic of the Congo* [2011] 14 HKCFAR 395" (2014) 108 AJIL 776: "Because China's Supreme People's Court and other Chinese courts rarely rule on public international law issues, this decision has especial significance for understanding China's position on the issue of sovereign immunity." [Shen, *FG Hemisphere*].

Energoinvest is a corporate entity formed in the former Yugoslavia. It entered into two credit agreements with the Republic of Zaire (the predecessor of the Congo) and a Congolese corporation called Société Nationale d'Electricité ("SNE").[408] According to their agreements, Energoinvest would provide credits to the Congo and SNE to finance the construction of a hydro-electric facility and power lines. Following the Congo and SNE's default, Engergoinvest commenced arbitration proceedings pursuant to their agreements.[409] In 2003, it obtained two awards of approximately USD 12 million and USD 18 million each with interest. Energoinvest in 2014 executed an absolute assignment of its rights in the awards and the underlying debts to FG Hemisphere, a US company, for an undisclosed sum. As part of its enforcement effort, FG Hemisphere initiated the Hong Kong court proceedings that will be discussed below.[410]

Around the same time period, China and the Congo signed an agreement ("China-Congo Umbrella Agreement") in 2001, according to which China agreed to finance and construct infrastructure projects in return for the right of mineral exploration in the Congo.[411] In September 2007, the Congo and a consortium of Chinese SOEs signed a Memorandum of Agreement ("Memorandum") on financing. The Memorandum provided that a joint venture would be created to engage in mining activities and distribute dividends that would be used to finance the infrastructure projects mentioned in the China-Congo Umbrella Agreement.[412] On 22 April 2008, the Congo and China Railway Group Limited ("China Railway") and Sinohydro Corporation Ltd

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[408] *FG Hemisphere 1*, *ibid* at 166. The primary fact summarized here is based on the majority decision rendered by Chan PJ, Ribeiro PJ and Sir Anthony Mason NPJ. For facts that are not presented in the majority decision yet provide context of the case, I referred to the facts summarized by Bokhary PJ in his dissenting opinion. Reference to the dissenting opinion will be noted.
[409] *FG Hemisphere 1*, *ibid* 166-67.
[410] *Ibid* at 167. The Hong Kong case documented that FG Hemisphere has successfully attached Congolese state assets in Belgium, Bermuda, and South Africa before the Hong Kong proceedings. *Ibid* at 117.
[411] *Ibid* at 167.
[412] *Ibid* at 167.

("Sinohydro") entered into a *Collaboration Agreement*.[413] According to this *Collaboration Agreement*, China Railway and Sinohydro agreed to finance and construct the infrastructure projects in the Congo in return for mining rights to be granted to the Joint Venture Company. A Congolese SOE, La Générale des Carrières et des Mines ("Gécamines") and the subsidiaries of China Railway and Sinohydro were the parties to the Joint Venture Agreement.[414] According to the *Collaboration Agreement* between the Congo, China Railway and Sinohydro, the two Chinese SOEs had to pay an "Entry Fee" to the Congo.[415] On 22 April 2008, a Joint Venture Agreement was concluded between the Congo, a Mr. Banika who was later replaced by a company La Société Immobilière du Congo ("Simco"), and three wholly-owned subsidiaries of China Railway and two subsidiaries of Sinohydro.[416] In the lawsuit initiated by FG Hemisphere, China Railway's three subsidiaries that were parties to the Joint Venture Agreement and China Railway are the second, third, fourth and fifth defendants in addition to the first defendant the Congo before the Hong Kong Court of First Instance ("HKCFI").[417]

Because China Railway is listed on the Hong Kong Stock Exchange, its entry into the Joint Venture Agreement by its three subsidiaries triggered its disclosure obligations under the Hong Kong Stock Exchange Listing Rules.[418] According to China Railway's public

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[413] *Ibid* at 167. See *Convention de collaboration entre la République Démocratique du Congo et le Groupement d'Enterprises Chinoises: China Railway Group Limited Sinohydro Corporation relative au développement d'un projet minier et d'un projet d'infrastructures en République Démocratique du* Congo (刚果民主共和国和中国企业集团：中国中铁股份有限公司中国水利水电建设集团公司关于刚果民主共和国矿业开发和基础设施建设的合作协议), 2008 [*Collaboration Agreement*]. Available online in French and Chinese: <https://congomines.org/system/attachments/assets/000/000/484/original/B30-Sicomines-2008-Convention-Collaboration.pdf?1430928928>.
[414] *Ibid* at 167-68.
[415] *Ibid* at 168; see also Article 5 of the *collaboration agreement between Congo and Chinese enterprises*, *supra* note 413.
[416] *Ibid* at 168.
[417] *Ibid* at 167-168.
[418] *Ibid* at 167-168.

announcement, the Chinese parties to the aforementioned Collaboration and Joint Venture Agreements had to pay "Entry Fees" of USD 350 million (among which USD 221 million was payable by China Railway and its subsidiaries) to the Congo and Gécamines.[419] FG Hemisphere launched execution proceedings against the USD 221 million Entry Fees—by arguing that they were Congolese state assets—payable by China Railway and its subsidiaries to the Congo and Gécamines in an effort to enforce the two arbitral awards against the Congo that it had obtained from Energoinvest.[420]

b. Decision of the Hong Kong Court of First Instance

Justice Saw of the HKCFI permitted FG Hemisphere's *ex parte* interim injunction against the fees payable by the Chinese parties to the Congo without the Congo's presence in May 2008.[421] The injunction also allowed the enforcement of the two arbitral awards as judgments of Hong Kong courts.[422] The Congo acknowledged service of the proceeding but contested the HKCFI's jurisdiction on the basis of sovereign immunity.[423]

The Congo's jurisdictional challenge was assigned to Justice Reyes of the HKCFI in November 2008. Justice Reyes was asked to determine what is Hong Kong's immunity position regarding foreign states and their properties. During the hearing, the Hong Kong Secretary of Justice intervened and submitted a letter from the Office of the Commissioner of the Ministry of Foreign Affairs ("OCMFA") addressed to the Constitutional and Mainland Affairs Bureau of the Hong Kong Special Administrative Region ("First OCMFA Letter").[424] The First OCMFA Letter stated that the "consistent and principled position of China is that a state and its property shall, in

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[419] *Ibid* at 168.
[420] *Ibid* at 169.
[421] *Ibid* at 169.
[422] *Ibid* at 169.
[423] *Ibid* at 169.
[424] *Ibid* at 169-170.

foreign courts, enjoy absolute immunity, including absolute immunity from jurisdiction and from execution, and [China] has never applied the so-called principle or theory of 'restrictive immunity'."[425]

In his decision in December 2008, Justice Reyes decided not to address the issue of Hong Kong's immunity position—*i.e.*, whether Hong Kong should take an absolute or a restrictive immunity position—because the underlying transaction—the payment of the Entry Fees—was not commercial in nature.[426] His conclusion was made based on the following findings: the Collaboration and Joint Venture Agreements were made under the China-Congo Umbrella Agreement between two states;[427] the parties to the Joint Venture were SOEs and the purposes of the undertakings under the China-Congo Umbrella Agreement were "driven by two governments […] as opposed to private entities" for the development of the Congo's economic benefit and well-being of its citizens.[428] Justice Reyes thus held that the Entry Fee was equivalent to a license fee payable by the Chinese SOEs to the Congo for the exploration of the Congo's mining rights, the payment of which only a state or a government can impose or extract.[429] He concluded that the underlying transaction is sovereign in nature and therefore immune to attack in Hong Kong courts. As a result, he set aside Justice Saw's injunction order and declared that the HKCFI "ha[d] no jurisdiction" over [the] Congo in this case."[430]

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[425] *Ibid* at 170.
[426] *Ibid* at 170. In his *obiter*, Reyes J viewed that Hong Kong's immunity position is restrictive. While expressing this view, he acknowledged that although China had taken an absolute immunity until recently, the First OCMFA did not address China's signature of the *UNCSI*, a treaty that embraces the restrictive immunity theory. To him, China's signature of the treaty indicated that China has accepted "the wisdom" of the treaty even the treaty has not come into force. As such, he did not think that China's position was "as clear-cut as the [OCMFA Letter] state[ed]." He thus concluded that he had no trouble in finding that Hong Kong's immunity position is restrictive. *Ibid*, 171.
[427] *Ibid* at 170.
[428] *Ibid* at 170-71.
[429] *Ibid* at 171.
[430] *Ibid* at 171.

c. Decision of the Hong Kong Court of Appeal

FG Hemisphere appealed Justice Reyes' decision to the Hong Kong Court of Appeal ("HKCA") in December 2008.[431] Before the appeal hearing, the Hong Kong Secretary for Justice submitted another letter from the OCMFA ("Second OCMFA Letter") in May 2009.[432] In this letter, OCMFA reiterated China's absolute immunity position and added that China's position had not changed after its signature of the *UNCSI* because the treaty had not come into force and China had not ratified it.[433]

By majority, the HKCA reversed Justice Reyes' decision.[434] Unlike Justice Reyes who shied away from addressing the immunity position of Hong Kong, the majority held that Hong Kong continued to apply restrictive immunity after it became a special administrative region of China on 1 July 1997. The majority held that before 1 July 1997, restrictive immunity was applied in Hong Kong as a matter of statute (the UK *SIA*) and common law. Although the UK *SIA* ceased to apply after 1 July 1997, the common law of restrictive immunity continued to apply in Hong Kong because it was not inconsistent with the Hong Kong *Basic Law*—the equivalent constitutional law of Hong Kong.[435] Notably, they held that the application of restrictive immunity in Hong Kong would not "infringe upon or prejudice the sovereignty of [China]."[436] The majority also found the two OCMFA Letters are irrelevant and not decisive in their decision making because the letters merely expressed China's consistent absolute immunity position.[437] Having decided that Hong Kong applies restrictive immunity, the majority concluded

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[431] *Ibid* at 172.
[432] *Ibid*.
[433] *Ibid*.
[434] *Ibid* at 173.
[435] *Ibid*.
[436] *Ibid* at 173-74.
[437] *Ibid* at 174.

that there was "a good arguable case" that the part of the Entry Fees that were to be paid to Gécamines—the Congolese counterpart in the Joint Venture—were for commercial purposes. In its remand, the HKCA asked the lower court to determine to what extent the Entry Fees payable by the Chinese SOEs to the Congo are to be paid to Gécamines and whether that amount payable to Gécamines is immune from execution.[438]

2.2.2. Issues before the Hong Kong Court of Final Appeal and its provisional and final decisions

Following the decision of the HKCA, the Congo, China Railway and its subsidiaries and the Intervener—Hong Kong's Secretary of Justice appealed the decision to the HKCFA.[439] Before the HKCFA's hearing, the Hong Kong Secretary of Justice submitted the third letter from the OCMFA ("Third OCMFA Letter"), in which China reiterated its absolute immunity position and stated that its sovereignty will be prejudiced if Hong Kong would apply the restrictive immunity theory as a Special Administrative Region of the unitary Chinese state.[440] Relying on constitutional arrangements between China and Hong Kong established in the *Basic Law*,[441] the three OCMFA Letters, and principles of international law, the majority of the HKCFA held that Hong Kong as a Special Administrative Region must apply an absolute immunity position like China.[442] This conclusion of the majority was premised upon the "One Country Two Systems" constitutional framework reflected in the *Basic Law* as agreed by China and the United Kingdom before the handover of Hong Kong.[443] While the Hong Kong *Basic Law* ensures autonomy of Hong Kong's administrative and judicial affairs under the "Two Systems" principle, it does

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[438] *Ibid*.
[439] See Bokhary PJ's Dissenting Opinion in *FG Hemisphere 1*, *ibid*, 121.
[440] *Ibid* at 169, para 197, at 172, para 202, at 174, para 211.
[441] *Ibid* at 182, para 226.
[442] *Ibid* at 165, para 183.
[443] *Ibid* at165, para 181: "In this appeal, it falls to the Court to consider provisions in the latter category of ["one country" element of the "one country two system" principle], in particular, provisions concerning the management and conduct of foreign affairs."

provide that on certain issues the Chinese government has the exclusive jurisdiction under the "One Country" principle.[444] Before analyzing the majority's decision, I will briefly provide the relevant provisions of the Chinese *Constitution* and the Hong Kong *Basic Law* that established Hong Kong as a Special Administrative Region and the constitutional arrangements between the two set by the *Basic Law* that provide the decisive rationale of the majority's provisional decision.

a. The China–Hong Kong constitutional framework and the Majority of the HKCFA's provisional judgment

The Hong Kong Special Administrative Region was established by the National People's Congress ("NPC")—the Chinese legislative body—pursuant to Article 31 of the Chinese Constitution.[445] The NPC promulgated the Hong Kong *Basic Law* in April 1990.[446] While the *Basic Law* ensures the high autonomy of the Special Administrative Region, Article 13 provides that the executive branch of Hong Kong has no power over foreign affairs, which exclusively belongs to the Chinese government.[447] Following this constitutional constraint on Hong Kong's administrative organ, Article 19(3) adds that the Hong Kong judiciary shall obtain approval of the Chief Executive of Hong Kong in the form of a certificate to exercise jurisdiction over acts of state such as defence and foreign affairs:

> (3) The courts of the Hong Kong Special Administrative Region shall have no jurisdiction over acts of state such as defence and foreign affairs. The courts of the Region shall obtain a certificate from the Chief Executive on questions of fact concerning acts of state such as defence and foreign affairs wherever such questions arise in the adjudication of cases. This certificate shall be binding on

[444] *Ibid*.
[445] Article 31, Chinese Constitution, reproduced in *FG Hemisphere 1*, 207. Article 31 of the Chinese Constitution provides that "The state may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People's Congress in the light of specific conditions."
[446] *FG Hemisphere 1*, *supra* note 407 at 207.
[447] Paragraph 1, Article 13 of the Basic Law provides that "The Central People's Government shall be responsible for the foreign affairs relating to the Hong Kong Special Administrative Region." See *FG Hemisphere 1*, *ibid* at 212.

> the courts. Before issuing such certificate, the Chief Executive shall obtain a certifying document from the Central People's Government.[448]

According to the majority, Article 19(3) does not deprive the Hong Kong courts of the capacity to decide cases when the issue of an act of state arises.[449] Rather, Hong Kong courts continue to have jurisdiction over such issues pursuant to Article 19(2)[450] and simply have to comply with the what the Chief Executive submits in the certificate as indicated in Article 19(3).[451] Relying on the concept of "facts of state" as proposed by FA Mann in his treatise on *Foreign Affairs in English Courts*, the majority concluded that the three OCMFA Letters should be treated as "facts of state." This meant acknowledging the existence of "facts, circumstances, and events which lie at the root of foreign affairs and their conduct by the Executive… [and] are facts which are peculiarly within the cognisance of the Executive."[452] Because the Office of the Commissioner is the Office in Hong Kong established by the Chinese Government to deal with issues of foreign affairs pursuant to Article 13(2) of the *Basic Law*, the three OCMFA Letters "should be taken to have the status of declarations of facts of state, which the [Hong Kong] courts (even without any art.19(3) certificate) accept as authoritative statements of facts within the peculiar cognisance of the executive organ of government having charge of the nation's foreign policy."[453] In its provisional finding, the majority concluded that the Chinese government's determination of its absolute immunity policy comes within the phrase of "acts of

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[448] Article 19(3) of the Basic Law, reproduced in *FG Hemisphere 1*, *supra* note 380 at 216.
[449] *FG Hemisphere 1*, *supra* note 407 at 217.
[450] Article 19(2) provides that "The courts of the Hong Kong Special Administrative Region shall have jurisdiction over all cases in the Region, except that the restrictions on their jurisdiction imposed by the legal system and principles previously in force in Hong Kong shall be maintained."
[451] *FG Hemisphere 1*, *supra* note 407 at 217.
[452] *FG Hemisphere 1*, *ibid* at 204, para. 295 citing *FA Mann, Foreign Affairs in English Courts* (London: Clarendon Press, 1986) at 23.
[453] *Ibid* at 221, para. 363.

state such as defence and foreign affairs" in Article 19(3) and was supported by the authoritative facts of state declared in the OCMFA Letters, without a need for a certificate.[454]

After making this provisional judgment, the HKCFA turned to the SCNPC for interpretation of Articles 13 and 19(c) of the *Basic Law* as required by Article 158(3) on issues touching upon acts of state, such as foreign affairs, which fall into the mandate of the Chinese government. The relevant part of Article 158(3) provides:

> […] if the courts of the Region, in adjudicating cases, need to interpret the provisions of this [Basic] Law concerning affairs which are the responsibility of the Central People's Government, […] and if such an interpretation will affect the judgments on the cases, the courts of the Region shall, before making their final judgments, which are not appealable, seek an interpretation from the [SCNPC].[455]

As it found that sovereign immunity is an issue of foreign affairs falling into the scope of "acts of state" per Articles 13 and 19(c), the majority submitted the following four questions to the SCNPC pursuant to Article 158(3): (1) whether the Chinese government has the power to determine Hong Kong's policy on sovereign immunity; (2) whether Hong Kong courts shall apply China's immunity policy determined by the Chinese government; or, it is permitted to apply a different immunity position; (3) whether the Chinese government's decision on China's immunity policy falls in the "acts of state such as defence and foreign affairs" as found in Article 19(3) of the *Basic Law*; and (4) whether the common law restrictive immunity approach in Hong Kong found in the UK *SIA* had been replaced by the sovereign immunity policy determined by the Chinese government pursuant to the *Basic Law* and the SCNPC's interpretation of the Article 160 of the *Basic Law*.[456] Before submitting the above questions to the SCNPC, the majority

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[454] *Ibid* at 221, para. 363.
[455] Article 158(3) of the *Basic Law*, reproduced in *FG Hemisphere 1*, *ibid* at 229.
[456] *FG Hemisphere 1*, *ibid* at 232-233, para 407. Article 160 of the Basic Law provides that "Upon the establishment of the Hong Kong Special Administrative Region, the laws previously in force in Hong Kong shall be adopted as laws of the Region except for those which the Standing Committee of the National People's Congress declares to be

made the provisional decision to set aside the HKCA's decision pending the SCNPC's interpretation.[457] Following China's absolute immunity position, the provisional decision—that is subject to the SCNPC's interpretation—concluded that the Congo and its assets (fees payable by Chinese SOEs to it and Gécamines) should be granted immunities from jurisdiction and execution in Hong Kong courts.[458] The underlying rationale is that "[Hong Kong] cannot, as a matter of legal and constitutional principle, adhere to a doctrine of state immunity which differs from that adopted by [China]."[459]

While the Congo's underlying claim was execution immunity for fees payable by Chinese SOEs to it and Gécamines, the HKCFA clarified in its decision that a foreign state enjoys absolute immunities from both jurisdiction and execution in Hong Kong courts.

b. The HKCFA's final decision and the attached SCNPC interpretation

In August 2011, the SCNPC issued its interpretations on the four questions submitted by the HKCFA and affirmed the majority's provisional decision that the Congo enjoyed absolute immunities from jurisdiction and execution in Hong Kong.[460] It answered the four questions posed by the HKCFA in the following: (1) the Chinese government has the power to determine China's policy on sovereign immunity; (2) Hong Kong courts must give effect to the absolute immunity rule that is determined by the Chinese government; (3) the words of "acts of state such as defence and foreign affairs" found in Article 19(3) include the Chinese government's

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in contravention of this law. If any laws are later discovered to be in contravention of this law, they shall be amended or cease to have force in according with the procedure as prescribed by this law." See *Hemisphere 1*, *ibid*, at 242.

[457] *FG Hemisphere 1*, *ibid* at 235, paras 413, 415.

[458] *Ibid* at 235, para 415 (b): "That it be declared and a Declaration granted that the HKSAR courts have no jurisdiction over the first defendant (Congo) in the present proceedings[.]"

[459] *Ibid* at 182, para 226.

[460] Annex 2, *Democratic Republic of the Congo and FG Hemisphere Associates LLC (No 2)*, (2011) 14 HKCFAR 395. [*FG Hemisphere 2*]

determination of China's sovereign immunity policy; (4) the common law restrictive immunity in Hong Kong found in the UK *SIA* had been replaced by the sovereign immunity policy determined by the Chinese government pursuant to the *Basic Law* and the SCNPC's interpretation of the Article 160 of the *Basic Law* once Hong Kong became an administrative region of China.[461] The HKCFA subsequently made its provisional judgment final.[462] In its final judgment, the HKCFA reproduced Li Fei, Deputy Director of the Legislative Affairs Commission of the SCNPC's Explanation and Draft Interpretation to the SCNPC ("Li Fei's Explanation") and the interpretation of the SCNPC ("SCNPC's Interpretation") in Annex 1[463] and Annex 2.[464] Li Fei's Explanation closely followed China's position expressed in the *Aides Memoires* it submitted in the *Jackson* and *Morris* cases and the three OCMFA Letters,[465] which was further adopted by the SCNPC.[466]

c. Critique of the HKCFA's majority decision

The majority of the HKCFA's provisional decision was primarily drawn from the China-Hong Kong constitutional arrangements set by the *Basic Law* in the larger context of international law.[467] In the majority of the HKCFA's view, sovereign immunity in international law is absolute as set by the *Schooner Exchange* case, which is subject to only two exceptions—the

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[461] *FG Hemisphere 2*, *ibid* at 399, para 7; Annex 2, *FG Hemisphere 2*, *ibid* at 428-432.
[462] *FG Hemisphere 2*, *ibid* at 395.
[463] Li Fei, "The Explanations on the Draft Interpretation of Paragraph 1, Article 13 and Article 19 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China by the Standing Committee of the National People's Congress", 22nd Session of the Standing Committee of the Eleventh National People's Congress, 24 August 2011, reproduced in Annex 1, *FG Hemisphere 2*, *ibid*, 401. [Li Fei's Explanation]
[464] SCNPC, "Interpretation of Paragraph 1, Article 13 and Article 19 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China by the Standing Committee of the National People's Congress", adopted by the Standing Committee of the Eleventh National People's Congress at Its 22nd Session on 26 August 2011, reproduced in Annex 2, *FG Hemisphere 2*, *ibid*, 428. [SCNPC's Interpretation]
[465] Li Fei's Explanation, *supra* note 463.
[466] SCNPC's Interpretation, *supra* note 464 at 428-32.
[467] *Hemisphere 1*, *supra* note 407 at 183, paras. 227, 229; at 194, para. 265.

defendant state's waiver or the defendant state's consent to the forum state's jurisdiction.[468] Following Lord Denning's statement that "[e]ach country delimits for itself the bounds of sovereign immunity [and] [e]ach creates for itself the exceptions from it[]",[469] the majority of the HKCFA concluded that a state has a right to determine which of its organs should bear the responsibility for laying down the state's immunity policy, based on its constitutional allocation of powers and foreign policy interests.[470] This conclusion paved way for the majority of the HKCFA to hold that it is the Chinese executive branch that determines China's sovereign immunity policy, which should be followed by Hong Kong because China is a unitary state. In the Chinese unitary system, Hong Kong has no sovereign ability to establish its own policy or practice of state immunity; it should follow that, as a constituent part of China, Hong Kong's foreign policy is set by China.[471] Adopting a sovereign immunity policy in Hong Kong that was different from China would "embarrass or jeopardize the [s]tate in its conduct of foreign affairs."[472] The rationale of the majority of the HKCFA's deference to China's absolute immunity is that China can "adopt[] a regime of state immunity that is consistent with its own interests in light of its circumstances and its foreign policy."[473]

In addition to considering the China—Hong Kong constitutional framework as a basis for its reasoning, the majority of the HKCFA also briefly discussed China's political economy in foreign investment. Relying on the Third OCMFA Letter, the majority of the HKCFA observed that China's state-led foreign investment model and its foreign policy in other countries are

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[468] *Ibid* at 183-184, paras. 227, 230.
[469] *Ibid* at 184, para 232 citing *Trendtex*.
[470] *Ibid* at 184-185, para. 233; at 194, para 266.
[471] *Ibid* at 195, paras 267-268; at 195, para 267.
[472] *Ibid* at 195, para 269; at 195, para 269.
[473] *Ibid* at 198, para 279.

intertwined.[474] In its provisional decision, the majority of the HKCFA highlighted China's foreign policy in Africa as an essential context for understanding Chinese SOEs' foreign investments:

> The rapid evolution of China's foreign policy in Africa and elsewhere over that last decade is well-known. It often involves international agreements for large-scale development projects such as the agreement for mineral rights in exchange for infrastructural development in the present case. It follows that [China's] foreign policy, which obviously differs from many other countries' foreign policy, requires it to invest heavily abroad on projects which may arguably be characterized as having "commercial" elements.[475]

Particularly, they noted that China's foreign policies in some countries such as the Congo are carried out through large infrastructure development projects in exchange for rights to natural resources exploitation.[476] Thus, the majority implied that the characterization of these projects for immunity purposes should be assessed in the context of China's foreign policies.[477] The majority of the HKCFA stopped here. The question they left open—as noted by Tony Carty[478]—is how to characterize the underlying agreements made between the Chinese and Congolese parties under the law of sovereign immunity. This is because how we characterize the underlying agreements would have an impact on our assessment of the Congo's immunity if Hong Kong applied restrictive immunity in a hypothetical situation; or it would have an impact on our

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[474] In the third OCMFA Letter, China highlighted that it maintains absolute immunity position "for the sake of protecting *the security and interests of China and its property abroad*" in addition to the fact that it is a "fundamental international law principle of 'sovereign equality among nations'", *FG Hemisphere 1*, *ibid* at 199, para. 280 [emphasis added].

[475] *FG Hemisphere 1*, *ibid*.

[476] *Ibid*.

[477] *Ibid*. See also 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*" (2011) Hong Kong LJ 85, 91 arguing that the majority could have addressed the dispute pursuant to international law within the China-Hong Kong constitutional arrangements set in the *Basic Law* by focusing on the core issue of the nature of the transactions among China, the Congo and Chinese SOEs in its entirety, not the nature of the original transaction between the Congo and the entity from former Yugoslavia [Carty].

[478] Carty, *ibid* arguing the transactions between China, the Congo and Chinese SOEs encompassed a sovereign element as "China is implicated at the highest level in these activities, in order to achieve a range of social and political as well as economic goals."

assessment of China Railway's and Sinohydro's sovereign immunity in a jurisdiction that applies restrictive immunity when the two Chinese SOEs' sovereign immunity is at stake.

In Chapter 4, I will use the publicly-accessible *Collaboration Agreement* signed between the Congo and the Chinese SOEs[479] as a case study to analyze Chinese SOEs' status and functions, and the characterization of the *Collaboration Agreement* in the Chinese political economy. Situating Chinese SOEs' conduct and transactions (such as the *Collaboration Agreement*) in that bigger picture—China's infrastructure-for-resources foreign policy/investment model as defined by the Chinese political economy—is essential to our assessment of (1) whether Chinese SOEs are part of the state for immunity purposes and (2) whether they enjoy immunity in a particular case under the customary international law.

3. China's Position on SOEs' Immunity Claims in Foreign Domestic Courts

3.1 China excludes SOEs from its definition of the state for immunity purposes

As Chapter 4 will illustrate in further detail, Chinese SOEs are corporate entities established pursuant to Chinese domestic laws. According to Chinese laws and regulations, SOEs enjoy independent corporate governance and have autonomy to acquire and dispose of corporate assets—to different extents—as defined by the Chinese political economy.[480] Based on this domestic legal relationship between China and SOEs, China has consistently sought to exclude SOEs from the scope of the state for sovereign immunity purposes. For example, before the conclusion of the *UNCSI*, China submitted the following statement regarding the inclusion of a provision on "state enterprise" in the treaty. According to this statement, Chinese SOEs are not

[479] *The Collaboration Agreement*, *supra* note 413.
[480] See Chapter 4, Section 3.

part of the state for immunity purposes under the *UNCSI* precisely because they have independent juridical personalities under Chinese laws:

> On the question of state and state enterprise vis-a-vis the system of immunity, the Chinese delegation is of the view that state enterprise is not something unique existing only in a certain country. In addition, asset composition of a state enterprise takes various forms. Take China for example, our state enterprise[s'] asset composition includes asset[s] owned by natural person[s] and other [juridical] person[s] not belonging to the state. Under Chinese law, our state enterprises have independent ownership of and the right to dispose of their own assets. Therefore, the state enterprises are independent of each other, so are [the] state and state enterprises.[481]

China affirmed this position in the 2017 *China National Coal* case, in which China National Coal, a 100% state-owned Chinese SOE, claimed Crown immunity[482] before the HKCFI.[483] In this case discussed below, the Chinese government explicitly stated in its submission that Chinese SOEs shall not have either Crown immunity or sovereign immunity in Chinese courts or foreign domestic courts because they are not part of the state while they are acting in their commercial capacity as independent juridical persons. The HKCFI concluded that China National Coal is an independent juridical entity which is distinctive from China and did not enjoy Crown immunity in Hong Kong courts.

3.1.1. *China National Coal*

After TNB—a Malaysian private corporation—won an arbitration against the China National Coal Group Corporation ("China National Coal"), TNB launched execution against China National Coal's shares in China Coal Hong Kong Limited in Hong Kong. The HKCFI granted

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[481] Permanent Mission of the People's Republic of China to the UN, News Release, "Statement by Mr. Guan Jian of the Chinese Delegation on Agenda Item 157, Jurisdictional Immunity of States and Their Property", (16 November 2000) online: Permanent Mission of the People's Republic of China to the UN <http://chnun.chinamission.org.cn/eng/chinaandun/legalaffairs/sixthcommittee1/t28548.htm> [Permanent Mission of the PRC to the UN, "Statement of Mr. Guan"].

[482] Crown immunity is an English common law concept regarding the English Crown's immunity in its own courts, including its overseas territories. It continues to exist in Hong Kong after China resumed sovereignty over Hong Kong. See *The Hua Tian Long (No. 2)*, [2010] 3 HKLRD 611 ["*Hua Tian Long*"].

[483] *China National Coal*, *supra* note 45.

leave to TNB to enforce the arbitral award as a Hong Kong court judgment and dismissed China National Coal's set aside petition.[484] TNB was permitted to execute against China National Coal's shares in its Hong Kong subsidiary—China Coal Hong Kong Limited.[485] China National Coal claimed Crown immunity by arguing that it was part of the Chinese government and therefore its assets were immune from execution.[486]

Based on the *Huang Tian Long* case, Justice Chan—the judge of the HKCFI— confirmed that whether China National Coal could claim Crown immunity under the common law is a question of Hong Kong law, which is governed by the common law "control" test; whereas whether China National Coal is controlled by the Chinese government is a question of Chinese law.[487] Justice Chan followed Justice Stone's *obiter* in the *Hua Tian Long* case[488] and gave significant weight to the Letter submitted by the Hong Kong and Macao Affairs Office of the State Council, in which China articulated its position on Chinese SOEs' capacity to claim Crown immunities. The Hong Kong and Macao Affairs Office of the State Council explained that Chinese SOEs have no capacity to claim Crown immunity in Hong Kong courts because Chinese SOEs are distinctive from the state under Chinese laws:

> China National Coal Group Corporation is a wholly state-owned enterprise, an enterprise legal person, established according to the law. According to the relevant legal regulations of our country, a state-owned enterprise is an independent legal entity, which carries out activities of production and operation on its own, independently assumes legal liabilities, and there is no special legal person status or legal interests superior to other enterprises.[489] [emphasis in the original]

[484] *Ibid*, para. 1.
[485] *Ibid* at para. 2.
[486] *Ibid* at para. 2.
[487] *Ibid* at para. 9.
[488] *Hua Tian Long*, *supra* note 482.
[489] *China National Coal*, *supra* note 45 at para. 14.

China National Coal also gave China the opportunity to express its view that Chinese SOEs do not enjoy sovereign immunity in foreign domestic courts for the same reasons that Chinese SOEs do not enjoy Crown immunity in Chinese courts: because Chinese SOEs are separate legal entities—thus not part of the state—according to Chinese laws.[490] As the Hong Kong and Macao Affairs Office of the State Council said:

> In the Mainland or *in foreign states*, all state-owned enterprises of our country respond to litigation arising from their activities of production and operation in the capacity of independent legal persons.[491] [emphasis added]

The purpose of emphasizing Chinese SOEs' independent corporate juridical status is to ensure there exists a proper "arm's length" distance between China and Chinese SOEs so that (1) China's claims to sovereign immunity will not be impacted in foreign domestic courts by Chinese SOEs' conduct and (2) Chinese SOEs' liabilities would not trigger China's state responsibility under international law.[492] In its submission, China added that in "extremely extraordinary circumstances", an SOE could be considered as part of the state if it was acting on behalf of the state with proper authorization:

> [S]ave for extremely extraordinary circumstances where the conduct was performed on behalf of the state via appropriate authorization, etc, the state-owned enterprises of our country when carrying out commercial activities shall not be deemed as a part of the Central Government, and shall not be deemed as a body performing functions on behalf of the Central Government. It should be pointed out that the opinion above shall not be interpreted as derogation of any rights and immunity enjoyed according to law by the Central Government and its bodies in the Hong Kong SAR.[493] [emphasis in the original]

In this case, China made it clear that it excludes SOEs from the scope of the state for both Crown and sovereign immunity purposes in Chinese and foreign domestic courts as a general rule.

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[490] *Ibid*.
[491] *Ibid*.
[492] Permanent Mission of the PRC to the UN, "Statement of Mr. Guan", *supra* note 481.
[493] *China National Coal*, *supra* note 45 at para. 14.

China also clarifies that a Chinese SOE would acquire the status of the state for either sovereign or Crown immunity purposes if it was instructed by the Chinese state to act on behalf of the state but that this would occur only in "extremely extraordinary circumstances."[494]

4. Assessing China's absolute immunity position for states under the customary international law of restrictive immunity

4.1 The evolving rationale of China's absolute immunity position on states

From the above analysis we can see that China maintains an absolute immunity position for states but excludes SOEs from the scope of the state for immunity purposes.[495] China's underlying rationale for that position has evolved. Around the time of the *Jackson v. China* case, the Chinese rationale carried a significant ideological character. Jill A. Sgro noted that China's absolute immunity derives from its cultural distaste of litigation and prior experience in extraterritorial consular jurisdictions[496] as imposed by Western countries under unequal treaties they concluded with China.[497] Ni Zhengyu, a former Chinese Judge at the International Court of Justice, argued that restrictive immunity disfavored developing and socialist countries based on

[494] This position of China aligns with the current Chinese SOE reform in which the state can instruct SOEs to carry out different functions, see Chapter 4, Section 3.2; see also Liang Yixin (梁一新), "论国有企业主权豁免资格:以美国 FSIA、英国 SIA 和 UN 公约为视角" [Sovereign Immunity of State-owned Enterprises: A Perspective from the US FSIA, the UK SIA and the UN Treaty] (2017) 1 Journal of Comparative Law (比较法研究) 82, 92. [Liang, Sovereign Immunity of State-owned Enterprises]

[495] A commentator—Ye Yan—coined such approach of China as "restrictive absolute immunity" since it excludes SOEs from the scope of the state for immunity purposes. Ye argues that this position best serves China's interests on the international plane. See Ye Yan, "论当代中国的国家豁免政策选择" [On China's Contemporary Choice of State Immunity] (2022) 1 Chinese Review of International Law (国际法研究) 37; Ye, "Restrictive Absolute Immunity", *supra* note 352 at 15.

[496] Extraterritorial consular jurisdiction clause is often found in treaties signed by the Imperial Chinese government with Western states (including the US and the UK). Extraterritorial jurisdiction clauses allowed foreign consular offices to resolve disputes between Chinese nationals and their nationals according to that foreign state's laws, not Chinese laws, on the Chinese soil. See Sgro, "China's Stance on Sovereign Immunity", *supra* note 354 at 120; Zhou, *International Law*, *supra* note 216 at 251-61.

[497] Sgro, "China's Stance on Sovereign Immunity", *ibid* at 119-122; Shen, "FG Hemisphere", *supra* note 407 at 780.

some Asian and African countries' colonial experience.[498] Qi Dahai noted that Ni's view had significantly influenced the Chinese scholarly discourse in the 1980s and contributed to China's adherence to absolute immunity.[499] China's ideological resistance to foreign domestic courts' jurisdiction explained its very limited presence before the US courts.[500]

In the *FG Hemisphere 1* case, China's rationale transitioned from one of ideologically-driven to one of state interest-driven as incentivized by China's political economy.[501] With Chinese SOEs' investments in African countries as a backdrop, China gave weight to considerations such as possible diplomatic confrontations, protection of China's overseas interests and properties, reciprocity, economic and trade cooperation, and China's foreign policies.[502] As the majority of the HKCFA has noted and other scholars have pointed out, the agreement made between the Congo and China on the state-to-state level was a crucial precondition for the creation of the subsequent *Collaboration Agreement* made between the Congo and two Chinese SOEs—China Railway and Sinohydro.[503] Seeing the transactions between the Chinese SOEs and their Congolese partners in the larger context of Chinese political economy and China's foreign policies, some writers argued that Chinese SOEs are tools of

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[498] Ni, *With Ease in The Hague*, *supra* not 391 at 26-30; Ni Zhengyu, "关于国家豁免的理论和实践" [Theory and Practice of State Immunity] Chinese Yearbook of International Law 1983 (中国国际法年刊) 3 at 26 [Ni, "Theory and Practice of State Immunity"]; see also Chen Tiqiang, "国家主权豁免与国际法：评湖广铁路债券案" [Sovereign Immunity and International Law: A Comment of Huguang Railway Bond Case] Chinese Yearbook of International Law 1983 (中国国际法年刊) 31 [Chen, "Sovereign Immunity and International Law"]; Zhou, *International Law*, *supra* note 216 at 190.
[499] Qi, "State Immunity, China and Its Shifting Position" *supra* note 123 at 324.
[500] Ni, *With Ease in The Hague*, *supra* not 391 at 176-178; see also, Ni, "Theory and Practice of State Immunity", *supra* note 498 at 27-28; Chen, "Sovereign Immunity and International Law", *supra* note 498 at 52-53.
[501] See Chapter 4. The Chinese political economy is a state-driven economy that is highly regulated by the state.
[502] Third OCMFA Letter, para. 5.
[503] Andoni Maiza-Larrarte & Gloria Claudio-Quiroga, "The Impact of Sicomines on Development in the Democratic Republic of Congo" (2019) 95:2 International Affairs 423 [Maiza-Larrarte & Claudio-Quiroga, The Impact of Sicomines]; Jingwei Xu, "Chinese Resource-for-Infrastructure (RFI) Investments in Sub-Saharan Africa and the Future of the 'Rules-Based' Framework for Sovereign Finance: The Sicomines Case Study" (2020) 41:3 Michigan JIL 615 [Xu, Chinese RFI Investments].

China's infrastructure-for-resources policy that encompass political, economic and diplomatic elements.[504] From an outcome perspective, Chinese SOEs were indirect beneficiaries of the Congo's absolute immunity: the entry fees payable by Chinese SOEs to the Congo that were targeted by FG Hemisphere could not be executed against in Hong Kong courts as a result of the Congo's absolute immunity. Yiling Zhang and Kuan Shang argued that "if China Railway did not have [s]tate property worth US$ 104 million at stake in the case, it would be unthinkable for China's Office of Commissioner of the Ministry of Foreign Affairs to place letters before Hong Kong courts at each instance of the case."[505] Hence, in addition to political and international relations calculations, China's absolute immunity position in the *FG Hemisphere 1* case has a strong economic consideration: protecting Chinese state economic interests represented by Chinese SOEs and their assets abroad, particularly in large infrastructure for resources projects.[506]

When we read China's absolute immunity position with consideration of its overseas economic interests represented by Chinese SOEs, it seems that the scope of the state asserted by China for absolute immunity purposes—contrary to China's general position in *China National Coal*—would include Chinese SOEs, at least in some situations. Such a reading challenges—or raises doubts about—whether China would always argue that Chinese SOEs should not attract immunity in foreign domestic courts since they are not part of the Chinese state. Even in *China*

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[504] Xu, "Chinese FRI Investments", *ibid* at 626-27; see also Maiza-Larrarte & Claudio-Quiroga, *ibid*, providing the political economy context of the underlying deal between the Congolese and Chinese entities.
[505] Zhang & Shang, "The Crown in the People's Republic", *supra* note 123 at 52; see also Shen, "*FG Hemisphere*", *supra* note 407 at 780 noting that one reason for China's reluctance to embrace restrictive immunity is "the vast number of Chinese state-owned enterprises…, which aggressively invest overseas and actively conduct a large number of cross-border commercial transactions."
[506] Third OCMFA Letter, para. 5; Zhang & Shang, *ibid*; Zhang Naigen (张乃根), "国家及其财产管辖豁免对我国经贸活动的影响" [The Impact of the Jurisdictional Immunities of States and Their Property on China's Economic Activities] (2005) 6 Jurist (法学家) 28, 32 expressed concerns over whether China could claim execution immunity for its assets hold by Chinese SOEs [Zhang, The Impact].

National Coal, China declared that in "extraordinary circumstances", Chinese SOEs—with appropriate authorization—could be regarded as part of the state for immunity purposes.[507] Such authorization could be either sovereign or commercial in nature as China has not defined the scope of that authorization. In either case, Chinese SOEs would become part of the state for immunity purposes. The *FG Hemisphere 1* and *China National Coal* cases illustrate the thorny issue of how to categorize Chinese SOEs' status, functions, their assets' relationship to China, and their immunity under the law of sovereign immunity. The answers to these questions hinge upon Chinese SOEs' status, functions, and the scope of their assets defined by the Chinese political economy that will be scrutinized in Chapter 4.

4.2 Embracing restrictive immunity is a potentially preferable immunity policy for China

Without providing a robust legal analysis (such as a survey of state practice of absolute immunity, international or domestic court decisions and scholarly views but only limited Chinese state practice in foreign courts), China in the *FG Hemisphere 1* case principally stated that "[s]tate immunity is a doctrine of international law widely accepted by the international community"[508] and announced that its consistent immunity position is absolute.[509] In the *Selected Practices and Cases of China in International Law* edited by the Treaty and Law Bureau of China's Foreign Ministry of Affairs ("Treaty and Law Bureau"), the Treaty and Law Bureau rejected the notion that restrictive immunity has replaced absolute immunity and "it is difficult to ascertain whether restrictive immunity has acquired status of customary international law."[510]

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[507] *China National Coal*, *supra* note 45 at para. 14.
[508] Li Fei's Explanation, *supra* note 463 at 404.
[509] *FG Hemisphere 1*, *supra* note 407.
[510] Treaty and Law Bureau, *supra* note 388 at 366.

Similarly, some Chinese scholars[511] and Judge Xue Hanqin,[512] a judge at the International Court of Justice, argued that the customary law of sovereign immunity has not become restrictive or the customary international law status of restrictive immunity is unsettled. The Treaty and Law Bureau noted that although states such as the US and the UK have enacted laws on restrictive immunity, "there is no sign that absolute immunity has been abandoned, absolute immunity continues to be an applicable rule in international law."[513] In other words, China treats both absolute and restrictive immunity as applicable rules of international law and it is within a state's sovereignty to choose either stance,[514] based on its own policy considerations.[515] The Treaty and Law Bureau argued that China's choice of absolute immunity from the two competing theories was evidenced by the fact that the *UNCSI*, a representation of states' efforts to make an agreement on sovereign immunity, has not been widely accepted as it is not in force, and was only ratified by a handful countries.[516] Finally, the Treaty and Law Bureau considered that the "persistent objector" doctrine is irrelevant to China's absolute immunity position since the

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[511] Gong, *A Comparative Study of State Immunity*, *supra* note 352 at 339; Huang Jin et al., "国家及其财产管辖豁免的几个悬而未决的问题" [Huang et al., The Unsettled Issues of Jurisdictional Immunities of States and Their Property] (2011) 4 中国法学 (China Legal Science) 140 at 150 arguing that "restrictive immunity has become an international trend, but it has not become an established rule of customary international law" [Huang et al.]; He Zhipeng, "主权豁免的中国立场" [The Chinese Position on Sovereign Immunity] (2015) 33:3 Tribune of Political Science and Law (政法论坛) 64 at 76, arguing that "it is debatable that restrictive immunity has become customary law" [He, The Chinese Position]; Ye, "On China's Contemporary Choice of State Immunity", *supra* note 495 at 38, arguing that "restrictive immunity has not become universally accepted rule of international law"; Jia Bingbing (贾兵兵), 国际公法：和平时期的解释与适用 [Public International Law: Its Interpretation and Application in Time of Peace], (Beijing: Tsinghua University Press, 2015) 236 [Jia, *Public International Law*]; Jia affirms this view in the second edition of his treatises, see Jia Bingbing (贾兵兵), 国际公法：和平时期的解释与适用（第二版）[Public International Law: Its Interpretation and Application in Time of Peace, 2nd ed.], (Beijing: Tsinghua University Press, 2022) 292 [Jia, *Public International Law* 2nd ed.].

[512] Xue Hanqin, *Chinese Contemporary Perspectives on International Law* (2011) 355 Recueil des cours 41,102: "So far there has not been enough evidence to prove that by State practice and *opinio juris,* this customary international law rule [of absolute immunity] has changed." [Xue, *Chinese Contemporary Perspectives*]

[513] Treaty and Law Bureau, *supra* note 388 at 366.

[514] Treaty and Law Bureau, *ibid*.

[515] Sun, "Study on the Applicable Law Issue in State Immunity", *supra* note 394 at 32.

[516] Treaty and Law Bureau, *supra* note 388 at 366; see also Sun, *ibid* at 6-10, arguing that the *UNCSI* has no customary law status, thus not binding on China.

concept of persistent objector itself in international law is unsettled and China's stance has nevertheless been consistent on claiming absolute immunity.[517] The Treaty and Law Bureau implicitly suggested that China is a persistent objector to restrictive immunity in any event.[518]

4.2.1 Whether China is a "persistent objector" to restrictive immunity

Under international law, once a rule crystalizes as customary international law, it is binding not only on states that participated in its practice but all members of the international community.[519] One exception to this rule is the "persistent objector." Some scholars have expressed concerns regarding the coherence and consistency in application of this doctrine, citing weak judicial recognition and limited state practice support.[520] Nevertheless, an influential scholarly view is that as long as a state has objected consistently to the application of a rule of law while it was in the process of becoming such a rule, it could continue to "opt out" of the application of the rule even after that rule had acquired the status of customary international law.[521]

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[517] Treaty and Law Bureau, *ibid* at 366-367. In the *Jackson v. China* case, China expressly argued that as restrictive immunity may be a developing rule of customary international law, restrictive immunity did not constrain states that disagree with it, such as China. See *Jackson v. China*, *supra* note 354 at 1494. *Cf* Ding, *supra* note 123 at 1023, Ding argues that China cannot claim itself as a persistent objector to the customary law of restrictive immunity as a result of its signature of the *UNCSI*.

[518] Treaty and Law Bureau, *ibid* at 367. Some scholars and Judge Xue also take the view that it is within China's sovereign right and to its interests to subscribe to absolute immunity. See Sun, "Study on the Applicable Law Issue in State Immunity", *supra* note 394 at 10; Ye, "On China's Contemporary Choice of State Immunity", *supra* note 495 at 48, arguing that "restrictive immunity" is not as good as China's current practice of "restrictive absolute immunity." *Cf* Qi, *supra* note 123 at 330-331 arguing that neither absolute nor restrictive immunity "has secured a status of customary international law", thus, it is up to each state to decide its immunity position, although he argued that China should embrace restrictive immunity.

[519] Maurice H. Mendelson, *The Formation of Customary International Law* (1998) 272 Recueil des cours 155, 227-44; Hugh Thirlway, *The Sources of International Law* 2nd ed (Oxford: Oxford University Press, 2019) 99 [Thirlway, *The Sources*].

[520] Patrick Dumberry, *The Formation and Identification of Rules of Customary International Law in International Investment Law*, *supra* note 210 at 393-96; Patrick Dumberry, "Incoherent and Ineffective: The Concept of Persistent Objector Revisited" (2010) 59 ICLQ 779; see also Mendelson, *The Formation of Customary International Law*, *supra* note 519 at 227-44 mentioning a few scholars, such as D'Amato, Stein, and Charney, who have criticized the rule of "persistent objector".

[521] Mendelson, *The Formation of Customary International Law*, *ibid*; Thirlway, *The Sources*, *supra* note 519 at 100; Brownlie, *supra* note 153 at 28; Jia, *Public International Law*, *supra* note 511 at 36-38; Shaw, *supra* note 55 at 67.

In this thesis, I do not delve into the issue of whether the "persistent objector" doctrine is a rule of customary international law or not. I premise my analysis of China's "persistent objector" status on the basis of the work of the ILC, which recognizes the notion of "persistent objector" in its *Draft Conclusions on the Identification of Customary International Law* ("*Draft Conclusions on CIL*") and concludes that even if such a doctrine does exist, China's actions do not meet its requirements.

In the *Draft Conclusions on CIL*, the ILC recognizes a persistent objector where the following requirements are met:

> 1. Where a [s]tate has objected to a rule of customary international law while that rule was in the process of formation, the rule is not opposable to the [s]tate concerned for so long as it maintains its objection.
>
> 2. The objection must be clearly expressed, made known to other [s]tates, and maintained persistently.
>
> 3. The present draft conclusion is without prejudice to any question concerning peremptory norms of general international law (*jus cogens*).[522]

According to the ILC's commentaries, Paragraphs 1 and 2 provide demanding requirements for a state to fulfill to qualify as a persistent objector: the objection has to be timely and clearly expressed, made known to others, and maintained persistently.[523] Two questions arise regarding China's persistent objector status in light of the ILC's draft conclusion. First, has China expressed its clear, known objection at the earliest possible moment while the customary

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[522] Part Six, Conclusion 15: Persistent Objector, *ILC's Draft Conclusions on the Identification of Customary International Law, with Commentaries*.
[523] *Ibid*, paras. 1, 5-9.

international law of restrictive immunity rule was in formation?[524] Secondly, if so, has it maintained it persistently since then?[525]

In Chapter 2, we saw that some Western states started to turn toward restrictive immunity beginning in the 1950s and have argued it was a customary international law requirement; and the US and the UK followed this trend through their executive and judicial branches.[526] The US and the UK enacted the first two domestic laws on restrictive immunity in the 1970s, which were followed by other states in the 1980s.[527] If the time from the 1950s to the 1970s was the beginning of a formation process for the customary international law of restrictive immunity, China was silent during this time.[528] As noted above, China only made clear its absolute immunity position in the US courts for the first time when it submitted an *Aide Memoire* in *Jackson v. China* in 1983 after it was sued.[529] In this very case, China argued that it was a persistent objector to restrictive immunity if restrictive immunity was a developing rule of customary international law.[530] It could be argued that China failed to assert its absolute immunity position on a timely basis when a number of states were turning to restrictive immunity.

In the event China claimed itself to be a persistent objector in a timely manner when it did so in *Jackson v. China* in 1983, China's subsequent actions taken in the *Morris* case in 2007

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[524] *Ibid*, para. 5: "the objection must have been made while the rule in question was in the process of formation. The timeliness of the objection is critical: the [s]tate must express its opposition before a given practice has crystallized into a rule of customary international law, and its position will be best assured if it did so at the earliest possible moment."
[525] *Ibid*, Conclusion 15: Persistent Objector, Commentary, para. 7.
[526] Chapter 2, Section 2.2.
[527] Chapter 2, Section 2.2.
[528] From the early 1950s to the late 1970s, China went through several appalling political movements, including the Cultural Revolution. During this time, law schools were closed, law professors, law students, and lawyers were purged and sent to rural areas for socialist re-education. It is not surprising that in such an environment, China paid no attention to international law. See Roberts, *Is International Law International?*, *supra* note 87 at 160.
[529] See *Jackson v. China*, *supra* note 354 at 1494, discussed in Section 2.1.1 above.
[530] *Ibid*.

discussed above arguably undermine its claim of a persistent objector. In the *Morris* case, China instructed its US counsel to defend the case explicitly pursuant to the US *FSIA*'s commercial exception to jurisdiction immunity, although it declared that it reserved the right to claim absolute immunity through diplomatic channels.[531]

Less clear evidence undermining China's persistent objector status were positions expressed by China during the drafting process and after the conclusion of the *UNCSI*.[532] In 2001, China submitted the following general comments to the Secretary-General of the United Nations on the ILC draft articles:

> 1. [] China considers that for the topic of jurisdictional immunities of [s]tates and their property, it is imperative that a uniform rule be adopted.
>
> 2. The Government of China also believes that an international rule adopted for such an important subject should be legally binding and operational, so that it could be applied directly by national courts in dealing with relevant cases…
>
> 3. The draft articles adopted by the International Law Commission on this topic after years of deliberation provide a solid basis for [s]tates to adopt a uniform norm of international law on this topic. [...] Efforts are still needed to resolve the remaining substantive questions, but discussion in the Sixth Committee during the past two sessions of the Assembly indicates that it is possible for [s]tates to achieve consensus on those questions.[533]

Although China did not explicitly say the drafting of the *UNCSI* is a codification of customary international law of restrictive immunity, it nevertheless supported the option of having a binding treaty as a final product on the matter. In this context, China went on to comment on the then draft article 2, paragraph 2 of the ILC draft articles on Jurisdictional Immunities of States and

[531] *Morris v. China*, *supra* note 357, discussed in Section 2.1.3 above. See Exhibit A, Memorandum of Law in Support of the People's Republic of China's Motion to Dismiss, in which China argued that it "reserve[d] its right to maintain its absolute defence of sovereign immunity." 2006 WL 1792563.
[532] Ding, *supra* note 123 at 1023, Ding argues that China cannot claim itself as a persistent objector to the customary law of restrictive immunity as a result of its signature of the *UNCSI.*
[533] *Report of the Secretary-General for Convention on Jurisdictional Immunities of States and Their Property*, UNGA fifty-sixth session, UN Doc A/56/291, 2, paras. 1-3 [Secretary General's Report (China)]

Their Property—the basis of the *UNCSI*—concerning what constitutes a commercial transaction. China declared that it endorses the commercial exception articulated therein:

> 5. Article 2 establishes the principle that if a [s]tate engages in a commercial transaction with a foreign natural and juridical person and, by virtue of the applicable rules of private international law, differences relating to the commercial transaction fall within the jurisdiction of a court of another [s]tate, the [s]tate cannot invoke immunity from that jurisdiction in a proceeding arising out of that commercial transaction. *The Government of China endorses this principle*[.][534] [emphasis added]

Regarding draft article 18 on execution immunity, China implicitly indicated its preference for an absolute immunity position regarding execution immunity,[535] but nevertheless agreed that a commercial exception could be made to it:

> 13. The Government of China also believes that whenever a court takes measures of constraint against the property of a defendant State, the following conditions must be fully satisfied: (a) the property is in the territory of the State of the forum; (b) *the property is specifically in use or intended for use by the State for other than government non-commercial purposes*; (c) the property has a connection with the claim which is the object of the proceeding, or with the agency or instrumentality against which the proceeding was directed.[536] [emphasis added]

China immediately expressed its dissatisfaction with some contents—such as the interpretation of commercial transaction—of the *UNCSI* shortly after the treaty was concluded:

> China has actively participated in the entire process of preparing the draft Convention in the expectation that it will take into account the concerns of all parties as far as possible. Frankly speaking, the concluded [d]raft Convention is not as satisfactory and perfect as we expected. For example, in determining a "commercial transaction", the provisions of the draft Convention do not give as much weight to the purpose of the transaction as those adopted by the International Law Commission.[537]

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[534] Secretary General's Report (China), *ibid* at 3, para. 5.
[535] Secretary General's Report (China), *ibid* at 3, para.10: "Moreover, compared to immunity from jurisdiction, immunity from measures of constraint is more akin to absolute immunity. Relevant international practice also supports such a view. Therefore, the Government of China considers that, in principle, the provision of article 18 of the 1991 draft articles is acceptable."
[536] Secretary General's Report (China), *ibid* at 3, para. 15.
[537] Permanent Mission of the People's Republic of China to the UN, "Statement by Mr. Guan Jian, Counsellor and Legal Advisor of the Chinese Mission to the United Nations, at the Sixth Committee of the 59th Session of the UN

These official statements show that China did not object to a commercial exception made to jurisdiction and execution immunities in the treaty, or as a matter of customary international law. Nevertheless, China still could argue that the *UNCSI* is a treaty that does not reflect customary international law, as the Treaty and Law Bureau has done by arguing that absolute and restrictive immunities are two competing and existing immunity rules for states to choose.

But China's signature of the *UNCSI* has important implications under customary international law.[538] Recall that in the *Oleykinov v. Russia* case discussed in Chapter 2, the ECtHR held that the *UNCSI* is applicable to Russia under customary international law since Russia has signed and not opposed the treaty even if Russia has not ratified the treaty:

> [T]he International Law Commission's 1991 Draft Articles, as now enshrined in the 2004 [*UNCSI*], apply under customary international law, even if the [s]tate in question has not ratified that convention, provided it has not opposed it either…For its part, Russia has not ratified it but has not opposed it: on the contrary, it signed the [*UNCSI*] on 1 December 2006.
>
> […]
>
> Consequently, it is possible to affirm that the provisions of the 1991 [ILC draft articles] and the 2004 [*UNCSI*] apply to [Russia], under customary international law.[539]

Applying the ECtHR's rationale to China, the *UNCSI*—a treaty that codifies customary international law—would be applicable to China as customary international law since China has signed it and has not opposed it such as by withdrawing its signature to the treaty. It does not matter that China has not ratified the treaty for the *UNCSI* to have binding customary international law effect on it.

General Assembly, on Item. 142: Convention on Jurisdictional Immunities of States and Their Property", available online: <http://un.china-mission.gov.cn/eng/lhghyywj/ldhy/previousga/ld59/200905/t20090506_8416868.htm>.

[538] Since China has signed the *UNCSI*, China's obligation for not defeating the "object and purpose" of the *UNCSI* as required by Article 18 of the *Vienna Convention on the Law of Treaties* will be discussed below on why China should embrace restrictive immunity.

[539] *Oleykinov v. Russia*, *supra* note 250 at paras. 66, 68. *Cf* Pavoni, "The Myth of the Customary Nature of the United Nations Convention on State Immunity: Does the End Justify the Means?" *supra* note 256 at 265.

The requirement set by the ILC for a state to become a persistent objector is that the state must have objected to the rule while it was becoming customary international law. China arguably was late in objecting to the formation of a customary international law on restrictive immunity when Western states' judicial practice and legislation have been steadily growing from the 1950s to the 1970s. In the event if China has made the objection in a timely manner, China has to comply with the requirement to object to the rule consistently to maintain its persistent objector status. Two of China's actions could defeat its consistent absolute immunity position. First, China signed the *UNCSI* on 14 September 2005. In light of the *Oleykinov v. Russia*, China's signature is an embrace of customary international law of restrictive immunity as codified in the *UNCSI* even it has not ratified the treaty.[540] Secondly, China instructed its counsel in US courts to argue that the commercial exception to jurisdictional immunity stipulated in the US *FSIA* was inapplicable in *Morris* in 2007. Notably, in its *Aide Memoire* to the US government, China also argued that this case did not fall under the commercial exception of the US *FSIA* because the underlying debt is political, not commercial, in nature.[541] In *Morris*, China failed to maintain a consistent absolute immunity position before US courts as it defended its case under the commercial exception of the US *FSIA*—the crux of restrictive immunity theory, even though it implicitly argued for an absolute immunity for itself in the same diplomatic note

[540] Jia, *Public International Law* 2nd ed., *supra* note 511 at 41 arguing that when a state has participated in treaty negotiations, it will be difficult for that state to argue for a persistent objector status by rejecting the content of that draft treaty it has negotiated.
[541] PRC, *Aide Memoire* in *Morris*, in Treaty and Law Bureau, *supra* note 388 at 410: "This case does not fall into 'commercial activity' exception [of the US *FSIA*], and it does not have 'direct effect' to the US."

to the US from the outset.[542] To conclude, China is not a persistent objector to the customary international law rule of restrictive immunity.[543]

4.2.2 Embracing restrictive immunity is a preferable choice for China

Regardless of whether China is a persistent objector in international law to restrictive immunity, I take the view that absolute immunity position is not a desirable immunity policy for China.

Embracing restrictive immunity, compared to its stringent absolute immunity position, is a potentially preferable choice for China for a few reasons.[544] First, it allows China to conform to the *UNCSI*'s object and purpose in light of Article 18 of the *Vienna Convention on the Law of Treaties* ("*VCLT*").[545] Pursuant to Article 18 of the *VCLT*—which China has ratified in 1997—China has an obligation "not to defeat the object and purpose of a treaty prior to its entry into force"[546] after signing the *UNCSI*. Richard Gardiner suggests that a treaty's "object and purpose" can be found in its preamble and substantive provisions.[547] Paragraph 3 of the *UNCSI*'s Preamble as well as its substantive provisions such as the commercial transactions exception found in

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[542] PRC, *Aide Memoire* in *Morris*, *ibid* at 408: China reiterated its absolute immunity position by stating that "without a state's waiver to immunity, a foreign domestic court cannot exercise jurisdiction over that state in litigation."

[543] See Ding, *supra* note 123 at 1023, Ding argues that China cannot claim itself as a persistent objector to the customary law of restrictive immunity by signing the *UNCSI*.

[544] Other Chinese scholars also expressed their preference to restrictive immunity for China. See Qi, *supra* note 123 at 327-30; He, "The Chinese Position", *supra* note 511 at 77-79; Huang et al., *supra* note 511 at 143-44; 150-51; Cai, *The Rise of China*, *supra* note 141 at 258: "China's decision to sign the [UNCSI], indicates that it has begun to refine its traditional conception of sovereignty. In times, Chinese courts will begin to hear disputes between Chinese nationals and foreign states." For the benefit of ratifying the *UNCSI*, see Richard Gardiner, "UN Convention on State Immunity: Form and Function" (2006) 55 ICLQ 407, 409 arguing that the *UNCSI* demands ratification for its aims (enhance the rule of law, legal certainty, codify and develop international law, and harmonize the practice in the area) to be achieved. [Gardiner, UN Convention on State Immunity]

[545] *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

[546] Article 18(a) of the *VCLT* provides that "A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when … it has signed the treaty … subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty[.]" See Roberts, *Is International Law International?*, *supra* note 87 at 161 documenting an anonymous Chinese scholar who takes the view that China's absolute immunity position is inconsistent with the *UNCSI*, which China has signed. But this scholar chooses to be silent on this matter for not wanting to be appeared as critical to the government; *cf* Ye, "On China's Contemporary Choice on State Immunity", *supra* note 495 at 50 arguing that to conform to international practice of restrictive immunity should not be a reason for China to change its absolute immunity position.

[547] Richard Gardiner, *Treaty Interpretation* 2nd ed. (Oxford: Oxford University Press, 2015) 216-18.

Article 10 indicate that the object and purpose of the *UNCSI* is to codify and develop the law and harmonize the practice of restrictive immunity.[548] Curtis A. Bradley notes that although it is unclear to what extent Article 18 of the *VCLT* has acquired customary international law status and there is almost no state practice to clarify the content of signing obligation,[549] states do have "a narrow obligation not to negate the reasons for having the treaty in the first place."[550] We can argue that the reasons for states to have negotiated the *UNCSI* in the first place include their intention to harmonize, codify and develop the law of sovereign immunity, which is restrictive as reflected in the treaty. Arguing for an absolute immunity position after signing the *UNCSI* thus puts China in possible violation of these objects and purposes in light of Article 18 of the *VCLT*. Moreover, China's position expressed in *FG Hemisphere 1* that it is not bound by the *UNCSI* because it has not ratified the treaty also contradicts China's desire to have a binding treaty in the drafting process of the *UNCSI*. Recall that "China considers that for the topic of jurisdictional immunities of [s]tates and their property, it is imperative that a uniform rule be adopted" and "China also believes that an international rule adopted for such an important subject should be legally binding and operational, so that it could be applied directly by national courts in dealing with relevant cases".[551] Hence, embracing restrictive immunity allows China to comply with customary international law of restrictive immunity as expressed in the *UNCSI*, its treaty obligation under the *UNCSI* for being a signatory, and its own statements made in the drafting process of the *UNCSI*.

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[548] Paragraph 3, Preamble and Article 10, *UNCSI*.
[549] Curtis A. Bradley, "Treaty Signature", in Duncan B. Hollis ed., *The Oxford Guide to Treaties* (Oxford: Oxford University Press, 2012) 208, 213 [Bradley, Treaty Signature].
[550] Bradley, "Treaty Signature", *ibid* at 217.
[551] Secretary General's Report (China), *supra* note 533 at paras. 1-3.

Secondly, embracing restrictive immunity allows China to contribute to the development of this area of law through its state practice. To this end, the NPC could enact a domestic law for the *UNCSI* to be enforceable in Chinese courts as it has done for other treaties to which China has acceded.[552] As noted above, China, among other issues, is unsatisfied by the lesser role of the purpose of the transaction in distinguishing commercial from non-commercial transaction in the *UNCSI*. Since the purpose test can play a role if the forum state decides so per Article 2(2) of the *UNCSI*, China could specify to what extent the purpose could play a role in defining the character of a commercial or a non-commercial transaction in China's enabling law of the *UNCSI* after its ratification.[553]

Further, ratifying the *UNCSI* provides China a treaty basis for its argument regarding its position on Chinese SOEs' status and immunity in international law. As the definition of state agency/instrumentality in the *UNCSI* generally excludes SOEs unless an SOE has proven that it is entitled to exercise and has actually exercised sovereign authority, it aligns with China's view that Chinese SOEs do not have immunity, except where China has authorized the SOEs to perform sovereign functions.[554] In fact, in 2012, China specifically referred to the *UNCSI* in its trade remedy cases with the US when it argued that Chinese SOEs are not "public bodies" for the purposes the *Subsidies and Countervailing Measures Agreement* ("*SCM Agreement*"). China argued that Chinese SOEs are commercial actors as defined by the *UNCSI*, thus, they were not

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[552] Xue Hanqin & Jin Qian, "International Treaties in the Chinese Domestic Legal System" (2009) 8 Chinese J Intl L 299, 306: "The transformation process [of international treaties] normally takes place in one of the two ways: (i) transforming treaty obligations by special legislation; or (ii) incorporating treaty obligations into domestic law through amendments to existing laws." Jia, *Public International Law*, *supra* note 498 at 209-10.
[553] See Gardiner, "UN Convention on State Immunity", *supra* note 544 at 408: "flexibility has already been built in to the [UNCSI]'s text: see, for example, Article 2(2) providing for account to be taken of the practice of the state of the forum if purpose is considered relevant there to determining the non-commercial character of a contract or transaction."
[554] See Liang, "Sovereign Immunity of State-owned Enterprises", *supra* note 494 at 92.

vested with or exercising governmental authority/functions as "public bodies" as defined by the *SCM Agreement*.[555] Ratifying the *UNCSI* would support China's arguments regarding its SOEs on the international plane in the trade and other contexts.[556]

Moreover, ratifying and enforcing the *UNCSI* in the Chinese courts would give individuals and corporations—Chinese and foreign—judicial means to sue foreign states and their emanations for their commercial defaults if claimants satisfied other jurisdictional requirements in Chinese courts.[557] It could facilitate private parties—foreign and Chinese ones—to enforce their commercial and treaty awards against sovereign states' commercial assets in China under the *New York* and *ICSID Conventions*, knowing that states cannot claim absolute immunity over their commercial assets in Chinese courts.[558] As Cai Congyan has argued, embracing restrictive immunity aligns with China's vow to "protect the legal rights and interests

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[555] United States Department of Commerce International Trade Administration, "Final Determination: Section 129 Proceedings Pursuant to the WTO Appellate Body's Findings in WTO DS 379 Regarding the Antidumping and Countervailing Duty Investigations of Certain New Pneumatic Off-the-Road Tires from the People's Republic of China", 31 July 2012, available online: <https://enforcement.trade.gov/download/section129/prc-otr-tires-Final-129-Determination-20120830.pdf>, at 10-11: "Comment 4: The Relevance of the Doctrine of Sovereign Immunity to a Public Bodies Inquiry". [US Department of Commerce International Trade Administration, Final Determination] China made the same argument in three other submissions, see footnote 21 of this document. See also Zhao Haile (赵海乐), "论国有企业'政府权力'认定的同源异流：国家责任、国家豁免与与反补贴实践比较研究" [Same Origin, Different Outcome? A Comparative Study of SOEs' 'Government Authority' under the Laws of State Responsibility, State Immunity, and Subsidies and Countervailing Duties] (2015) 2 Renmin University Law Review (人大法律评论) 348, 360-61 [Zhao, Same Origin, Different Outcome].

[556] Although as Chapter 4 will show, China's relationship to Chinese SOEs cannot be fully captured by their ownership relationship, a political economy analysis is required to expose Chinese SOEs' dual identity shaped by the Chinese political economy.

[557] Liang, "Sovereign Immunity of State-owned Enterprises", *supra* note 494 at 92; *cf* Ye, "On China's Contemporary Choice on State Immunity", *supra* note 495 at 46-47 arguing that embracing restrictive immunity only has a symbolic meaning in protecting private parties' rights. It is better to resolve disputes in foreign domestic courts where investments were made, by diplomatic protection, or through arbitration, other than having Chinese entities suing foreign states in Chinese courts.

[558] On the interaction between the execution of ICSID awards and sovereign immunity, see Andrea K Bjorklund, Lukas Vanhonnaeker & Jean-Michel Marcoux, "State Immunity as a Defense to Resist the Enforcement of ICSID Awards" (2020) 35: 3 ICSID Review 506.

of Chinese nationals and corporations abroad in accordance with law”[559] by allowing Chinese citizens and entities to have recourse to Chinese courts for their disputes with foreign states. It does make commercial sense. China’s desire to protect Chinese overseas interests today is similar to that of the United States when the United States enacted the US *FSIA* in 1976, the legislative history of which shows that the US *FSIA* was enacted to provide a means for American citizens and foreign nationals to sue foreign states and their emanations in the US courts when disputes arose between them.[560] By using legal means, instead of diplomatic means, relations between Chinese individuals and foreign states probably could be depoliticized.[561] The commercial benefit is that China’s and Chinese SOEs’ commercial counterparts will be confident that their commercial transactions will be judicially enforceable in Chinese courts if any disputes arise therein. This partly aligns with China’s position expressed in *China National Coal* that Chinese SOEs should not attract Crown immunity in Chinese courts.

Legally and practically, it is time for China to rethink its absolute immunity position. Arguing for absolute immunity in foreign domestic courts where restrictive immunity is upheld does not serve China’s legal and international relations interests since it is the forum law that will governs China’s immunity in the forum courts.[562] Adopting restrictive immunity does not erode China’s sovereignty nor strip away China’s defense rights in foreign domestic courts. Instead, it provides China a solid customary international law basis and treaty basis (after it ratifies the *UNCSI*) to defend itself on the basis that sovereign state actions and properties are immune under

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[559] Although he was referring to China here, Cai actually was citing the Communist Party of China Central Committee’s *Decision on Major Issues Concerning Promoting the Rule of Law*, Part VII.7. See Cai, *The Rise of China and International Law*, *supra* note 131 at 255; see also Qi, *supra* note 113 at 327.
[560] *Jurisdiction of United States Courts in Suits Against Foreign States*, HR Rep No 94-1487, *supra* note 198 at 6-8.
[561] Cai, *The Rise of China and International Law*, *supra* note 141 at 255.
[562] Brownlie, *supra* note 153 at 490; *Dicey, Morris & Collins on The Conflict of Laws*, *supra* note 221 at 337.

international law. The consequential commercial benefit for China's restrictive immunity position taken in foreign domestic courts is that China's and Chinese SOEs' business counterparts are ensured that their disputes will be addressed in foreign domestic courts as commercial disputes without China's or Chinese SOEs' sovereign immunity claims. This will possibly encourage foreign entities to contract with China and Chinese SOEs in the commercial context.

However, opening Chinese courts' doors to Chinese and foreign private parties to bring claims against foreign states and arguing in favour of restrictive immunity in foreign domestic courts for China would be contrary to China's version of respecting sovereignty and sovereign equality,[563] and its preference to conduct bilateral negotiations on states' rights and obligations in exchange for their economic cooperation.[564] This approach of China—as demonstrated in the *FG Hemisphere 1* case discussed above[565]—explains China resistance toward restrictive immunity despite its signature of the *UNCSI*.[566] Additionally, the Chinese government—supported by its

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[563] See "中华人民共和国和俄罗斯联邦关于促进国际法的声明" [The Declaration of the People's Republic of China and the Russian Federation on the Promotion of International Law], reproduced in Treaty and Law Bureau, *supra* note 388 at 18, para. 2: "The People's Republic of China and the Russian Federation share the view that the principle of sovereign equality is crucial for the stability of international relations"; para. 8: "The People's Republic of China and the Russian Federation assert that international obligations regarding immunity of states, their property and officials must be honored by states at all times. Violations of these obligations are not in conformity with the principle of sovereign equality of states and may contribute to the escalation of tensions." For comments on these points, see Treaty and Law Bureau, *supra* note 388 at 4-5; 13-15; see also Ye, "On China's Contemporary Choice on State Immunity", *supra* note 495 at 45: "adopting restrictive immunity is contrary to China's diplomatic policy of 'protecting China's sovereignty and dignity'"; Roberts, *Is International Law International?*, *supra* note 87 at 290.

[564] China's preference to bilateral negotiation is exemplified by its BRI, on this point, see Wang, "China's Approach to the Belt and Road Initiative", *supra* note 69 at 39: "[m]any of the BRI-related mechanisms are usually bilateral ones[.]" See also Shaffer & Gao, "A New Chinese Economic Order", *supra* note 71 at 615: "Each economic corridor in the BRI adopts a different package, subject to local negotiations and adaptation to different geoeconomic conditions, but the modalities are similar."

[565] See Section 2.2 above.

[566] Just out of speculation, China may have signed the *UNCSI* for a gesture given its invested participation in the treaty's drafting process, or it may have regret about its signature after the *FG Hemisphere 1* case. Instead of withdrawing from the treaty, it simply chooses not to ratify the treaty without the reputation cost. *Cf* Cai, *The Rise of China*, *supra* note 141 at 254 arguing that signing the *UNCSI* "signaling that [China] would shift its policy from absolute immunity to [restrictive] immunity"; at 258 arguing that "China's decision to sign the [*UNCSI*] indicates

diplomats and scholars[567]—tries to use absolute immunity to "avoid the exercise of jurisdiction in foreign courts",[568] even though it is really the forum laws that determine China's liability and immunity in the forum court.

Compared to the suggestions above, China's consistent domestic practice is that "Chinese courts have neither exercised jurisdiction over acts of foreign states nor enforced any decisions involving foreign states."[569] Instead of utilizing Chinese courts, Chinese Ministry of Commerce recommended that Chinese companies to use bilateral investment treaties and treaty arbitrations to resolve their disputes with foreign states in June 2021.[570] This suggests there is still a long way to go for China to change its heart over absolute immunity.[571]

5. Conclusion

This Chapter examined China's position that states have absolute immunity, but the scope of the state excludes SOEs for immunity purposes. China's contemporary rationale for states' absolute

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that it has begun to refine its traditional concept of sovereignty. In time, Chinese courts will begin to hear disputes between Chinese nationals and foreign states."

[567] Sun, "Study on the Applicable Law Issue in State Immunity", *supra* note 394.; Li, "The Illegality Analysis of the Ferocious Claims Related to the United States COVID-19 Breakout", *supra* note 396; Gong & Ding, "A Study on China's Reference to Sovereign Immunity as a Defence in the United States Litigation", *supra* note 404, the entire article discusses strategies China could employ in the pandemic litigation brought by individuals and US State governments against China in the US courts; Ye, "Restrictive Absolute Immunity", *supra* note 352.

[568] Cai, *The Rise of China and International Law*, *supra* note 141 at 254, citing the example of the *Jackson v. China* case discussed in Section 2.1.1 above; Ye, "On China's Contemporary Choice on State Immunity", *supra* note 495 at 51-53.

[569] Cai, *The Rise of China and International Law*, *supra* note 141 at 254; Xue, *Chinese Contemporary Perspectives*, *supra* note 512 at 100-01; Nollkaemper, *National Courts*, *supra* note 99 at 13 & 55, noting that Chinese courts play no to little role in applying international law and securing China's compliance to international law; *cf* Zhang Lianju & Yuan Qian (张连举 & 袁茜), "国家豁免的转向—以一带一路工程商业争端为视角" [The Transition of State Immunity: A Perspective of Belt and Road Construction Commercial Disputes] (2019) 36:3 Journal of Political Science and Law (政法学刊) 33, 33-34, 38, reporting a few Chinese enterprises (including SOEs) sued foreign state agencies such as Ethiopian Road Authority, Polish Road Authority, Syrian Bureau of Power Transmission, Georgia Department of Justice in Chinese courts. In the case against Polish Road Authority, the Polish Road Authority challenged the Chinese court's jurisdiction, the Chinese court denied this challenge without addressing whether the Polish Road Authority is a state agency that can enjoy sovereign immunity in Chinese courts or not.

[570] Ministry of Commerce of the People's Republic of China, News Release, "企业利用投资协定参考指南" [Guidance for the Enterprises' Usage of Investment Agreements], (28 June 2021), online: Ministry of Commerce of the People's Republic of China <http://www.mofcom.gov.cn/article/zwgk/zcfb/202106/20210603162407.shtml>.

[571] A change is likely to be coming in light of China's *Foreign State Immunity Law (Draft)* published for consultation on 30 December 2022. See Chapter 1, Section 1.1 and the Postscript.

immunity position is based on its desire to avoid confrontations in courts but leaves conflicts to diplomatic resolution, protecting China's overseas interests and properties (arguably including its interests in SOEs in some cases), reciprocity between states, and China's economic, trade and foreign policies (as in the *FG Hemisphere 1* case). Although China argues that the scope of the state for both sovereign and Crown immunity purposes excludes SOEs, Chinese SOEs could become part of the state for sovereign and Crown immunity purposes if they were instructed by the state to undertake certain actions—whether the nature of these actions is sovereign or commercial as indicated in China's position in *China National Coal*. The issue of state instruction will be further explored in the next Chapter.

China's absolute immunity position, however, is inconsistent with the customary international law of restrictive immunity as shown in Chapter 2. Further, China is not a persistent objector in light of the rules provided by the ILC. Regardless, I recommend that China adopt a restrictive immunity position as it is a preferable choice given that it allows China to practice restrictive immunity and protect its international commerce, legal, and foreign relations interests.

In the next Chapter, I will unpack China's rationale for its argument that Chinese SOEs are not immune under international law: Chinese SOEs have separate juridical status and, in general, only pursue commercial interests under Chinese laws. My analysis in Chapter 4 will show that China's argument does not account for Chinese SOEs' dual identity—which encompasses a commercial and a sovereign dimension—as defined by the Chinese political economy. Other elements such as China's SOE categorization, the state's and the CPC's influences over and instructions to SOEs, and SOEs' implementation of the state's sovereign functions and purposes are also important factors in defining Chinese SOEs' status and functions in the Chinese political economy.

Chapter 4: Chinese SOEs' Status and Functions in the Chinese Political Economy

1. Introduction

Chapter 3 showed that China takes an absolute immunity position on states' immunity but views Chinese SOEs as not part of the state for immunity purposes. Regarding Chinese SOEs' immunity, China argues that they should not be seen as part of the state for immunity purposes, *ratione personae*, because Chinese SOEs are independent juridical entities and undertake commercial activities pursuant to Chinese laws—not at the behest of any political entity. In this Chapter, I unpack China's argument within the Chinese political economy and assess the following questions: (1) do Chinese SOEs have independent corporate assets from the state? (2) Do Chinese SOEs have business autonomy, even though the state has direct, and full or majority ownership in them? (3) How do we categorize SOEs' status and functions in the Chinese political economy? Based on my answers to these questions, I will elaborate upon my thesis argument in Section 3.2: that our understanding of Chinese SOEs' "state" status and immunity under the law of sovereign immunity should be examined in light of their status and functions defined by the Chinese political economy.

My analysis of the Chinese SOEs' status and functions in the Chinese political economy is inspired by the work of two political scientists Yongnian Zheng and Yanjie Huang, who argue that the Chinese political economy should be seen as one of "economic statism," in which the state domination of the market is the rule.[572] Based on this assessment, the two authors vividly characterize the Chinese political economy as one of "market in the state." As suggested by the name of this analytical framework, they argue that in China, "in principle there is a boundary

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[572] Zheng & Huang, *Market in State*, *supra* note 61 at 19.

between the state and the market, the market is not autonomous and its function is sometimes not guaranteed by laws and political cultures; it must live within the boundaries set by the state in order to survive."[573] Despite the rule of state domination of the market, the two authors acknowledged that the market is not a helpless actor and it actively interacts with China's "economic statism."[574]

In applying this "state in the market" analytical framework to my assessment of the Chinese SOEs' status and functions in the Chinese political economy, I find that Chinese SOEs have a dual identity. Chinese SOEs' dual identity has two facets. First, China has indicated that Chinese SOEs should be categorized as commercial SOEs or public welfare SOEs in the most recent Chinese SOE reform. China further divides commercial SOEs into "commercial SOEs that are in competitive businesses" and "commercial SOEs that are in industries and sectors that have an impact on national security and lifeline of national economy." Secondly, both kinds of commercial Chinese SOEs have a dual identity. Commercial SOEs' commercial identity is reflected in their pursuit of commercial interests. Their sovereign identity is reflected in their pursuit or execution of the state's sovereign purposes and policies. But since the state announced that SOEs should be categorized into three different groups, the SASAC—which was mandated to do so—has not finished the task. So we do not know what SOEs are to be considered commercial SOEs or public welfare SOEs. This creates a problem for our assessment of Chinese SOEs' immunity under international law, particularly regarding public welfare SOEs, which are apparently intended to carry out public functions.

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[573] Zheng & Huang, *ibid* at 32.
[574] *Ibid* at 127.

Because the policy prescription on what SOEs are public welfare SOEs and commercial SOEs is missing, the status and functions of 97 SOEs owned by central SASAC will have to be determined by their primary business and the purpose thereof, including whether they are in a national security sector identified by the CPC, and whether they have exercised sovereign authority on a case-by-case basis. In this thesis, an SOE will be treated as a "commercial SOE that is in industries and sectors that have an impact on national security and lifeline of national economy" if its primary business falls into a national security sector as identified by the CPC. Based on China's recent treaty practice with the European Union, if an SOE provides poverty relief or natural disasters relief as instructed by the state, it could fall into the category of "public welfare SOE." In other situations, an SOE is likely to fall into the category of "commercial SOEs that are in competitive businesses." In principle, we can say that all central SASAC-owned Chinese SOEs have a dual identity and the degree to which SOEs are engaged in carrying out public function or exercising sovereign authority may vary from one SOE to another SOE (*e.g.*, one is a commercial SOE and one is a public welfare SOE) and from one transaction or activity to another (*e.g.*, one transaction is importing mineral resources for a general industrial usage purpose and one transaction is importing semi-conductors for a military usage purpose).

In this Chapter, my analytical focus will be "commercial SOEs" given the scope of "public welfare SOEs" is unclear and it is primarily "commercial SOEs" that are engaging in international trade and investment. Further, because not all public functions or sovereign authority can be addressed exhaustively, in this and subsequent Chapters, I choose three central SASAC-owned SOEs as subjects of my case studies. The first two to be studied are China Railway and Sinohydro—which were involved in the *FG Hemisphere 1* case discussed in

Chapter 3.[575] This case study shows that while commercial Chinese SOEs exhibit a strong dual identity, its sovereign identity as reflected in the foreign policy purposes they pursue is not determinative of their sovereign immunity in international law. The third SOE to be studied is China Electronics Technology Group Corporation ("China Electronics")—the No. 28 Institute of which was added to an *Entity List for Supporting People's Republic of China's Military Modernization, Violations of Human Rights, and Risk of Division* ("*Entity List*") by the US Department of Commerce on 15 December 2022.[576] This *Entity List* prohibits China Electronics's No. 28 Institute from importing certain technologies from the US for their possible military usage. This case study, compared with the previous one, shows an SOE's inherent sovereign purpose—such as a military usage purpose—attached to their commercial transactions can possibly have an impact on its sovereign immunity in international law.

This Chapter is divided as follows. After a brief introduction to the Chinese political and legal systems established by the Chinese Constitution, Section 2 describes the evolution of China's political economy from a state-command economy to a socialist market economy designed by the CPC within the "market in the state" analytical framework. It shows the paramount role of the CPC and the state in harnessing the Chinese economy, including the state's top-down design of the Chinese SOE system. This portrait of the Chinese political economy

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[575] China's BRI indicates that commercial SOEs that carry out operations with a quasi-sovereign or sovereign mandate is becoming more and more prevalent and explicit. See Wang, "China's Approach to the BRI", *supra* note 69; Lew et al., "China's Belt and Road", *supra* note 69.
[576] Bureau of Industry and Security, US Department of Commerce, Press Release, "Commerce Adds 36 to Entity List for Supporting the People's Republic of China's Military Modernization, Violations of Human Rights, and Risk of Diversion", online: <https://www.bis.doc.gov/index.php/documents/about-bis/newsroom/press-releases/3195-bis-press-release-clean-2022-12-14/file>. For the entity list, see Bureau of Industry and Security, US Department of Commerce, "Additions and Revisions to the Entity List and Conforming Removal from the Unverified List", 15 CFR Part 744, < https://public-inspection.federalregister.gov/2022-27151.pdf?utm_source=federalregister.gov&utm_medium=email&utm_campaign=pi+subscription+mailing+list> [US Department of Commerce, *Entity List*].

provides the contextual framework to understand Chinese SOEs' status and functions, as will be examined in Section 3. Section 3 elaborates upon the argument that commercial Chinese SOEs have a dual identity as evidenced by my case studies of China Railway, Sinohydro, and China Electronics. My case studies show that the sovereign identity of a Chinese SOE—even if it was only reflected in its purposes—can possibly make an impact on that SOE's sovereign immunity claim in international law. Section 4 concludes that commercial Chinese SOEs' dual identity is inconsistent with China's argument that Chinese SOEs are only commercial actors in pursuit of commercial interests. This dual identity should be taken into account when we assess Chinese SOEs' "state" status and immunity under the *UNCSI*, the US *FSIA*, and the UK *SIA* in analysis in subsequent Chapters.

2. The Chinese Political Economy: Market in the State

2.1 A brief introduction to China's political and legal systems

China is a socialist country,[577] in which all the power belongs to the people.[578] The Chinese people exercise their power through the NPC and local people's congresses.[579] Article 3 of the 1982 Constitution provides that the Chinese executive, judicial and prosecutorial organs at the central and local levels were created by the NPC and local people's congresses.[580] Article 57 provides that the NPC is the highest authority in China and it functions through its Standing Committee—SCNPC.[581] The NPC exercises legislative power during its sessions in a given year

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[577] Article 1, 中华人民共和国宪法（1982 年） [Constitution of the People's Republic of China (1982)], promulgated on 4 December 1982 and came into effect on 4 December 1982, (China) [1982 Constitution]. The 1982 Constitution has been amended several times and the most recent one was implemented in 2018.
[578] Article 2, 1982 Constitution.
[579] *Ibid*.
[580] Article 3, 1982 Constitution.
[581] Article 57, 1982 Constitution.

and the SCNPC exercises legislative power in the NPC's absence when it is not in session.[582] Article 85 provides that the State Council, *i.e.*, the Central People's Government, is the highest executive organ in China.[583] The State Council has the power to promulgate administrative measures, regulations, decisions and orders based on the Constitution and legislation made by the NPC and SCNPC.[584] The organs of the State Council—such as the SASAC—also have the power to issue administrative orders, instructions and regulations within their executive power pursuant to Chinese laws and regulations, decisions and orders promulgated by the State Council.[585] Article 123 of the 1982 Constitution provides that the People's Courts are the judicial organs of China.[586] The judicial system is composed of the Supreme People's Court ("SPC"), local courts and special courts such as military courts.[587] The SPC is the highest judicial organ in China,[588] and the Chinese courts exercise independent adjudication power pursuant to the Constitution.[589]

While the Chinese Constitution sets boundaries between the executive, legislative and the judicial organs, the influence of the ruling CPC in all three organs is prevalent yet often overlooked.[590] The CPC's paramount role in Chinese society was constitutionalized in a 2018 Constitutional amendment which defined the CPC as "the essential characteristic of the Chinese

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[582] Article 58, 1982 Constitution, see also Paragraph 3 of Article 67, which stipulates the SCNPC's legislative power when the NPC is not in session.
[583] Article 85, 1982 Constitution.
[584] Article 89, 1982 Constitution.
[585] Article 90, 1982 Constitution.
[586] Article 123, 1982 Constitution.
[587] Article 124, 1982 Constitution.
[588] Article 127, 1982 Constitution.
[589] Article 126, 1982 Constitution.
[590] See Preamble, "中华人民共和国宪法"（1954 年） [Constitution of the People's Republic of China (1954)], promulgated on 20 September 1954, (China) [1954 Constitution]; Preamble, 1982 Constitution; Preamble, 中华人民共和国宪法修正案（2004 年）[2004 Amendment of the 1982 Constitution], promulgated on 14 March 2004; Zheng Yongnian & Lance L.P. Gore, "Introduction" in Zheng Yongnian & Lance L.P. Gore, eds, *The Chinese Communist Party in Action: Consolidating Party Rule* (Abingdon: Routledge, 2020) at 1-2 [Zheng & Gore, *The Chinese Communist Party in Action*].

socialism."[591] Generally, the CPC designs China's political and economic agenda in a "top-down" policy-making manner through the executive branch.[592] It also controls the judicial and legislative organs of the state by controlling key personnel appointments.[593] The CPC's role as the designer of China's policies recently has come to the attention of China scholars,[594] including scholars of Chinese SOEs and Chinese corporate law.[595] In their view, CPC instruments and guiding documents are an indispensable part of the Chinese political economy for understanding the relevant Chinese legal regimes. Noting this important role of the CPC, I will use CPC instruments and documents as part of my evidence to illustrate the Chinese "market in the state" political economy in Section 2.2 and use them to assist my analysis of the Chinese SOEs' status and functions in the Chinese political economy in Section 3.

2.2 The SOE regime in the Chinese political economy

2.2.1 The rationale of the Chinese political economy: state ownership represents the people's ownership

China operates a state-driven, public-dominant economic system in which the state represents the Chinese people's exercise of their public ownership pursuant to the Chinese Constitution.[596] Based on the constitutional principle that all power belongs to the Chinese people, the Chinese state adopted a command economy in the early 1950s.[597] Article 6 of the 1954 Constitution

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[591] Article 36, 中华人民共和国宪法修正案（2018 年）[2018 Amendment of the 1982 Constitution], promulgated on 11 March 2018.

[592] Xiangchu Zhang, "Company Law Reform in China" in John Garrik, ed, *Law and Policy for China's Market Socialism* (New York: Routledge, 2012) at 40 [Zhang, "Company Law Reform in China"]

[593] Wang Jiang Yu, "The Party in the Legislature and the Judiciary" in Zheng & Gore, *The Chinese Communist Party in Action*, *supra* note 590 at 181.

[594] Zheng Yongnian, *The Chinese Communist Party as Organizational Emperor: Culture, Reproduction and Transformation* (Abingdon: Routledge, 2010); Zheng & Gore, *The Chinese Communist Party in Action*, *ibid*; Gao & Zhou, *Between Market Economy and State Capitalism*, *supra* note 46.

[595] Lin & Milhaupt, "We are the (National) Champions", *supra* note 41; Benjamin L. Liebman & Curtis J. Milhaupt, eds, *Regulating the Visible Hand: The Institutional Implications of Chinese State Capitalism* (Oxford: Oxford University Press 2016).

[596] Luyao Che, *China's State Directed-Economy and the International Order* (Singapore: Springer, 2019).

[597] Article 2, 1954 Constitution.

explained the rationale of the command economy: a state-operated economy based on the state's planning is the basis of the "socialist economy of the whole people's ownership."[598] As the massive population cannot exercise their public ownership in reality, Article 5 authorized the state to exercise the public ownership on behalf of the people by equating the two: "the state's ownership is the whole people's ownership."[599] As the state's ownership or the people's ownership is the essence of the socialist economy and they are interchangeable, the 1954 Constitution prioritized the development of the state-operated economy by state planning and underscored it as "the leading force of the material basis for the state's socialist reform."[600]

After 30 years of practicing a command economy, the Chinese economy was on the verge of collapse at the end of the 1970s.[601] To tackle the issue, the CPC announced that it would open up ("gai ge kai fang") and implement economic reform in the framework of the command economy in December 1978.[602] In this period, the central government promulgated executive directives and gave SOEs limited operational and managerial autonomy such as reducing administrative intervention, providing tax incentives and permitting the SOEs to keep a certain amount of profits.[603] Later, China codified the complementary role of the market to the command economy in the 1982 Constitution.[604] To breathe life into the market, the state continued to

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[598] Article 6, 1954 Constitution; Also see Articles 9 of the 1982 Constitution, which provides that all natural resources "belong to the state, that is, belong to the People"; see also Qi Tonghui, "重新理解国家所有：类型、依据及其绩效风险" [Reconceptualize the State's Ownership: Categories, Rationale and Performance Risks] (2019) 2 ECUPL Journal (华东政法大学学报) 88.
[599] Article 5, the 1954 Constitution.
[600] Article 6, the 1954 Constitution. Also see Article 5, 中华人民共和国宪法修正案（1993 年）[1993 Amendment of the 1982 Constitution], promulgated on 29 March 1993, which provides similar content: "State-owned economy, which is a socialist economy based on the whole people's ownership, is the leading force of the national economy. The state ensures the reinforcement and development of the state-owned economy."
[601] Huang Qunhui, "How 'New SOEs' Come of Age: Four Decades of China's SOE Reform" (2018) 13:1 China Economist 58 at 60.
[602] *Ibid*.
[603] Sheng Hong & Zhao Nong, *China's State-owned Enterprises: Nature, Performance and Reform* (Singapore: World Scientific Publishing, 2013) at 24-26 [Sheng & Zhao, *China's SOEs*].
[604] Articles 15 and 16, the 1982 Constitution.

expand SOEs' managerial autonomy in pilot programs. For example, China enacted a law in 1988 that primarily regulates SOEs—the *Law of Industrial Enterprises Owned by the People* ("*Law of Industrial Enterprises*").[605] Constrained by China's command economic system at the time, SOEs were not independent juridical entities but state organs pursuant to the *Law of Industrial Enterprises*.[606] As organs, SOEs implement the state's plans and instructions and do not have independent personality, assets or ability to bear independent responsibilities. Rather, the state bore unlimited responsibility for them as state organs.[607]

The breakthrough of China's economic reform came in 1992 and 1993, during which time the CPC announced its adoption of a "socialist market economy."[608] China constitutionalized the socialist market economy as its basic economic form in a 1993 constitutional amendment.[609] Notably, the terminology of the "guo ying jing ji" ("state-operated economy") used in the command economic system was changed to "guo you jing ji" ("state-owned economy") in this constitutional amendment. As a result, "guo ying qi ye" ("state-operated enterprises") was changed to "guo you qi ye" ("state-owned enterprises").[610] The

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[605] 中华人民共和国全民所有制工业企业法 [Law of the People's Republic of China of Industrial Enterprises Owned by the Whole People], promulgated on 13 April 1988 and amended on 27 August 2009 [*Law of Industrial Enterprises*].

[606] Article 3 of the *Law of Industrial Enterprises* provided that "the fundamental mission of the enterprises [owned by the whole people] is to develop commodity production, create fortune, increase value, satisfy the society's increasing material and culture needs based on the state's planning and market need", *ibid*. See also Jiangyu Wang, *Company Law in China: Regulation of Business Organizations in a Socialist Market Economy* (Cheltenham: Edward Elgar, 2014) at 70 [Wang, *Company Law in China*].

[607] Wang Xinhong (王新红), "国有企业所有权与经营权相分离理论批判" (A Critique of the Theory of Separating Ownership and Management in SOEs) (2019) 8 Politics and Law (政治与法律) 138 at 145 [Wang, A Critique of the Theory of Separation].

[608] Jiang Zeming's Report at the 14th Party Congress (江泽民在中国共产党第十四次全国代表大会上的报告), "加快改革开放和现代化建设步伐，夺取有中国特色社会主义事业的更大胜利" [Speed up the pace of opening up and modernization, achieve a bigger victory in establishing socialism with Chinese characteristics], 12 October 1992, [Jiang's Report at the 14th Party Congress]; see also Han Dayuan, "中国宪法上'社会主义市场经济'的规范结构" (Normative Structure of 'Socialist Market Economy' in the Constitution of China) (2019) 2 China Legal Science (中国法学) 5 at 14-15 [Han, Normative Structure of 'Socialist Market Economy'].

[609] Article 7, Amendment of the People's Republic of China's Constitution (1993).

[610] Article 5, Amendment of the People's Republic of China's Constitution (1993).

changes signal that the state decided to eliminate day-to-day intervention in SOEs, but it remained as a corporate owner of SOEs.[611] In this new regime, SOEs would become independent juridical entities instead of being state organs under the 1988 *Law of Industrial Enterprises*.[612]

In the CPC's view, the socialist market economy is a market economy qualified by China's socialist system. When the CPC first proposed the concept in 1992, it explained that the socialist market economy is a market economy with a Chinese characteristic that is different from capitalist market economies.[613] In the socialist system, the dominant role of the state's (people's) public ownership would not change. The emphasis on the socialist character of the new Chinese market economy affirmed the priorities of public ownership and justified the state's regulation and its supervision of Chinese SOEs. In the socialist market economy, the Chinese state would not only be the owner of the state-owned assets in SOEs but also the regulator of the economy on behalf of the Chinese people.[614]

In this economic framework transition, one theoretical and legal challenge that the CPC needed to address was how to balance the roles of state regulation (legacy of the socialist command economy) and the market (characteristic of the capitalist market economy). Building on China's early experiences in complementing state planning with a market economy in the 1980s, the CPC concluded that China could utilize the market in a manner similar to capitalist countries, despite its socialist system. Thus, "the market should play the basic role in allocating the resources under the macroeconomic guidance and regulation of the socialist state."[615]

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[611] Han, "Normative Structure of 'Socialist Market Economy'", *supra* note 608 at 20-21.
[612] Wang, *Company Law in China*, *supra* note 606 at 70.
[613] Jiang's Report at the 14th Party Congress, *supra* note 608.
[614] *Ibid*.
[615] *Ibid*.

To implement its economic reform agenda under the socialist market economy, the CPC issued the *Decision on Matters Concerning the Creation of a Socialist Market Economic System* ("CPC 1993 *Decision*").[616] The CPC 1993 *Decision* ambitiously set out the blueprint for a "modern enterprise system [for SOEs]", with the following characteristics:

> explicitly delimit ownership between the state and the SOE;
>
> define rights and responsibilities of SOEs;
>
> separate government administration from SOE management; and
>
> inject management incentives and accountabilities to SOEs.[617]

The CPC was looking to balance the state ownership as a matter of constitutional principle on the one hand and the corporate independence of the SOE in the sense of Western corporate law on the other hand. In the transition from a command economy to a socialist market economy and going forward in the development of this socialist market economy, China would safeguard public ownership and the paramount role of the SOE sector based on its Constitution and its "market in the state" political economy.[618]

Ian Bremmer uses the CPC's definition of the Chinese socialist market economy to define "Chinese state capitalism"—a term he used to describe the Chinese economy.[619] In Bremmer's view, state capitalism is "a strategic long-term policy choice."[620] It sees the market as

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[616] 中共中央关于建立社会主义市场经济体制若干问题的决定 [The Decision of the Central Committee of the Communist Party of China on Matters Concerning the Creation of a Socialist Market Economic System], promulgated on 11 November 1993 ["CPC 1993 Decision"].
[617] CPC 1993 Decision, *ibid*.
[618] Zheng and Huang, *Market in the State*, *supra* note 61 at 7.
[619] Ian Bremmer, *The End of the Free Market: Who Wins the War Between States and Corporations?* (London: Penguin Books Ltd, 2010) 129 quoting former Chinese Premier Wen Jiabao: "The complete formulation of our economic policy is to give full play to the basic role of market forces in allocating resources under the macroeconomic guidance and regulation of the government. We have one important piece of experience of the past thirty years, that is to ensure that both the visible hand and invisible hand are given full play in regulating the market forces." [Bremmer, *The End of the Free Market*].
[620] Bremmer, *The End of the Free Market*, *ibid* at 51-52.

a tool to pursue national interests or those of the ruling elites; it also uses the market to extend its political and economic leverage both domestically and internationally.[621] Whether one labels China's economy as socialist market economy or state capitalism, the Chinese economy provides a unique economic model that no others resemble.[622] While not engaging in the definitional debate over the Chinese economic model, I will use the Chinese official term "socialist market economy" in this thesis to refer to the Chinese economy. At the same time, literature on Chinese state capitalism[623] will be consulted to the extent that it assists our understanding of the Chinese political economy. Despite their terminological differences, both concepts of the socialist economy and state capitalism show that the market's invisible hand is subject to the state's visible guidance.[624] In Zheng and Huang's words, it is a "market in the state" political economy.[625] This emphasis on the market operating within the boundary of the state's regulation forms the core of the Chinese political economy. To implement this "market in the state" framework in the SOE regime, the CPC revived the "separation theory", *i.e.*, separating the

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[621] Bremmer, *ibid* at 52; see also Gao & Zhou, *Between Market Economy and State Capitalism*, *supra* note 46 at 4-5 referring "state capitalism" to "the magnitude of government involvement in business activities depending on 'state ownership stake in or significant influence over' the business sector."
[622] Mark Wu, "The 'China, Inc.'", *supra* note 40 at 264-266; Zheng and Huang, *Market in the State*, *supra* note 61 at 20 argue that the Chinese economy is a "*sui generis* market economy"; Li Chen describes the Chinese political economy as a "central state corporatism" with the CPC at the center, see Li Chen, "China's Central State Corporatism: the Party and the Governance of Centrally Controlled Business" in Zheng & Gore, *The Chinese Communist Party*, *supra* note 590 at 225.
[623] See Andrew Szamosszegi and Cole Kyle, "An Analysis of the State-Owned Enterprises and State Capitalism in China" (2011) U.S. China Economic and Security Review Commission, available online: <https://www.uscc.gov/research/analysis-state-owned-enterprises-and-state-capitalism-china>; Du, "China's State Capitalism and World Trade Law", *supra* note 40; Benjamin L. Liebman & Curtis J. Milhaupt, eds, *Regulating the Visible Hand: The Institutional Implications of Chinese State Capitalism* (Oxford: Oxford University Press, 2016) [Liebman & Milhaupt, *Regulating the Visible Hand*]; Curtis J. Milhaupt, "The Governance Ecology of China's State-Owned Enterprises" in Jeffrey N. Gordon & Wolf-Georg Rigne, eds, *The Oxford Handbook of Corporate Law and Governance* (Oxford: Oxford University Press, 2018) at 757 [Milhaupt, The Governance Ecology of China's SOEs]; Zheng and Huang, *Market in the State*, *supra* note 61; Chen, "China's Central State Corporatism", *supra* note 621 at 225; Gao & Zhou, *Between Market Economy and State Capitalism*, *supra* note 46.
[624] Liebman & Milhaupt, *Regulating the Visible Hand*, *ibid*.
[625] Zheng and Huang, *Market in the State*, *supra* note 61; see also Gao & Zhou, *Between Market Economy and State Capitalism*, *supra* note 46.

state's ownership rights from the SOE's managerial and operational rights it created in the 1980s. As Subsection 2.2.2 will show, the separation theory allowed the SOEs to become corporations while enabling the state to maintain business, regulatory, and sometimes political control over SOEs. However, it created problems for SOEs' operations and doubts about SOEs' corporate independence regarding its assets as will be discussed in Section 3.

2.2.2 Separation theory: ensuring the state's (people's) ownership in SOEs

Separation theory traces its origin to China's first economic reform in early 1980s when China still operated a command economy. During this time, SOEs did not have independent juridical status but were organs or departments of the state.[626] By separating SOEs' operation from the closest part of the state and giving them some measure of independence, the government was able to incentivize SOEs' performance while the state maintained the ownership right of the state-owned assets in SOEs, all without requiring changes to the ownership structure.[627] Instead of imposing day-to-day regulation over SOEs, the state allows SOEs' managers to enjoy some operational and managerial autonomy, such as entering into business contracts and determining production output, the performance of which would eventually be judged by the state.[628] Separation theory "ultimately created a system where [the state] owners and [the SOE] managers shared the risks and interests" in SOEs.[629]

To justify the separation theory in the socialist system, the CPC proposed that "the whole people's ownership and the state organ's direct operation of the enterprises" are not the same.[630] In the CPC's view, "[under] the theory of Marxism and the practice of the socialism, the

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[626] See discussion in above Section 2.2.1 of this Chapter.
[627] Sheng & Zhao, *China's SOEs*, *supra* note 603 at 13-14.
[628] Sheng & Zhao, *ibid* at 10-13.
[629] Sheng & Zhao, *ibid* at 14.
[630] Decision of the Central Committee of the Communist Party of China on Economic Structural Reform (1), ["CPC 1984 *Decision*"]; see Wang, "A Critique of the Theory of Separation", *supra* note 607 at 139.

ownership right [of the state] and the managerial right [of the SOEs] can be separated."[631] The separation theory became law in the *General Principles of Civil Law* enacted in 1986 [which ceased to be law following China's enactment of *Civil Code* in 2020].[632] Article 82 of the *General Principles of Civil Law* provided that "[e]nterprises owned by the whole people enjoy the operational right over the assets authorized by the state and are protected by law."[633] Article 2 of 1988 *Law of Industrial Enterprises* provided a more detailed account of the separation theory:

> The assets of an enterprise are owned by the whole people, the state authorizes the enterprise rights of operation and management based on the principle of separating ownership right from the operational and managerial rights. The enterprise has the right to possess, utilize and dispose of the assets based on the state's authorization.[634]

Separation theory in the command economy era provided the theoretical justification for the CPC to test its reform agenda and deviate from the planned economy under the Marxist and Soviet socialist model that it was practicing at the time.[635] It ensured the state's ownership and control over state-owned assets as required by the socialist system, while enabling SOEs—which were organs of state—to participate in the market to certain degrees before the CPC started the socialist market economy reform in 1993.[636]

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[631] CPC 1984 Decision, *ibid*.

[632] 中华人民共和国民法通则 [The General Principles of Civil Law of the People's Republic of China], promulgated in 12 April 1986 and ceased to be effective on 31 December 2020. It was replaced by the 中华人民共和国民法典 [Civil Code of People's Republic of China], which was promulgated on 28 May 2020, effective on 1 January 2021.

[633] Article 2, *The General Principles of Civil Law of the People's Republic of China*.

[634] Article 2, *Law of Industrial Enterprises*.

[635] Wang, "A Critique of the Theory of Separation", *supra* note 607 at 139.

[636] *Cf* Deng Feng (邓峰), "中国公司理论的演变和制度变革方向" [The Evolution and Reform Direction of the Chinese Company Law Theory] (2022) 16: 2 Tsinghua University Law Journal (清华法学) 42, 47 arguing that SOEs' legal personality provided by the *General Principles of Civil Law* enabled them—compared to Soviet SOEs—to only bear limited corporate liability as corporate juridical entities (not state organs) in the commercial context since the late 1980s [Deng, The Evolution].

In embracing a socialist market economy, the CPC injected new meaning to the separation theory when it began to corporatize SOEs. Deng Feng found that instead of privatizing SOEs, China was more attracted to the Singaporean model represented by its holding company Temasek, without constitutional reform or changes to the state's full or majority ownership in SOEs.[637] Temasek is a wholly owned by the Singapore Ministry of Finance,[638] and manages the portfolio of SOEs under the control of Ministry of Finance and focuses on their financial performance.[639] The Temasek Review 2020 indicates that although it is wholly owned by the Singaporean Ministry of Finance, Temasek is the owner of its assets, not the Ministry of Finance.[640] China tweaked the Singaporean model by incorporating separation theory in the 1993 *Corporate Law*.[641] Part of Article 4 provided that "the ownership of the state-owned assets in state-owned enterprises belong to the state."[642] This language of the state's continued ownership of the state-owned assets in SOEs creates questions that have both theoretical and practical consequences: Do Chinese SOEs have independent corporate assets in the Chinese corporate law regime or does the state maintain the ownership of the state-owned assets it has invested in SOEs and in assets subsequently acquired by SOEs with those assets?[643]

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[637] Deng Feng, "Indigenous Evolution of SOE Regulation" in Liebman & Milhaupt (ed) *Regulating the Visible Hand*, *supra* note 623 at 5 [Deng, Indigenous Evolution]; Deng Feng, "The Transformation of China's SOEs: Approaching a System of Crown Property" (2015) 3 Peking U LJ 1 [Deng, The Transformation of China's SOEs].
[638] Temasek Review 2021, News Release, "A Trusted Steward", online: Temasek <https://www.temasekreview.com.sg/steward/a-trusted-steward.html>.
[639] Deng, "Indigenous Evolution of SOE Regulation", *supra* note 637 at 5.
[640] Temasek, "A Trusted Steward" in Temasek Review 2021, *supra* not 638.
[641] Wang, "A Critique of the Theory of Separation", *supra* note 607 at 145.
[642] Article 4, 中华人民共和国公司法（1993 年）[Corporate Law of the People's Republic of China (1993)], promulgated on 29 December 1993 and came into effect on 1 July 1994 [1993 *Corporate Law*].
[643] See Deng, "The Transformation of China's SOEs", *supra* note 637 at 4, arguing that the SOE's assets have ceased to be the people's collective property but the Chinese state's "crown property"; see also Deng Feng (邓峰), "国有资产的定性及其转让对价" [The Nature of the State-owned Assets and Its Transfer-Pricing] (2006) 1 Legal Science (法律科学) 113.

Separation theory assumes that the ownership of the state-owned assets, which originally were invested by the state, belong to the state, not the SOEs.[644] Wang Xinhong argues that in theory, SOEs did not have independent corporate assets under the 1993 *Corporate Law* because the state maintains the ownership of the state-owned assets it invested in SOEs.[645] In Wang's view, separation theory contradicts the "modern enterprise system [for SOEs]" proposed by the CPC for the socialist market economy.[646] Wang contends that this theoretical framework fits in China's planned economy in which SOEs were organs of state and they did not have independent legal personality or assets.[647] However, he argues that the separation theory cannot stand under the "modern enterprise system [for SOEs]" in the socialist market economy because once the state has made financial contributions to the SOEs in various forms, the state no longer has ownership right over these contributions, but rather the rights of an investor.[648] It is the SOE that has the ownership of the corporate SOE assets.[649] The SOE's corporate ownership right is not from the state's authorization but its inherent right as a corporation.[650] Further, separation theory implies that the operational and managerial rights of the SOEs come from the authorization of

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[644] Wang, "A Critique of the Theory of Separation", *supra* note 607 at 145.
[645] Wang, *ibid*; see also Deng, "The Transformation of China's SOEs", *supra* note 637 at 60 arguing that the SOE's property is the Chinese state's "Crown property." China's notion of state-owned assets at this time was similar to that of the "segregated state assets" proposed by the Soviet states during the International Law Commission's drafting work on the *UNCSI*. See Chapter 5, Section 3.1.2. Under this concept, an SOE, as a legal entity, possessed a segregated part of state property that it can control and dispose of.
[646] Wang, *ibid*.
[647] *Ibid*.
[648] *Ibid*.
[649] *Ibid* at 146.
[650] *Ibid*. But to be clear, SOEs' ownership of corporate assets as a corporate law concept is different from the notion of people's ownership of the entire Chinese public economy in the Chinese socialist system, which is a Constitutional concept that has strong political and ideological taste. See earlier discussion of the people's ownership = the state's public ownership as a manifestation of the Chinese socialist economy in the Chinese Constitution in Section 2.2.1 above. See also David S Caudill, "Breaking Out of the Capitalist Paradigm: The Significance of Ideology in Determining the Sovereign Immunity of Soviet and Eastern-Bloc Commercial Entities" (1980) 2:2 Hous J Intl L 425, discussing the issue in the Soviet context [Caudill, The Significance of Ideology in Sovereign Immunity of Soviet Commercial Entities].

the state, which leaves the state's interference in the SOEs' operation unavoidable.[651] Wang concludes that separation theory should be abolished because it prevents SOEs from becoming truly independent juridical entities.[652]

On the contrary, Sheng Hong and Zhao Nong argue that the content of the separation theory has evolved in the socialist market economy. In their view, SOEs have independent juridical personality and corporate assets that are separate from the state in the newly established corporate law regime because there is a distinction between state ownership and enterprise ownership.[653] Sheng and Zhao's proposition justifies the separation theory from a practical perspective in the Chinese socialist regime: SOEs are assumed to have independent assets as a result of their independent juridical status. However, as Wang has rightly pointed out, the separation theory creates a number of questions such as to what extent the SOE has independent business operation and what are the nature and purposes of the usage of their assets.[654] These are also very important questions in examining Chinese SOEs' sovereign immunity in international law as will be shown below and Chapters 5-7.

As we can see, in China's "market in the state" political economy, the emphasis of the state's ownership and the importance of the SOE regime in China derives from the Chinese constitutional principle that the state's ownership is the people's ownership—one of the foundations of the Chinese socialist system. To adapt this constitutional concept to the socialist market economy, the CPC and the Chinese state initiated economic reforms, including SOE reforms in 1993, 2003 and 2013 respectively. Having briefly introduced the Chinese political

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[651] *Ibid* at 149; see also Deng, "The Evolution", *supra* note 636 at 49.
[652] *Ibid*.
[653] Sheng & Zhao, *China's SOEs*, *supra* note 603 at 269-270; see also Deng, "The Evolution", *supra* note 636 at 47.
[654] Wang, "A Critique of the Theory of Separation", *supra* note 607 at 148.

economy up until 1993, which forms the backdrop of the Chinese SOE reforms, I will now turn to examine the legal relationship between the state and SOEs from 1993 and onward in Section 3. Section 3 is divided into two periods of time by the year of 2013 since the current SOE reform started in that year:

- In Section 3.1 below, I will assess how to characterize Chinese SOEs' status and functions in the Chinese political economy since China's embrace of the socialist market economy under Chinese laws from 1993 to 2012, particularly after 2003 when SASAC was established. Chinese SOEs' development in this period of time formed the basis of the SOE regime we see today.
- In Section 3.2 below, I will assess how to characterize Chinese SOEs' status and functions in the Chinese political economy under the current SOE reform initiated by the CPC in 2013.

The assessment of the relationship between China and Chinese SOEs—particularly their relationship after the 2013 SOE reform—provides the key evidence for my argument that Chinese SOEs have a dual identity that is created by the Chinese "market in the state" political economy.

3. Examining Chinese SOEs' status and functions in the Chinese political economy

Since China's creation of the socialist market economy in 1993, Chinese SOEs have undergone two major reforms in 1993 and 2003. China's SOE regime is currently in a third round of reform, which started in 2013.[655] This section divides the examination of the relationship between the state

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[655] Barry Naughton, "The Current Wave of State Enterprise Reform in China: A Preliminary Appraisal" (2017) 12 Asian Economic Policy Review 282 [Naughton, The Current Wave]; Weihuan Zhou, Henry Gao & Xue Bai, "Building a Market Economy through WTO-Inspired Reform of State-owned Enterprises in China" (2019) 68 ICLQ 977 at 980-981 [Zhou, Gao & Bai, Building a Market Economy]; Gao & Zhou, *Between Market Economy and State Capitalism*, *supra* note 46 at 13, Chapter 2, "The Evolution of China's Reforms of State-Owned Enterprises (1978–2020)".

and the SOE up to 2013 when the current reform started. Sections 3.1 examines the evolution of the relationship between China and Chinese SOEs under the 1993 *Corporate Law*, the overhauled 2005 *Corporate Law* and the 2009 *State-owned Assets Law*. It shows how Chinese SOEs' status and functions have evolved to that of a corporate form with distinctive features. It assesses three sub-issues: (1) Do Chinese SOEs have independent corporate assets? (2) Do Chinese SOEs have operation and management autonomy from the state? (3) How do we categorize Chinese SOEs' status and function in the Chinese political economy? The understanding of the Chinese SOE regime up to the year of 2013 provides us with an important context in understanding the current SOE regime which started in 2013. Section 3.2 answers this third question by undertaking a full analysis of how Chinese SOEs have a dual identity defined by the Chinese political economy since China's categorization of Chinese SOEs in 2013.

3.1 Assessing Chinese SOEs' status and functions from 1993 to 2012

3.1.1 The SOE legal regime from 1993 to 2012: The establishment of a central state ownership management system

Zheng and Huang correctly hold the view that Chinese SOEs in the Chinese "market in the state" political economy were not, are not and will never have the same features and status as private companies.[656] Chinese SOEs' privileges are products of the Chinese political economy in which SOEs are designed differently from Chinese private companies. For example, Article 4 of the 1993 *Corporate Law* makes clear this difference by providing that:

> The corporate shareholders as investors shall enjoy investors' rights to enjoy capital gains, make major decisions and choose managers in accordance with their investment shares. A company has full property rights derived from shareholders' investments and exercises civil rights and undertakes civil

[656] Zheng & Huang, *Market in the State*, *supra* note 61 at 380.

> responsibilities according to law. *The ownership of the state assets in a company belongs to the state*.[657] [emphasis added]

Pursuant to Article 4, a private company "has full property rights derived from shareholders' investments", thus it has independent corporate assets. However, the ownership of the undefined "state assets" belong to the state.[658] As noted above, an unsettled issue among Chinese scholars is whether Chinese SOEs have independent corporate assets or not pursuant to Article 4 of the 1993 *Corporate Law*.[659] The uncertain scope of state assets in SOEs will be examined in subsection 3.1.2.a below as it will be crucial to assess SOEs' immunity from execution regarding their assets in subsequent Chapters.

In the first decade following the promulgation of the 1993 *Corporate Law*, the ownership rights of SOEs were dispersed among different state ministries.[660] In the 16th CPC Congress held in November 2002, the CPC decided to change the situation of "multiple-owners" of SOE assets. The CPC announced that the state would establish a single state-owned assets supervision and management system to replace the various governmental departments who acted as investors on behalf of the state at the central and local governmental levels (except for financial institutions).[661] Following the CPC's direction, the State Council established the SASAC in 2003, followed by establishment of SASACs by local governments.[662] These SASACs were owned by provincial and municipal governments, acting as shareholders of a number of SOEs by full or majority ownership. Local SASACs were not branches of the central SASAC. Rather,

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[657] Article 4, 1993 *Corporate Law* [emphasis added]; see also Deng, "The Evolution", *supra* note 607 at 48.
[658] Deng, "The Evolution", *supra* note 636 at 47-49.
[659] See Section 2.2 of this Chapter.
[660] Milhaupt, "The Governance Ecology of China's SOEs", *supra* note 623 at 771.
[661] 江泽民同志在党的十六大上所作报告全文 [Build a Well-off Society in an All-Around Way, Create a New Situation in Building Socialism with Chinese Characteristic] 18 November 2002.
[662] Zhou, Gao & Bai, "Building a Market Economy", *supra* note 655 at 980-81.

local SASACs were under the direct leadership of the governments that established them.[663] In other words, local SASACs were accountable to their corresponding provincial or municipal governments, not the central SASAC. Because of this parallel relationship between central and local SASACs, as indicated in Chapter 1, I chose to limit the Chinese SOEs that will be examined in this thesis to central SASAC-owned SOEs because (1) the result of this research would still be applicable to SOEs that are directly owned by local SASACs established by Chinese provincial and municipal governments and (2) the definition of the state under the customary law of immunity includes central (or federal), provincial (or state), and municipal governments.[664]

Shortly after the establishment of the central SASAC, the State Council issued the *Interim Measures on the Supervision and Administration of State-owned Assets of Enterprises* ("2003 *Interim Measures*") in May 2003,[665] which codified the role of the central and local SASACs. The 2003 *Interim Measures* laid out the central and local SASACs' mandates both as state shareholders and regulators.[666] The establishment of the SASAC at the central and provincial levels united the previous dispersed SOE governance regime by combining different state departments into one state organ, like Temasek in Singapore.[667] It then just took over a

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[663] See Chapter 1, Section 3.2.
[664] See Chapter 1, Section 3.2. This choice allows me to look at rules that are applicable to these SOEs—not their subsidiaries—and makes the research more focused and efficient.
[665] 企业国有资产监督管理暂行条例 [Interim Measures on the Supervision and Administration of State-owned Assets of Enterprises], promulgated on 15 May 2003 and came into effect on 13 May 2003 [2003 *Interim Measures*].
[666] Article 5 of the 2003 *Interim Measures* indicates that the State Council represents the state to act shareholder in SOEs and this role was delegated to SASAC. Article 13 allows SASAC to supervise the maintenance and increase of the value of the state-owned assets by auditing and promulgate regulations and directives on state-owned assets' supervision and management. See 2003 *Interim Measures*, *ibid*.
[667] But China's transplantation of Temasek model was incomplete as there are financial SOEs directly owned by the Chinese Ministry of Finance, not SASAC, see Deng, "The Transformation of China's SOEs", *supra* note 637.

decade for the central SASAC to become "the world's largest controlling shareholder."[668] As noted by some scholars, some central-SASAC controlled SOEs have constantly appeared on the Fortune 500 list since the SASAC's formation.[669] The following subsection's analysis focuses on the 97 central SASAC-owned SOEs' status and functions under the 2003 *Interim Measures*, 2005 *Corporate Law* and 2009 *State-Assets Law* from the time the SASAC was established to the ongoing SOE reform started in 2013.[670]

3.1.2 Assessing the legal relationship between the Chinese state and central SOEs in the SASAC regime from 2003 to 2012

a. Do SOEs owned by the SASAC have independent corporate assets?

Like Article 4 of the 1993 *Corporate Law*,[671] Article 4 of the 2003 *Interim Measures* ensures the state's continued ownership of the assets of SOEs based on the separation theory: "[t]he state-owned assets in enterprises belong to the state."[672] Article 3 of the 2003 *Interim Measures* provides a broad definition of the state-owned assets in an enterprise:

> The state-owned assets in the enterprises defined by this law are all forms of investments and the equities arising therefrom made by the state in the SOEs, and other equites that are owned by the state as prescribed by laws.[673]

Reflecting the separation theory, Articles 3 and 4 of the 2003 *Interim Measures* allow the state to assert ownership over its original investment—shares—in SOEs, in addition to the profits from

[668] Wu, "The 'China, Inc.'", *supra* note 40 at 271; Milhaupt, "The Governance Ecology of China's SOEs", *supra* note 623 at 758; Zhou, Gao & Bai, "Building a Market Economy", *supra* note 655 at 981.
[669] Lin & Milhaupt, "We are the National Champions", *supra* note 41 at 699; Milhaupt finds that more than two-thirds of Chinese Companies on the Fortune 500 list are SOEs, see Milhaupt, "The Governance Ecology of China's SOEs", *ibid* at 758. Fortune 500 rankings are based on revenues.
[670] As noted in Chapter 1, Section 4.2, the assessment of the relationship between the state and central SASAC-owned SOEs applies to Chinese provincial and municipal governments and SOEs owned directly by their corresponding SASACs. Their "tiered" subsidiaries are excluded from the scope of the thesis.
[671] Section 3.1.1 of this Chapter.
[672] Article 4, 2003 *Interim Measures* [author's translation].
[673] Article 3, 2003 *Interim Measures* [author's translation]. The original text in Chinese is complex to grasp and it reads as: "本条例所称企业国有资产，是指国家对企业各种形式的投资和投资所形成的权益，以及依法认定为国家所有的其他权益."

the SOE's operation, plus anything else that belongs to the state as indicated by law. Read together, the two Articles establish that SOEs would not have independent corporate assets since everything in the SOEs belong to the state. SOEs were state agents/instruments in a corporate form to operate state-owned assets on behalf of the state with the purposes of increasing their value. To this effect, Article 11 provides that SOEs shall maintain and increase the value of the state-owned assets that they "operate and manage."[674] It means that at this time, SOEs did not have separate assets from the state under the 2003 *Interim Measures*. This situation, however, shortly changed after the enactment of the 2005 *Corporate Law*[675] and 2009 *State-owned Assets Law*.[676]

China overhauled its 1993 *Corporate Law* in 2005. Significantly, the 2005 *Corporate Law* deleted the words "[t]he ownership of the state assets in a company belongs to the state" found in Article 4 of the 1993 *Corporate Law* or Article 4 of the *Interim Measures*. This deletion paved the way for the 2009 *State-owned Assets Law* to clarify the relationship of the state and the SOE as a state investor and an enterprise through the concept of state-owned assets. Article 2 of the 2009 *State-owned Assets Law* defines state-owned assets as corporate rights and interests derived from the state's original investments in the SOEs:

> The state-owned assets of enterprises prescribed by this law (hereinafter referred to as state-owned assets), are rights and interests derived from all forms of investments made by the state in the SOEs.[677]

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[674] Article 11, 2003 *Interim Measures* provides that SOEs "shall endeavor to maximize economic efficiency and have the responsibility to maintain and increase the value of state-owned assets that they operate and manage."

[675] 中华人民共和国公司法 [Corporate Law of the People's Republic of China (2005)], amended at the 18th Meeting of the Standing Committee of the Tenth National People's Congress on 27 October 2005 and came into effect on 1 January 2006 [2005 *Corporate Law*].

[676] 中华人民共和国企业国有资产法 [State-owned Assets Law of the People's Republic of China], promulgated on 28 October 2008 and came into effect on 1 May 2009 [2009 *State-owned Assets Law*].

[677] Article 2, 2009 *State-owned Assets Law* [author's translation]. The original Chinese text reads as: "本法所称国有企业资产（以下称国有资产），是指国家对企业各种形式的出资所形成的权益."

Article 3 adds that the State Council will exercise the ownership right of state-owned assets on behalf of the Chinese people:

> The state-owned assets belong to the state, *i.e.*, owned by the whole people, the State Council represents the state [for the purposes of] exercising the ownership right of the state-owned assets.[678]

Article 16 clarifies that SOEs have independent corporate assets as juridical persons that are distinct from the state's original investments:

> The enterprises invested by the state enjoy the rights of possession, utilization, benefit and disposition over its movable properties, immovable properties and other properties according to laws, administrative regulations and the corporation's articles of association.[679]

Articles 2, 3 and 16 for the first time clarified the ownership relationship between the state's original investment in SOEs, SOEs' corporate assets and their profits in the Chinese legal system. As such, Wang Xinhong argues that by defining the concept of the state-owned assets within the SOEs, the 2009 *State-owned Assets Law* has enabled Chinese SOEs to become corporations with independent assets under the 2005 *Corporate Law*.[680] Wang's conclusion is correct. Since the overhaul of the 2005 *Corporate Law* and the enactment of the 2009 *State-owned Assets Law*, a boundary between the Chinese state (central SASAC) and central SASAC-owned SOEs was established—at least on paper—regarding the SOE's corporate assets: (1) SASAC-owned SOEs as corporations have independent corporate assets that are distinctive from the original investments from SASAC made on behalf of the state; (2) The State Council by way of SASAC has the right to reap agreed profits through SASAC as defined by the 2005 *Corporate Law* and the 2009 *State-owned Assets Law* as a state investor/owner.[681]

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[678] Article 3, 2009 *State-owned Assets Law*, *ibid* [author's translation].
[679] Article 16, 2009 *State-owned Assets Law*, [author's translation].
[680] Wang, "A Critique of the Theory of Separation", *supra* note 607 at 146-147.
[681] See Jiangyu Wang, "The Political Logic of Corporate Governance in China's State-Owned Enterprises" (2014) 47:3 Cornell ILJ 631, 653. [Wang, "The Political Logic"]; *cf* Deng, "The Transformation of China's SOEs", *supra*

b. Do SOEs owned by the SASAC have operational and managerial independence from the state?

Another often disputed question regarding the relationship between China and Chinese SOEs in different contexts is to what extent the latter has operational and managerial independence from the former. As I noted in Chapter 1, this is a debated issue in different contexts of international law, particularly in trade law.[682] Whether Chinese SOEs are governmental entities or not in international law cannot be determined simply by the ownership relationship between the Chinese state and Chinese SOEs. A multi-dimensional corporate governance analysis should be undertaken from the lens of the 2005 *Corporate Law*, the 2009 *State-owned Assets Law* in light of the Chinese "market in the state" political economy. As Milhaupt pointed out, the Chinese SOE corporate governance framework should be viewed in its own terms which are distinctive from the mainstream Western corporate governance theories.[683] In this *sui generis* corporate governance framework defined by the Chinese political economy,[684] I will examine the degrees of control the SASAC and the CPC have over SOEs (such as staffing decision-making, executive compensation and day-to-day business decision-making). In doing so, I will assess whether that degree of the state/CPC control deprives Chinese SOEs of daily operational and managerial independence from the state, and therefore whether these Chinese SOEs should be considered as part of the Chinese state.[685]

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note 637 at 60 arguing that the state-owned assets are no longer the whole people's assets but "Crown property"—a form of private property of the state in the SASAC model.

[682] Chapter 1, Section 1.

[683] Milhaupt, "The Governance Ecology", *supra* note 623 at 756-757; see also Zheng & Huang, *Market in State*, *supra* note 61 at 379-380.

[684] Zheng and Huang argue that China's market in state political economy is a "*sui generis* market economy." See Zheng & Huang, *Market in the State*, *ibid* at 20.

[685] For an insightful analysis of the political governance of Chinese SOEs, see Wang, "The Political Logic", *supra* note 681.

While the 2009 *State-owned Assets Law* formalized SASAC as the state shareholder of SOEs,[686] some scholars argue that it should be seen as an "ostensible shareholder" in the Chinese political economy.[687] For example, it lacks full power regarding staffing decision making and it faces institutional challenges to exercise some of its shareholder's rights in SOEs.[688] Milhaupt finds that even though the SASAC has a broad range of power, including appointing and assessing executives and managers in SOEs and awarding and reprimanding them by laws and regulations,[689] that power is diluted by the CPC through party organizational means.[690] The CPC, by way of the executive branch and CPC committees established in the SASACs and SOEs, influences the appointments and replacements of key personnel and decision-makings in SOEs.[691] Milhaupt also notes that there are inherent institutional challenges for the SASAC to exercise meaningful control over some SOEs as 53 of the most important SOEs under its supervision are at the same ministerial level as of the SASAC.[692] Nevertheless, it is the SASAC that determines the compensation packages for SOEs' executives.[693] The essential role of the CPC in SOEs' governance is further evidenced by the existence of a "revolving door" among high-level executives of SOEs and the CPC bureaucracy within the CPC system; not only do they move between these roles, but the executives' economic performance is tied to their political future within the CPC.[694] As Li Chen observes:

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[686] Article 4, 2009 *State-owned Assets Law* [author's transalation].
[687] Wang, "The Political Logic", *supra* note 681 at 652-54; Milhaupt, "The Governance Ecology", *supra* note 623 at 770-771.
[688] Wang, *ibid* at 653-54; Milhaupt, *ibid*.
[689] Article 13, 2003 *Interim Measures* [author's translation].
[690] Milhaupt, "The Governance Ecology", *supra* note 623 at 772-773.
[691] Milhaupt, "The State as Owner", *supra* note 67 at 369; see also Wang, "The Political Logic", *supra* note 681 at 655.
[692] Milhaupt, "The Governance Ecology", *supra* note 623 at 771.
[693] Milhaupt, *ibid* at 774-775; see also Wang, "The Political Logic", *supra* note 681 at 660.
[694] Wang, "The Political Logic", *ibid* at 658; Milhaupt, *ibid* at 772; Li Chen, "China's Central State Corporatism: The Party and the Governance of Centrally Controlled Business" in Zheng & Gore, ed, *The Chinese Communist Party in Action*, *supra* note 590 at 220 [Chen, China's Central State Corporatism].

> The [CPC's] leadership management is a crucial feature of China's central state corporatism. It shapes the incentives, mobility and distribution of power in the system. The core leadership personnel of [central SOEs] are deeply involved in the [CPC's] political process. Many of them have been elected into the [CPC's] Central Committee and Central Disciplinary Committee…they are motivated by both political achievement and business achievement, and can be moved back and forth across political hierarchy and state-controlled business hierarchy.[695]

It should be highlighted that the Western standard corporate mechanism for the appointment and evaluation of senior executives—the board of directors—does not function the same way in the Chinese SOEs.[696] The key personnel of the central SOEs, for example, ranked either at a ministerial or vice-ministerial level in the political system, are appointed by the CPC Central Organization Department through SASAC,[697] not boards of directors.

While the CPC's influence is highly integrated in the SOEs' corporate governance, Chinese SOEs do have daily business autonomy, owing to the SOEs' special status in the Chinese "market in the state" political economy. Even though the CPC has the capacity to make sure central SOEs are run by state officials,[698] it cannot influence their day-to-day business decision-making once these executives are appointed because the CPC "tends to reward economic performance and recognize [them] with autonomous sources of power."[699] Central

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[695] Chen, "China's Central State Corporatism", *ibid* at 236; see also Zheng and Huang, *State in Market*, *supra* note 61 at 402; Wang, "The Political Logic", *supra* note 681 at 658-660.

[696] Ezra Wasserman Mitchel, "Eliminating the Board in Chinese Listed SOEs: Using Anti-Corruption Law as Monitoring Device" (2021) 3:2 International Business & Economics Studies, SSRN: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3810368; Deng, "The Evolution", *supra* note 636 at 51, argues that the boarder of directors have not become the real decision-makers in Chinese enterprises in general; Sun Jin & Xu Zelin (孙晋 & 徐则林), "国有企业党委会和董事会的冲突与协调" [The Conflicts and Reconciliation of the Communist Party Board and the Board of Directors in State-owned Enterprises] (2019) 1 法学 (Law Science) 124, 126 [Sun & Xu, The Conflicts and Reconciliation].

[697] Wang, "The Political Logic", *supra* note 681 at 659.

[698] Zheng and Huang, *supra* note 61 at 379, 402: "Since the elite management class are also high-ranking party cadres, the [CPC's] Central Organization Department [] has legitimate jurisdiction over their offices and exercises considerable discretionary power over job appointments. This organizational commanding height is enforced by the fact that the CCP also controls the ministerial-level SASAC, the party group embedded within it. The [Central Organization Department], in conjunction with SASAC, which formally exercises the power of ownership, manage the top-tier personnel of all centrally managed SOEs." *Cf* Sun & Xu, "The Conflicts and Reconciliation", *supra* note 696 at 127 arguing that the CPC's influence over Chinese SOEs' boards of directors is not enough.

[699] Zheng and Huang, *ibid* at 402.

SASAC-owned SOEs have day-to-day business autonomy as indicated by the fact that sometimes they act against the state's interests abroad or in China to pursue their own corporate interests.[700] For example, Zheng and Huang found that internationally, two central SOEs in oil and infrastructure sectors fought with each other on overseas bids even when the government put pressure on them to cooperate.[701] Domestically, the SASAC has failed to order central SOEs to withdraw from the real estate industry when their principal business was not real estate.[702]

Even though the SASAC does not assert day-to-day control over the SOEs it owns, SASAC has the power to review, approve or influence significant business decisions of these SOEs through its laws and regulations. Chapter 4 of the 2003 *Interim measures* is titled "management of the [state-owned] enterprises' significant affairs." It spells out the SASAC's review mandate, including reviewing and approving wholly state-owned SOEs' reorganization plans, their shareholding restructuring plans and their articles of association.[703] As noted earlier, Chinese SOEs do not function like Western private corporations. A notable example is that before China's SOE reform started in 2013, Chinese SOEs either did not have boards of directors or had a board of directors that do not function like Western private corporations.[704] Under the US unitary board system, the following issues have to be approved by the board of directors:

> Approval by the board of directors is a statutory prerequisite, for example, to mergers and related transactions such as sales of all or substantially all corporate assets, the issuance of stock, distribution of dividends, and amendments to the articles of incorporation. Approval by the board of directors of related party transactions involving top managers or board members is a statutory option for substantially insulating such transactions from judicial

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[700] *Ibid* at 406, 421.
[701] *Ibid* at 412-413.
[702] *Ibid* at 415.
[703] Article 21, 2003 *Interim Measures*.
[704] Deng, "The Evolution", *supra* note 636 at 51; Sun & Xu, "The Conflicts and Reconciliation", *supra* note 696 at 126; *cf* Gao & Zhou, *Between Market Economy and State Capitalism*, *supra* note 46 at 27 finding that "[b]y the end of 2020, ninety-five (out of ninety-seven) central SOEs … had established a board [of directors]."

> review for fairness. The board typically has non-exclusive power to amend bylaws. And so on.[705]

In the Chinese legal regime, it is the SASAC and the CPC that carry out these functions. As Milhaupt pointed out:

> Although SASAC and the [CPC] have begun taking steps to bring boards of directors into the appointment process and to create boards for those core companies which do not yet have them, the steps taken thus far leave little doubt that the [CPC] does not intend to relinquish appointment authority with respect to the most important enterprises and highest-level appointments. [706]

As a result, matters of dissolution, merger, bankruptcy, capital increase and decrease, and issuance of bonds of SOEs are significant matters that need to be approved by the SASAC, not their boards of directors, according to the 2003 *Interim Measures*.[707] Article 21 further provides that if these SOEs are important SOEs (without defining "important"), these decisions have to be further approved by the central, provincial or municipal governments that the SASACs are part of since each SASAC is accountable to their corresponding government.[708] Article 23 of Chapter 4 provides that share transfer of SOEs have to be approved by SASACs.[709] Chapter 5 of the 2009 *State-owned Assets Law* is titled "significant issues related to the state-owned assets of the [state] shareholder's rights" and it endorsed the above rights of the SASAC.[710] While the SASAC has decision-making power or influence on some business decisions of SOEs that are considered

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[705] Stephen M. Bainbridge, "The Board of Directors" in Jeffrey N. Gordon & Wolf-Georg Rigne, eds, *The Oxford Handbook of Corporate Law and Governance* (Oxford: Oxford University Press, 2018) at 277.
[706] Milhaupt, "The Governance Ecology", *supra* note 623 at 773.
[707] See Articles 20 and 21, 2003 *Interim Measures* on significant management issues of SOEs to be determined by the SASAC such as the approval of the reorganization, stock structuring plan, and articles of incorporation/association (Article 20) and the approval the division, merger, bankruptcy, increase and decrease of capital, and bond issuance of their wholly owned SOEs (Article 21).
[708] See Article 21, 2003 *Interim Measures*. Local SASACs are not directly supervised by the central SASACs but their corresponding governments.
[709] Article 23, 2003 *Interim Measures*.
[710] Articles 30 – 38 in Section 1, Chapter 5 provides the general rules, Articles 47 – 50 in Section 4, Chapter deals with valuation of state-owned assets in SOEs; and Articles 51 – 57 in Section 5, Chapter 5 governs the SASAC's supervisory power over state-owned assets' transfer in SOEs.

significant (usually carried out by boards of directors in Western corporations), these issues do not arise daily. We can conclude that Chinese SOEs have day-to-day managerial independence as their executives, once appointed by the CPC, have the freedom and incentives to make efficient business decisions to ensure the profitability of the SOEs, which will support their future career either in other SOEs or elsewhere in the CPC political system. Nevertheless, this close personal and institutional relationship between the CPC and high-ranking executives in Chinese SOEs means that operation and management decisions may not be taken on purely commercial grounds at all times.[711] In fact, the CPC's political leadership in Chinese SOEs' corporate governance has been increased in the current Chinese SOE reform, as we will see in Section 3.2 below.

c. How do we categorize Chinese SOEs' status and functions in the Chinese political economy?

While Chinese SOEs are established as corporations with business operational and managerial autonomy and independent corporate assets, Chinese SOEs act as tools for the state to implement certain state and CPC objectives.[712] Milhaupt uses the term "policy channeling" to describe this phenomenon when a state uses its ownership of business enterprises to carry out non-financial objectives as contrasted with the use of regulation to accomplish those objectives.[713] He argues that SOEs' "policy channeling" function is one that implements the state's goals, such as carrying out public functions, producing jobs, or creating national champions to compete

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[711] Milhaupt, "The State as Owner", *supra* note 67 at 370; Sun & Xu, "The Conflicts and Reconciliation", *supra* note 696 at 125 arguing that the CPC's political leadership and influence in SOEs is a key characteristic of Chinese SOEs.

[712] Wang, "The Political Logic", *supra* note 681 at 651-52; Gao & Zhou, *Between Market Economy and State Capitalism*, *supra* note 46 at 6.

[713] Milhaupt, "The State as Owner", *supra* note 67 at 363; WTO, *China's Trade-Disruptive Economic Model*, *supra* note 47 at 2, arguing that "[a]t its core, the framework of China's economy is set by the Chinese government and the Chinese Communist Party [], which exercise control directly and indirectly over the allocation of resources through instruments such as government ownership".

globally.[714] Moreover, by a tight and direct political control, China can use the SOEs to fulfill tasks that an independent company under market pressure would not be willing to undertake.[715] For example, Jiangyu Wang noted that the state has mobilized Chinese SOEs in natural disaster management without giving them any compensation.[716] China's recent investment agreement practice affirms Wang's findings. In China's view, some Chinese SOEs—even if they are in a corporate form—would be used to carry out public functions—such as supporting the development of poverty area or dealing with natural disasters. Article 3 of the *European Union-China Comprehensive Agreement on Investment* deals with SOEs, which is termed as "Covered Entities" under the treaty. While the treaty has articulated rules SOEs must comply with in investment law context, Articles 3bis 2(e) and 3bis 2(f) provide that these rules do not apply to SOEs in the following situations:

> (e) For greater certainty, this Article does not apply to activities conducted in the exercise of governmental authority, including those for national defence and public security[.]
>
> (f) For greater certainty, the Parties acknowledge that this Article does not apply to non-commercial activities conducted by covered entities [SOEs] to support the development of poverty area or to deal with natural disasters.[717]

These exceptions made to rules that are applicable to SOEs in the investment law context show that China explicitly acknowledges that SOEs could undertake public or sovereign functions in at least four situations: (1) exercising governmental authority of national defense, (2) exercising governmental authority of public security, (3) undertaking the non-commercial

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[714] Milhaupt, "The State as Owner", *ibid* at 67.
[715] Wang, "The Political Logic", *supra* note 681 at 661.
[716] Wang, "The Political Logic", *ibid* at 662-64.
[717] Articles 3bis 2(e) and 3bis 2(f), *European Union-China Comprehensive Agreement on Investment*, 22 January 2021, online: < https://trade.ec.europa.eu/doclib/docs/2021/january/tradoc_159343.pdf>.

activity of developing poverty area, and (4) undertaking the non-commercial activity of natural disasters relief.[718]

This policy channeling aspect of SOEs in the Chinese political economy is paramount in China as Chinese laws and regulations have highlighted it since the establishment of the SASAC. For example, Article 1 of the 2003 *Interim Measures* emphasizes the importance of developing and advancing the state-owned economy by improving the management of SOEs, so SOE management is a tool in China's toolbox of economic regulation:

> This regulation was promulgated to establish a state-owned assets supervisory and management system as required by the socialist market economy, further improve SOEs, promote the strategic structure and adjustment of the state economy, develop and advance the state-owned economy, and ensure the maintenance and increase of the value of the state-owned assets.[719]

Similarly, Article 1 of the 2009 *State-owned Assets Law* sets the tone for the law to safeguard the state's control over the state-owned economy by way of controlling state-owned assets in SOEs:

> This law was enacted to safeguard the basic economic system of the state, strengthen and develop state-owned economy, enhance protection of state-owned assets and exercise the leading force of the state-owned economy in the national economy.[720]

Seeing Chinese SOEs as a tool for state policy channeling or carrying out sovereign function in some circumstances does not negate their daily operational and managerial autonomy in the Chinese "market in the state" political economy.[721] As noted above, the CPC and the SASAC controls the SOE's executive appointments, their compensation and major business

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[718] For a detailed discussion on the exceptions made to SOE rules in the *European Union-China Comprehensive Agreement on Investment*, see Shen Wei & Fang Li (沈伟 & 方荔), "国际经贸协定国企条款的立法趋势与中国的立场演变" [The Legislative Trends of State-owned Enterprises Rules in International Economic and Trade Agreements and the Evolution of China's Stance] (2022) 5 国际经济评论 (International Economic Review) 93, 109-11; Shen Wei & Fang Li (沈伟 & 方荔), "欧式自由贸易协定国有企业规制的迭代、特质与启示" [The Evolution, Characteristics and Implications of Rules of State-owned Enterprises in European Free Trade Agreements] (2022) 2 欧洲研究 (European Studies) 1.
[719] Article 1, 2003 *Interim Measures*. [author's translation]
[720] Article 1, 2009 *State-owned Assets Law*. [author's translation]
[721] Milhaupt, "The State as Owner", *supra* note 67 at 369-370.

decision-making, neither the CPC or nor the SASAC have day-to-day control over the SOEs.[722] Milhaupt argues that the policy channeling function of the SOE regime should be evaluated in its entirety, not on an individual firm basis.[723] This is because:

> maximizing shareholder value is not the ultimate goal of this state system of corporate ownership. While profitability of the state sector is of course a relevant consideration, China's leaders evidently view SOEs as a means of maximizing the state's utility in non-pecuniary as well as pecuniary ways, and at the country level, rather than at the firm level. President Xi Jinping has been explicit about the policy-channeling role of the SOE sector. He has declared that SOEs are 'the basis for socialism with Chinese characteristics', serving as 'supporting forces for the party to govern and prop up the country'. In a 2016 speech, Xi urged SOE managers 'to bear in mind [that your] number one role and responsibility is to work for the party.'[724] [original quotes omitted]

Milhaupt provided two examples of SOEs' policy channeling function that are related to this thesis' subsequent assessment of Chinese SOEs' sovereign immunity. The first is China's "going out" policy of encouraging foreign investment in the late 1990s. The second is China's BRI. Regarding BRI, Milhaupt commented that:

> BRI is not simply an economic project to expand markets and trade, but a means of extending China's sphere of influence and military presence in Asia. These projects pose a range of legal and political risks for the firms involved, and their profitability is not assured. Most of the contracts for BRI projects have gone to Chinese SOEs, financed by loans to the host countries from Chinese state-owned banks.[725] [original quotes omitted]

Building on Milhaupt's conclusion that the Chinese SOE sector carries out policy channeling functions, *i.e.*, implementing the state's social, political and economic goals, we can conclude that Chinese SOEs have a dual identity as a whole: a commercial one and a non-commercial one. This dual identity of Chinese SOEs became clearer at the firm level following the Chinese SOE reform started in 2013, as discussed next.

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[722] Milhaupt, *ibid*.
[723] Milhaupt, *ibid* at 370.
[724] Milhaupt, *ibid.*
[725] Milhaupt, *ibid*.

3.2 Assessing Chinese SOEs' status and functions in the current SOE reform since 2013

3.2.1 Analyzing Chinese SOEs' status and functions in light of Chinese laws and CPC instruments

Shortly after President Xi Jinping took the reins, the CPC initiated the current SOE reform by issuing the *Decision on Several Important Matters on Comprehensively Deepening Reform* ("*CPC 2013 Decision*") at the Third Plenary Session of the 18th CPC Central Committee in 2013.[726] Following this decision, the CPC and the State Council jointly issued the *Guiding Opinions of the Central Committee of the Communist Party of China and the State Council on Deepening State-Owned Enterprise Reform* ("*CPC—State Council* 2015 *Guiding Opinions*") to elaborate on the SOE reform in 2015. The *CPC—State Council 2015 Guiding Opinions* highlight the SOEs' political missions in addition to their commercial missions. Its preamble provides that SOEs are an "important force to promote the state's modernization and secure the Chinese people's collective interests, [they are an] important material basis and political basis for the development of the CPC's and the state's missions."[727] Further, they "bear the historical mission and responsibility" for "the economy of the state's high-speed increase" in the process of "rejuvenating the Chinese nation and the Chinese dream".[728] This part of the preamble of the *CPC—State Council 2015 Guiding Opinions* clearly identifies the SOE's policy channeling function in social and political terms in addition to their commercial function in the Chinese political economy.

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[726] 中共中央关于全面深化改革若干重大问题的决定 [The Decision of the Central Committee of the Communist Party of China on Several Important Matters on Comprehensively Deepening Reform], issued on 12 November 2013, [*CPC 2013 Decision*]. For an early assessment of the 2013 Chinese SOE reform, see Naughton, "The Current Wave of State Enterprise Reform in China", *supra* note 655.

[727] 中共中央、国务院关于深化国有企业改革的指导意见 [Guiding Opinions of the Central Committee of the Communist Party of China and the State Council on Deepening State-Owned Enterprise Reform], issued on 24 August 2015 [*CPC—State Council 2015 Guiding Opinions*].

[728] *CPC—State Council 2015 Guiding Opinions*, *ibid*.

An important question is under what circumstances the overall policy channeling function stated in these documents—at the SOE regime level—would negate an individual SOE's commercial status and functions, thus rendering it part of the state in a particular case? The *CPC—State Council 2015 Guiding Opinions* for the first time categorize SOEs as "commercial SOEs" and "public welfare SOEs" as part of the SOE reform.[729] "Commercial SOEs' goals are: (1) increasing the vitality of the state-owned economy; (2) expanding state-owned capital function; (3) maintaining and increasing the value of state-owned assets.[730] "Commercial SOEs" are divided into "commercial SOEs that are in competitive businesses"[731] and "commercial SOEs that are in industries and sectors that have an impact on national security and lifeline of national economy."[732] "Public welfare SOEs" will ensure people's livelihood, serve the society, and provide public goods and services.[733] Although the CPC and the State Council categorized SOEs into these three groups, the central SASAC—which was mandated to finalize the task—has failed to do so since the *CPC—State Council 2015 Guiding Opinions* were issued in 2015.[734] We thus do not know which SOEs are "commercial SOEs for competitive business," "commercial SOEs in industries and sectors that have an impact on national security and lifeline of national economy," or "public welfare SOEs." Because of this lack of policy clarity, the analysis of the 97 central SASAC-owned SOEs' status and functions has to be based on several factors such as what are SOEs' primary business and their purposes, whether the

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[729] *Ibid*, Part II, Section IV.
[730] *Ibid*, Part II, Section V.
[731] *Ibid*.
[732] *Ibid*.
[733] *Ibid*, Part II, Section VI.
[734] *Ibid*, Part II, Section IV provides that it is the financial contributor that carries out this categorization, in the case of central SASAC-owned SOEs, it is the central SASAC.

SOE's primary business fall into a national security sector identified by the CPC, and whether the SOE has undertaken public or sovereign function in a particular circumstance.

According to the *CPC—State Council 2015 Guiding Opinions*' categorization, "commercial SOEs" include "commercial SOEs in fully competitive industries and sectors" and "commercial SOEs in industries and sectors that have an impact on national security and lifeline of national economy."[735] The primary function of both groups of SOEs is to pursue commercial interests.[736] According to the same document, the primary difference between the two groups is reflected in how their performance will be evaluated by the state, which reflect each kind of SOE's purposes. For "commercial SOEs in fully competitive industries and sectors", the evaluation standard includes their ability to maintain and increase the value of the state-owned assets and their market competitiveness; for "commercial SOEs in industries and sectors that have an impact on national security and lifeline of national economy", the additional evaluation standard is "whether they have served the national strategy, safeguarded national security and national economic operation, made development in strategic industries, and fulfilled specific tasks [assigned by the state]."[737] We can see both groups of commercial SOEs have to pursue commercial interests and make profits to be successful in the state's annual evaluation. But for "commercial SOEs in industries and sectors that have an impact on national security and lifeline of national economy", they must carry out activities that connote a sovereign purpose as required by laws and CPC documents. In this regard, they are not simply commercial actors because they have non-commercial priorities that are not profit oriented.[738] Compared to "commercial SOEs in

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[735] *Ibid* at Part II, Section V.
[736] *Ibid*.
[737] *Ibid*.
[738] Zhou, "Rethinking the (CP)TPP as a Model for Regulation of Chinese State-owned Enterprises", *supra* note 7 at 578-79.

fully competitive industries and sectors", "commercial SOEs in industries and sectors that have an impact on national security and lifeline of national economy" have a stronger sovereign aspect in their dual identity.

The *Guiding Instructions on the Function and Categorization of SOEs* in 2015 ("*2015 Guiding Instructions* issued by the SASAC, the Ministry of Finance and the National Development and Reform Commission provide us with some clues regarding on how to categorize SOEs.[739] According to this document, SOEs' categorization should be based on their primary business. This suggests that if an SOE's primary activities are commercial in nature, that SOE is a commercial SOE. If an SOE's primary business touches upon public functions such as poverty relief and natural disaster relief, we would conclude that they are "public welfare SOEs."[740]

But if an SOE's primary business touches upon national defense and public security,[741] we could categorize them as "commercial SOE in industries and sectors that have an impact on national security and lifeline of national economy." Take China Electronics—a central SASAC-owned SOE—as an example. The introduction to the company on its website declares that it is "the primary force of the Chinese military electronics industry" and "the nation's strategic

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[739] 关于国有企业功能界定与分类的指导意见 [Guiding Instructions on the Function and Categorization of SOEs], issued on 29 December 2015 [*2015 Guiding Instructions*].

[740] See Article 3bis 2(f), *European Union-China Comprehensive Agreement on Investment*, *supra* note 690. In August 2019, Shanghai SASAC divided SOEs it owned in three groups: (1) "commercial competitive SOEs," (2) "financial service SOEs," and (3) "function-safeguarding SOEs." Shanghai SASAC's categorization has a "function-safeguarding SOE" group, which seems to be close to what the CPC and the State Council had in mind regarding "public welfare SOEs." Shanghai's "function-safeguarding SOEs" include airport, seaport, subway, technology, and information investment SOEs. See 上海市国资委关于印发市国资委监管企业分类名单的通知 [Notice of Shanghai State-owned Assets Supervision and Administration Commission on SOEs' Functions and Categorization], issued on 23 August 2019 [Notice of Shanghai SASAC].

[741] See Article 3bis 2(e), *European Union-China Comprehensive Agreement on Investment*, *ibid.*

technological force."[742] It also indicates that its operations rest upon the ultimate goal of that "it can fight a war, and it can win a war" as a main force of China's military industry.[743] Based on its apparent military nature and purposes as reflected in its primary business operation, we can categorize China Electronics as a "commercial SOE in industries and sectors that have an impact on national security and lifeline of national economy." Because of its military background and military purposes in its business operations, on 15 December 2022, the US Department of Commerce's Bureau of Industry and Security added China Electronics's No. 28 Institute[744] to the *Entity List*,[745] which prohibits listed Chinese corporations from importing certain US technologies to be used for military purposes. The US position on this matter in the trade law context shows that the sovereign purpose of an SOE's commercial activities, or the sovereign identity of a commercial Chinese SOE, can have important national security implications. The inherent sovereign purpose—which is military—of China Electronics will also have an impact on its sovereign immunity in domestic courts where the purpose of the conduct is given weight.

Another example of "commercial SOEs in industries and sectors that have an impact on national security and lifeline of national economy" are China Railway and Sinohydro discussed in Chapter 3,[746] since they operate in areas of "energy and mineral resources security" and "important infrastructure security," which are identified by the CPC's "*National Security*

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[742] China Electronics Technology Group Corporation, News Release, "集团介绍" [Introduction to the Group], October 2021, online, < http://cetcdkny.cetc.com.cn/zgdk/1592544/1592491/index.html>.
[743] Introduction to the Group, *ibid*, in the same document, China Electronics Technology Group Corporation expresses the company's loyalty to the CPC leadership by declaring that its "family name is the CPC".
[744] According to China Electronics's website, it has 47 state-level research institutes. The US Department of Commerce only targeted one of them this time, *ibid*.
[745] US Department of Commerce, *Entity List*, *supra* note 576.
[746] See Chapter 3, Section 2.2; *Collaboration Agreement*, *supra* note 413; "Notice of Shanghai SASAC", *supra* note 740 categorizing SOEs in infrastructure construction sector as "commercial competitive SOEs".

Strategy (2021—2025)" as parts of Chinese national security.[747] But the foreign policy and economic policy purposes exhibited in their commercial transactions—unlike China Electronics's—are not determinative to their immunity claims under international law as domestic courts tried to limit the role of SOEs' operational purposes in their assessment of SOEs' immunity.

An additional important feature of China's ongoing SOE reform is the strengthened role of the CPC in SOEs' corporate governance.[748] This raises the issue of CPC and governmental intervention in SOEs' business decision-makings. The *CPC—State Council 2015 Guiding Opinions* emphasize that the CPC should play a political leadership role in SOEs' corporate governance through a CPC committee created within SOEs. Part VII, Section XXIV of the *CPC—State Council 2015 Guiding Opinions* provide that:

> The strengthened CPC leadership and the improved corporate governance [in SOEs] should be combined, the legal role of the CPC committee in [SOEs'] corporate governance should be explicitly established, and the ways to exercise the political function of the CPC should be created in SOEs.[749]

Further, the *CPC—State Council 2015 Guiding Opinions* provide that the personnel exchange between the corporate leadership and the CPC leadership within a company should be facilitated. Notably, the chairperson of the board of director and the secretary-general of the CPC committee in an SOE should be the same person.[750]

As noted above, the CPC exercised influence in Chinese SOEs through senior executive appointments before 2013. Under the current SOE reform, the role of the CPC is enhanced

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[747] 中共中央政治局会议审议《国家安全战略（2021−2025）》[The Political Bureau of the CPC Reviews and Approves "National Security Strategy (2021-2025)], issued on 18 November 2021, online: <http://www.gov.cn/xinwen/2021-11/18/content_5651753.htm> [CPC Political Bureau, National Security Strategy].
[748] Gao & Zhou, *Between Market Economy and State Capitalism*, *supra* note 46 at 26-29.
[749] *CPC—State Council 2015 Guiding Opinions*, Part VII, Section XXIV.
[750] *Ibid*.

through explicit power to directly participate in the decision-making of boards of directors beyond personnel appointments.[751] Thus, despite China's SOEs' categorization, the CPC still can assert, an arguably stronger, political influence in Chinese SOEs' commercial decision-makings. Compared to "SOEs in competitive business", such CPC influence will be more obvious in "public welfare SOEs" and "commercial SOEs in industries and sectors that have an impact on national security and lifeline of national economy" in light of greater significance of their sovereign aspect of their dual identity.[752]

3.2.2. Analyzing Chinese SOEs' status and functions in a hypothetical situation based on some facts presented in the *FG Hemisphere 1* case discussed in Chapter 3

Having undertaken a textual analysis of Chinese SOEs' status and functions under Chinese laws and CPC instruments, now I will examine Chinese SOEs' status and functions in a hypothetical situation—when SOEs engage in foreign investments—based on some facts presented in the *FG Hemisphere 1* case discussed in Chapter 3.

The case study of China Railway's and Sinohydro's investments in and agreement with the Congo illustrates how Chinese foreign investments led by commercial Chinese SOEs work, such as those that are carried out under China's BRI: it involved a state-to-state agreement/memorandum, public and private contracts that include the host state, with Chinese state-owned banks' financial support, and Chinese SOEs' engagement in the host state's infrastructure construction and/or mineral exploitation.[753] Understanding Chinese SOEs'

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[751] Gao & Zhou, *Between Market Economy and State Capitalism*, *supra* note 46 at 29.
[752] Gao & Zhou, *ibid*.
[753] Shaffer & Gao, "A New Chinese Economic Order", *supra* note 71 at 616-17; Matthew S. Erie, "Chinese Law and Development" (2021) 62:1 Harvard International Law Journal 51, 58-59. Based on an interview with the former General Counsel of China Merchants, Erie found that "China Merchants, in its capacity as an SOE, was able to negotiate a contract with Djibouti that was perceived to be a state-to-state agreement[.]" [Erie, Chinese Law and Development]; Heng Wang, "The Belt and Road Initiative Agreements: Characteristics, Rationale and Challenges" (2021) 20 World Trade Review 282, 282-83 characterizing BRI agreements as primary and secondary agreements. Primary agreements are non-binding agreements signed between China and other states or international

nature—exemplified by China Railway and Sinohydro—is commercially important because many central SASAC-owned Chinese SOEs have been engaging in overseas projects,[754] and the issue of sovereign immunity could arise.

From Chapter 3 we know that a *Collaboration Agreement* was signed between China Railway, Sinohydro Corporation and the Congo in 2008, according to which China Railway had to pay the Congo an entry fee for the former's investment in the latter's mineral industry. An American company—after purchasing the execution right of an arbitral award against the Congo—launched execution proceedings to obtain the entry fee payable by China Railway to the Congo in Hong Kong courts because China Railway has two subsidiaries listed on the Hong Kong Stock Exchange. Their transactions with the Congo triggered their disclosure obligations under the rules of the Hong Kong Stock Exchange. While Sinohydro or its subsidiaries' assets were not involved in this litigation, Sinohydro's status and functions will be analyzed together with China Railway below as a party to their collaboration.

Both China Railway and Sinohydro are wholly and directly owned by the central SASAC. China Railway's website shows that the company provides commercial transportation services and public interest transportation prescribed by the state.[755] Sinohydro (now PowerChina)'s website shows that the company provides infrastructure services encompassing financing, design, construction and operation of electric power infrastructure in and outside of China. It also exercises planning and supervisory functions regarding hydroelectric, wind power

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organizations and secondary agreements "include performance agreements to construct various projects … and underlying financing contracts" [Wang, BRI Agreements].

[754] Wang, "BRI Agreements", *ibid* at 287.

[755] China Railway, News Release, "中国国家铁路集团有限公司简介" [Introduction of the China Railway Group Limited], 18 December 2022, online: <http://www.china-railway.com.cn/gsjs/gsjj/>.

and clean energy as prescribed by the state.[756] According to the 2015 *Guiding Instructions* mentioned above, the categorization of an SOE is determined by its main business.[757] The two companies thus should be considered as commercial SOEs in this regard since their main businesses are providing commercial transportation and hydro-related services, as indicated by their business overview. As noted above, their businesses in the Congo fall into the national security sectors as identified by the CPC, thus, we can treat China Railway and Sinohydro as two "commercial SOEs in industries and sectors that have an impact on national security and lifeline of national economy."

In the *FG Hemisphere 1* case, China Railway's and Sinohydro Corporation's engagement with the Congo was part of China's infrastructure-for-resources initiative as was agreed between China and the Congo under a state-to-state umbrella agreement in 2001.[758] The *Collaboration Agreement* between the Congo and China Railway and Sinohydro Corporation was signed on 22 April 2008. The *Collaboration Agreement* encompasses sovereign elements in addition to its commercial terms.[759] According to Article 1, the Congo's goal is to "find necessary financial resources to undertake important and urgent national infrastructure projects."[760] Chinese SOEs' goal is to invest in minerals in the Congo.[761] The two Chinese SOEs can be seen as tools of

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[756] Power China, News Release, "中国电力建设集团简介" [Introduction to Power China], online: <https://www.powerchina.cn/col/col7404/index.html>.
[757] *2015 Guiding Instructions*, Part I.
[758] *FG Hemisphere 1*, *supra* note 407 at 167, para. 189: "[T]he PRC and the DRC had agreed to a development scheme whereby the PRC would finance and construct extensive infrastructure projects in return for the right to exploit certain DRC mineral resources. Cooperation agreements had been signed by the two [s]tates in 2001." A different account was provided by Johanna Jansson, see Johanna Jansson, "The Sicomines Agreement: Change and Continuity in the Democratic Republic of Congo's International Relations" (2011) South Africa Institute of International Affairs Occasional Paper No. 97 at 7, arguing that China Railway Group Limited's arrival in the Congo should not be understood as the result of direct order given by the Chinese state. It was rather due to the company's previous experience in the Congo and its inability to secure mining concessions elsewhere [Jansson, The Sicomines Agreement].
[759] Xu, "Chinese RFI Investments", *supra* note 503 at 633, 643.
[760] Article 1.1.1, *Collaboration Agreement*, *supra* note 413.
[761] Article 1.1.2, *Collaboration Agreement*, *ibid*.

China's strategy for natural resources security abroad, in light of the importance of their industries and investments as indicated by China's *National Security Strategy (2021—2025).* Thus, the two parties' actions and purposes—seen in light of China's infrastructure for-resources-strategies and the umbrella agreement—are not commercial interests-driven only.[762] This is evidenced by some contractual provisions of the *Collaboration Agreement*. For example, the execution and coming into force of the *Collaboration Agreement* is subject to China and the Congo's further review and approval.[763] Other provisions of the *Collaboration Agreement* show that the two Chinese SOEs' roles go beyond mere foreign investors. They are also loan and aid providers to their Congolese partners.[764]

China also provided political and financial backing for the deal. Johanna Jansson observed that funds were made available by the Export-Import Bank of China (a policy bank fully and directly owned by the Chinese state) towards infrastructure financing for parties to the *Collaboration Agreement*, which demonstrates that "the Chinese leadership regarded [China Railway]'s expansion into the [Congo] as strategically highly important."[765] Jansson also noted that "[China Railway]'s quest for mining titles were given considerable political backing by the Chinese government. It added to [China Railway]'s negotiation basket the possibility for the [Congo] to access significant loans to finance infrastructure[.]"[766] In this regard, China Railway's participation in *Collaboration Agreement* echoes with the 2015 *Guiding Instructions*, which

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[762] See Maiza-Larrarte & Claudio-Quiroga, "The Impact of Sicomines", *supra* note 503; Xu, "Chinese RFI Investments", *supra* note 503.
[763] See for example Articles 5.2 and 13.3.2 of the *Collaboration Agreement*, *supra* note 413.
[764] Article 5.2, *Collaboration Agreement*, *ibid*; Xu, "Chinese RFI Investments", *supra* note 480 at 616.
[765] Jansson, "The Sicomines Agreement", *supra* note 758 at 7-8. The Export-Import Bank of China plays an important role in China's lending to other sovereign states, see Dahir, "Kenya Discloses Part of Secret Railway Contract with China", *supra* note 72; see also Gelpern et al., "How China Lends", *supra* note 72.
[766] Jansson, *ibid* at 12.

provides that "SOEs must voluntarily serve the state's national strategy."[767] In fact, on its website, China Railway announces that it has been serving the state's strategies and complying with the CPC's policies in their business venture.[768] Jansson also found that the incorporation of Sinohydro in the deal—the other central SASAC owned-SOE—was driven by Export-Import Bank of China for purposes of reducing risk.[769] This means that Sinohydro participated in the *Collaboration Agreement* not because it participated in a bidding process—if there was any—or because it wanted to be part of it out of commercial reasons in the first place, but because the Chinese government policy bank chose it to be part of the deal. We do not know if Sinohydro participated in this deal without any expectation of profits, but the Chinese policy bank's selection shows a certain degree of the state's instruction through the Export-Import Bank of China's financial backing.

Nevertheless, the *Collaboration Agreement* shows strong commercial traits. First, the underlying transactions of the *Collaboration Agreement* seen on their own—an investment arrangement, a natural resources exploitation agreement, and a loan agreement—are commercial transactions based on their nature—a test solely or predominantly applied under the law of sovereign immunity under different regimes as we will see in Chapters 5 to 7. Secondly, the *Collaboration Agreement* includes an ICSID arbitration clause.[770] The ICSID arbitration clause allows the Chinese SOEs to bring a legal action against the Congo for the latter's breach of the *Collaboration Agreement* through international arbitration directly if requirements set by the

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[767] *2015 Guiding Instructions*, Part I.
[768] For example see Introduction of the China Railway Group Limited, *supra* note 755: "Pursuant to the 'Charter of the Communist Party of China', it established a CPC committee to ensure the CPC's leadership, … , and discuss and determine the important matters pursuant to laws… [China Railway Group Limited] undertakes public interests transportation as prescribed by the state."
[769] Jansson, "The Sicomines Agreement", *supra* note 758 at 12.
[770] Article 20, *Collaboration Agreement*, *supra* note 413.

ICSID Convention are met.[771] Although the ICSID arbitration is to be conducted under the *ICSID Convention*, an international treaty, as an investor-state arbitration mechanism, it resembles to commercial arbitration to a significant degree in terms of arbitration procedures.[772] Thus, the arbitration clause connotes a strong commercial taste for resolving the dispute on commercial terms. Altogether, these features of the *Collaboration Agreement* exemplify both sovereign and commercial traits.[773]

In international law, whether an entity is part of the state and can attract jurisdictional immunity in a foreign domestic court is largely determined by the nature of that entity's conduct/transaction—whether it is an exercise of sovereign authority or a private act that can be performed by an individual—with purposes considered in limited jurisdictions (for example, the *UNCSI* if the forum law instructs so, the UK, and Canada).[774] Applying a nature test, China Railway's and Sinohydro's immunity—in a hypothetical situation—is determined by whether they have exercised sovereign authority or engaged in commercial activity. As noted earlier, looking at the *Collaboration Agreement* alone, we could define it as a foreign investment deal that is made between two foreign investors and a host state in infrastructure investments in exchange of natural resources exploitation, as well as providing a loan which are all commercial in nature. But if we take the following factors—including the SOEs' purposes in executing

[771] Campbell McLachlan, Laurence Shore & Matthew Weiniger, *International Investment Arbitration: Substantive Principles* 2nd ed (Oxford: Oxford University Press, 2017) 65; Jonathan Bonnitcha, Lauge N. Skovgaard Poulsen & Michael Waibel, *The Political Economy of the Investment Treaty Regime* (Oxford: Oxford University Press, 2017) 59.
[772] McLachlan, Laurence Shore & Matthew Weiniger, *ibid* at 47-48.
[773] See Xu, "Chinese RFI Investments", *supra* note 503 at 644, arguing that "the existing international legal framework—particular the divide between private and public international law—cannot adequately capture the hybrid public-private dynamics at apply in the [Collaboration] Agreement". See also Jansson, "The Sicomines Agreement", *supra* note 758 at 12: "This [Collaboration Agreement], unusual in the Congolese context, has created confusion over the labelling of the agreement since its inception, in terms of whether it is an aid agreement, a trade agreement, an investment deal, or all three."
[774] See discussions in Chapters 5 to 7.

China's foreign policy and economic goals—into consideration, a different conclusion is suggested: (1) China and the Congo signed an umbrella state-to-state agreement; (2) China provided political and financial backing for China Railway's and Sinohydro's deal with the Congo through a state-owned policy bank; and (3) China Railway's and Sinohydro's possible role in achieving China's infrastructure-for-minerals strategy, particularly when Sinohydro participated the deal under the instruction of the Chinese state policy bank. Taking these factors into consideration, we can probably redefine the *Collaboration Agreement* as a quasi-sovereign transaction, with the Chinese state and its policy bank providing indispensable political and financial support.[775] As Carty has correctly suggested, the nature of the *Collaboration Agreement* deserves close examination as "China is implicated at the highest level in these activities, in order to achieve a range of social and political as well as economic goals."[776]

This case reflects well the dual identity of commercial Chinese SOEs, including "commercial SOEs in industries and sectors of national security and lifeline of national economy": They have a corporate form and a primary agenda to pursue commercial interests; but they also have a duty and willingness to contribute to the state's and the CPC's political and policy goals as defined by the Chinese political economy. Sometimes they follow these goals as guiding principles in their business ventures and sometimes they implement these goals as instructed by the state. But pursuing the state's political and policy goals as purposes of their transactions is not the same as exercising sovereign authority under the law of sovereign immunity as we will see in Chapters 5 to 7. Put differently, Chinese SOEs could be actively

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[775] See Wang, "BRI Agreements", *supra* note 753 at 287 noting that "[BRI] agreements are often based on the direct or indirect support of the governments (host country, home country, or both) in funding, concession, and other aspects like dispute settlement."
[776] Carty, *supra* note 477 at 91; see also Erie, "Chinese Law and Development", *supra* note 753.

furthering state policies on national security and state-driven economy in their foreign investments, but these business transactions' commercial nature would not be converted to a sovereign one in international law if these sovereign purposes are incidental, compared to the predominant commercial nature of the transactions.

To summarize the findings of this Section: Whether a central SASAC-owned SOE is a "commercial SOE in competitive business", or a "commercial SOE in industries and sectors of national security and lifeline of national economy," or a "public welfare SOE" has to be determined by multiple factors. These factors include what is the SOE's primary business and the purpose thereof, whether that SOE's primary business falls into a sector of China's national security or economic lifeline, and whether that SOE has exercised sovereign authority in a particular situation. Based on these factors:

- If an SOE's primary function is to exercise public functions, *e.g.*, providing poverty relief or natural disasters relief, this SOE should be treated as a public welfare SOE. (See aforementioned Article 3bis 2(e), *European Union-China Comprehensive Agreement on Investment*)
- If an SOE's primary business is related to national defense (*e.g.*, engaging in business of technologies that will be used for military purposes like China Electronics) or national security (*e.g.*, investing in natural resources or engaging in infrastructure construction like China Railway and Sinohydro), this SOE is a "commercial SOE in industries and sectors of national security and lifeline of national economy."
- In other cases, SOEs are "commercial SOEs in competitive business."

Compared to "commercial SOEs for competitive business," "commercial SOEs in industries and sectors of national security and lifeline of national economy" have a stronger dual identity.

Nevertheless, both groups of commercial SOEs have a political feature as reflected in their pursuit of political and policy goals designed by the Chinese laws, regulations and CPC documents. However, the nature of the political and policy goals an SOE pursue will have an impact on its sovereign immunity claim in international law:

- Commercial SOEs that pursue a public policy or foreign policy with the state's political backing in commercial activities are not necessarily exercising sovereign authority in the sense that could trigger immunity under the law of sovereign immunity. This is because, as we will see in Chapters 5 to 7, the law of sovereign immunity predominantly looks at the nature of the conduct, not its purpose in defining whether an act is immune or not (See example A below). However, when it comes to purposes that are closely attached to inherently sovereign functions (such as military and public welfare) of the state, the result is debatable, especially when the purpose of the conduct is given weight in our assessment as show in example B below.
    - **Example A**: Although China Railway's and Sinohydro's engagement in the *Collaboration Agreement* in the Congo exhibits a sovereign aspect, which is largely reflected in their purpose of contributing to the state's and the CPC's foreign policy and economic policy goals, such purposes cannot convert their underlying commercial transactions into sovereign transactions for sovereign immunity purposes under the applicable laws such as the *UNCSI*, the US *FSIA* and the UK *SIA* because they are acts can be taken by private parties and cannot transform the underlying commercial transaction into a sovereign transaction.
    - **Example B**: China Electronics is also a "commercial SOE in industries and sectors of national security and lifeline of national economy." What sets China

Electronics apart from China Railway and Sinohydro is that China Electronics operates in military industry, which is arguably inherently sovereign and an exercise of sovereign authority, particularly when the company's technologies are designed for and provided to the Chinese military. The consideration of the sovereign purpose embedded in its commercial transactions will have an impact on our assessment of China Electronics's sovereign immunity in international law:

- If transactions for military usage purposes—such as developing and importing technologies for the state's military forces—are considered sovereign and a demonstration of an exercise of sovereign authority, China Electronics can arguably claim immunity for its transactions under the *UNCSI* and the UK *SIA* as the two regimes consider the purpose of the transaction in applying the commercial exception to jurisdictional immunity (see Chapters 5 and 6). But note that if they are treated the same as that of purchasing boots for the army, for which the US law and case law have treated them as commercial transactions for sovereign immunity purposes regardless of their ultimate military usage, then China Electronics's commercial transactions, such as importing technologies to be used for developing the Chinese military capacity will be treated as commercial transactions and attract no immunity.

- Contrary to the *UNCSI* and the UK *SIA*, sovereign usage purposes are barred from consideration in the commercial exception to jurisdictional immunity as applied under the US *FSIA* (see Chapter 7). Thus, under the US *FSIA*, China Electronics would not be immune from jurisdiction in relation to obligations related to its transactions—regardless of their military purpose—under the US *FSIA*.

4. Conclusion

The examination of the 97 central SASAC-owned Chinese SOEs' status and functions in the Chinese political economy showed that while Chinese SOEs have daily operational and managerial autonomy and separate corporate assets following China's enactment of the 2005 *Corporate Law* and the 2009 *State-owned Assets Law*, they also carry out sovereign purposes and implement the state' policies in some situations.

This Chapter concludes that Chinese SOEs have a dual identity, which has two facets. First, the dual identity is reflected in the current Chinese SOE categorization that some SOEs are commercial ones and others are public welfare ones. If China follows up by designating what SOEs are commercial SOEs and what are public welfare SOEs, we could say that these public welfare SOEs are part of the state as they provide public goods and services rather than engaging in commercial activities. Examples of potential public welfare SOEs include SOEs that provide poverty relief and natural disasters relief in light of China's recent treaty practice.

Secondly, commercial SOEs have a dual identity. For example, both China Railway and Sinohydro are commercial SOEs as defined by their primary businesses. Yet, their sovereign aspect was exhibited by their participation in the *Collaboration Agreement* with the Congo in light of their role in furthering China's infrastructure-for-resources strategy, China's political and

financial backing of the deal, and their execution of China's political and economic goals. However, this exhibited sovereign element of an SOE's implementation of the state's foreign policy and economic policy goals does not mean that SOE is exercising sovereign authority in the sense that is required to trigger immunity under the law of sovereign immunity, as will be shown in Chapters 5-7.

But when the purposes of an SOE's transactions are connected to inherently sovereign state functions, however, that SOE can potentially be immune from jurisdiction in relation to commercial transactions under the *UNCSI* and the UK *SIA*. The military purpose of China Electronics's commercial operations is an example of an inherently sovereign purpose. Under the US *FSIA*, China Electronics, however, is unlikely to enjoy jurisdictional immunity because the US *FSIA* excludes the consideration of the purpose of a transaction for jurisdictional immunity purposes.

Given their dual identity, this Chapter shows that to properly assess a central SASAC-owned SOE's status and functions in the Chinese political economy, a few factors need to be considered on a case-by-case basis. These factors include what is the SOE's primary business and the purpose thereof, whether that SOE's primary business falls into a sector of China's national security or economic lifeline, and whether that SOE has exercised sovereign authority—such as reflected in its sovereign purposes—in a particular situation.

Because Chinese SOEs have a dual identity, their ownership relationship to the state should not be determinative of their "state" status in the Chinese political economy. This finding refutes China's argument that all Chinese SOEs are commercial actors only pursuing commercial interests as prescribed by Chinese laws. The dual identity argument forms an important component of my thesis argument that a full assessment of Chinese SOEs' "state" status and

immunity under the customary law of restrictive immunity should be conducted in light of the Chinese political economy.

Chapter 5: Chinese SOEs' Status and Immunities under the 2004 *United Nations Convention on Jurisdictional Immunities of States and Their Property*

1. Introduction

This Chapter examines the "state" status and immunity of the 97 SOEs owned by the central SASAC under customary international law of sovereign immunity as expressed in and supplemented by the not-yet-in-force *UNCSI*. This Chapter examines two questions: (1) Under what circumstances would Chinese SOEs constitute part of the state for immunity purposes under the *UNCSI*? (2) What is the scope of Chinese SOEs' immunity from jurisdiction and execution and of the commercial exceptions thereto under the treaty?

This Chapter is organized in the following sections. Section 2 first lays out the definition of the state for immunity purposes found in the *UNCSI* and evaluates the rationale and customary nature of the "state" defined therein. Section 2 then examines the definition of state agency/instrumentality of Article 2(1)(b)(iii) of the *UNCSI* and to what extent it captures SOEs. Section 3 investigates the commercial exceptions to jurisdictional and execution immunity specified by the *UNCSI* and finds that the *UNCSI*'s test for the commercial exception provided in Article 2(2), which looks at both nature and purpose of an SOE's conduct, has not acquired customary international law status. This section further shows that the *UNCSI*'s definition of the state agency/instrumentality, which is based on an assessment of whether an entity has exercised sovereign authority in its actions, overlaps with the treaty's commercial exception—primarily focusing on the nature of the conduct—to jurisdictional immunity. Subsection 3.2 enquires into the scope of the state assets that are subject to execution and the threshold test imposed by Article 19(c) of the *UNCSI*. Section 4 evaluates the "state" status and immunity of the 97 central

SASAC-owned SOEs in a hypothetical *UNCSI* jurisdiction in which the domestic courts apply the *UNCSI*. Section 5 concludes.

2. Under what circumstances could an SOE become part of the state in the *UNCSI*?

2.1 The definition of the "state" for immunity purposes in the *UNCSI*

The definition of the state is one of the contentious issues left open before the conclusion of the *UNCSI*.[777] The final text of Article 2(1)(b) of the *UNCSI* defines the state for the purposes of claiming immunity as follows:

> "State" means:
>
> (i) the [s]tate and its various organs of government;
>
> (ii) constituent units of a federal [s]tate or political subdivisions of the [s]tate, which are entitled to perform acts in the exercise of sovereign authority, and are acting in that capacity;
>
> (iii) agencies or instrumentalities of the [s]tate or other entities, to the extent that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the [s]tate;
>
> (iv) representatives of the [s]tate acting in that capacity[.][778]

The *UNCSI*'s definition of the state provides a comprehensive list of what constitutes a state for immunity purposes: state organs, constituent units, political subdivision, agencies, instrumentalities, other entities, and state representatives.[779] This is different from the definitions

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[777] ILC Working Group Report 1999, *supra* note 239, identifies the definition of the state as one of five outstanding issues to be debated before the conclusion of the *UNCSI*; Grant, "Article 2(1)(a) and (b)" in O'Keefe & Tams, *supra* note 232 at 41.
[778] Article 2(1)(b), *UNCSI*.
[779] This Chapter primarily examines the definition of the state for sovereign immunity purposes under the *UNCSI*. For an overview of statehood and the creation of states in international law, see James Crawford, *The Creation of States in International Law* 2nd ed. (Oxford: Oxford University Press, 2006); Rowan Nicholson, *Statehood and the State-Like in International Law* (Oxford: Oxford University Press, 2019).

of the state found in the US *FSIA*[780] and the UK *SIA*.[781] Compared to the *UNCSI*, the US *FSIA* does not include something that is similar to "representatives of the state acting in that capacity." Both the *UNCSI* and the US *FSIA* include the concept of state agency and instrumentality, which the UK *SIA* does not have.[782] The UK *SIA*'s definition includes sovereign or other head of that state acting in his or her public capacity, which is similar to the *UNCSI*'s representatives of the state. The UK *SIA* also includes a government and any department of that government, which is similar to the *UNCSI*'s state/governmental organs. Further definitional differences can be found between the *UNCSI* and other domestic laws on immunity.[783]

In addition to its difference from the US and the UK laws, the *UNCSI*'s definition of the state is also different from that of the *Draft Articles on Responsibility of States for International Wrongful Acts* ("*ARSIWA*").[784] While the *UNCSI*'s definition of the state is for immunity purposes and the *ARSIWA*'s definition of the state is for responsibility purposes, the former was inspired by the latter to some extent and partial consistency was pursued in the drafting process,

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[780] Section 1603 of the US *FSIA* provides that: "(a) A 'foreign state', except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An 'agency or instrumentality of a foreign state' means any entity—

"(1) which is a separate legal person, corporate or otherwise, and

"(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

"(3) which is neither a citizen of a State of the United States as defined in section 1332 (c) and (d) of this title, nor created under the laws of any third country."

[781] Section 14(1) of the UK SIA provides that: "The immunities and privileges conferred by this Part of this Act apply to any foreign or commonwealth [s]tate other than the United Kingdom; and references to a [s]tate include references to:

(a) the sovereign or other head of that [s]tate in his public capacity;

(b) the government of that [s]tate; and

(c) any department of that government."

[782] The UK *SIA*'s Section 14(2) provides that a "separate entity"—which is not part of the state—could enjoy jurisdictional immunity only if (a) it has exercised sovereign authority and (b) a state would have been so immune if the conduct was done by the state.

[783] See for example, Article 3, Australia *FSIA*; Article 2, Canadian *SIA*. *Cf* Article 15, Pakistan *SIO*, Article 16 of Singapore *SIA*, and Article 1(2) of the South Africa *FSIA*, which are very close to the UK *SIA* model.

[784] ILC Working Group Report 1999, *supra* note 239 at para. 23.

even though opinions' of members of the ILC Working Group on this point were divided. As the ILC Working Group noted in its report:

> While some members of the Working Group felt that there should be a parallelism between the provision concerning the "concept of [s]tate for purpose of immunity" in the draft on jurisdictional immunities of [s]tates and their property and the provision on "attribution to the [s]tate of the conduct of entities exercising elements of the governmental authority" in the draft on [s]tate responsibility, other members felt that this was not necessarily the case. Although some members felt that it was not necessary to establish a full consistency between the two sets of draft articles, it was considered desirable to bring this draft article into line with the draft on [s]tate responsibility.[785]

Certain parallelism or consistency can be found in the final text of the *UNCSI* with the *ARSIWA*.[786] For example, Articles 2(1)(b) of the *UNCSI* incorporated tests from the definition of the state for attribution purposes of the *ARSIWA*'s Article 5.[787] Article 5 provides that:

> The conduct of a person or entity which is not an organ of the [s]tate under article 4 but *which is empowered by the law of that [s]tate to exercise elements of the governmental authority* shall be considered an act of the [s]tate under international law, provided the person or entity *is acting in that capacity in the particular instance*.[788] [emphasis added]

We can see that Article 5 imposes two requirements—"empowered … to exercise elements of governmental authority" and "is acting in that capacity in the particular instance"—that are similar to what the *UNCSI*'s requirement for an entity to be treated as a state agency/instrumentality—"entitled to perform acts in the exercise of sovereign authority" and "are acting in that capacity"—for immunity purposes under Article 2(1)(b)(iii).[789] Gerhard Hafner documented that the qualifier "provided that it was established that such entities were

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[785] ILC Working Group Report 1999, *ibid*.
[786] Binder & Wittich, "A Comparison of the Rules of Attribution in the Laws of State Responsibility, State Immunity and Custom", *supra* note 117 at 247.
[787] James Crawford & Simon Olleson, "The Continuing Debate on a UN Convention on State Responsibility" (2005) 54 ICLQ 959, 968 arguing that many provisions of the *ARSIWA*, including the one on attribution, have been generally taken to reflect customary international law.
[788] Article 5, *ARSIWA*.
[789] Binder & Wittich, "A Comparison of the Rules of Attribution in the Laws of State Responsibility, State Immunity and Custom", *supra* note 117 at 248.

acting in that capacity" was firstly recommended to be added for draft Article 2(1)(b)(ii) for "constituent units of a federal [s]tate or political subdivisions of the [s]tate" in the ILC Working Group's Report on Jurisdictional Immunities of States and Their Property.[790] This requirement was added for draft article 2(1)(b)(iii)—state agency, instrumentality, or other entity later.[791] Further, both the *UNCSI* and the *ARSIWA* use some terms to the same effect. The *ARSIWA* uses the term "person or entity" to include any natural or legal person in a broad sense for state responsibility purposes.[792] The *ARSIWA*'s commentary notes that the term "entity" is "used in a similar sense in the draft articles on Jurisdictional Immunities of States and Their Property"—the basis of the *UNCSI*.[793]

The prominent difference between the two instruments is the approach taken by them toward the scope of the state for definitional purposes.[794] As noted above, Article 2(1)(b) of the *UNCSI* has a comprehensive list in identifying what kind of entities constitute a state for immunity purposes. In contrast, the *ARSIWA*'s Article 4 uses "state organ"—which could be a person or an entity—to encompasses the legislative, executive, and judicial branches of a state for responsibility purposes:

> Conduct of organs of a [s]tate
>
> 1. The conduct of any [s]tate organ shall be considered an act of that [s]tate under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the [s]tate, and whatever its character as an organ of the central government or of a territorial unit of the [s]tate.

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[790] Chairman Report of the Sixth Committee 1999, *supra* note 238 at para. 18.
[791] *Ibid*.
[792] Crawford, *ILC's Articles 2002*, *supra* note 98 at 98, para. 12.
[793] Crawford, *ILC's Articles 2002*, *ibid*; see also Binder & Wittich, "A Comparison of the Rules of Attribution in the Laws of State Responsibility, State Immunity and Custom", *supra* note 117 at 247-48.
[794] Hafner and Kölher, "The UNCSI", *supra* note 118 at 16.

> 2. An organ includes any person or entity which has that status in accordance with the internal law of the [s]tate.[795]

In his recounting of the *UNCSI*'s drafting, Hafner explained why a more complex definition of the state—splitting state into several entities—for immunity purposes was adopted in the treaty, instead of using a simpler definition of the state as found in Article 4 of the *ARSIWA*.[796] He noted that when domestic courts address disputes between private entities and entities that claim immunity, all actors are treated as legal subjects of domestic laws. Only the question of the existence of immunity belongs to international law.[797] Whereas under the law of state responsibility, the state itself is addressed as a legal person under international law.[798] Based on this logic, Article 2(1)(b) provides a detailed guide to domestic courts on what kind of entities could be part of the state to claim immunity—the prerequisite condition for determining what kind of activities of a state can attract immunity under international law. A good example of this difference is found in the inclusion of state agency/instrumentality in Article 2(1)(b)(iii) of the *UNCSI* for immunity purposes. According to this provision, an entity that is entitled to exercise sovereign authority and has done so can become a state agency/instrumentality for immunity purposes, whereas the *ARSIWA* avoids using the term "agency" entirely.[799] Particularly, the *ARSIWA*'s Article 4 states that only legislative, executive, and judicial branches of a state can be treated as state organs—the inherent part of the state that can trigger international state responsibility. But it should be noted that the *ARSIWA* separately addresses the scenario where sovereign or governmental authority is delegated to an entity which is not a state organ in Article 5, similar to agencies/instrumentalities articulated by Article 2(1)(b)(iii) of the *UNCSI*.

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[795] Article 4, *ARSIWA*.
[796] Hafner and Kölher, "The UNCSI", *supra* note 118 at 16.
[797] Hafner and Kölher, *ibid*.
[798] Hafner and Kölher, *ibid*.
[799] Crawford, *State Responsibility 2013*, *supra* note 98 at 126.

Given the differences between the *UNCSI*'s definition of the state from the *ARSIWA*, the US *FSIA*, the UK *SIA*, and other domestic laws as shown in this section, the definition of the state provided in the *UNCSI* is arguably short of customary international law status.[800] Instead, it is a treaty description of state that guides litigation regarding states' sovereign immunity in domestic courts.[801] Article 2(1)(b)'s lack of customary international law status has important implications. First, it means domestic laws—such as the US and the UK laws studied in this thesis—have ample space to define the state for immunity purposes if they decide not to join the *UNCSI* as they have done in their domestic laws on sovereign immunity. Other states without immunity laws (which are the majority) could choose to adopt the *UNCSI*, or define the state based on the *UNCSI*'s formula in domestic legislation. If more states ratify the *UNCSI* or adopt a similar definition in their domestic laws, Article 2(1)(b)'s customary status could emerge, though the path could be long.[802] The second implication of Article 2(1)(b)'s lack of customary international law status is that the different approaches toward the definition of the state, particularly with regard to whether SOEs are part of the state, applied by domestic courts will lead to different analytical frameworks for our assessment of SOEs' sovereign immunity. These rules and their consequences on SOEs' immunity will be examined in detail in below and Chapters 6 and 7.

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[800] Varges, "Defining a Sovereign for Immunity Purposes", *supra* note 298 at 117ff explaining the difficulty for a consensus on the definition of the state for immunity purposes to emerge in international community as a result of states' differences in ideology, political organization, economic organization, and their approaches toward SOEs.

[801] Grant, "Article 2(1)(a) and (b)", in O'Keefe & Tams, *supra* note 232 at 41: "The 'highly disputed' definition of the '[s]tate', or at least parts of it, proved one of the most contentious issues over the course of the [*UNCSI*'s] drafting".

[802] As noted in the Introductory Chapter, China published a *Foreign State Immunity Law (Draft)* for public consultation on 30 December 2022. China takes a different approach in defining the state, compared to the *UNCSI*, the US *FSIA*, and the UK *SIA*. But it draws lessons from each regime. Article 2 provides that "The foreign state used in this law includes: (1) Sovereign states except the People's Republic of China; (2) Agencies or constituent parts of a sovereign state as defined by Section (1); (3) Natural persons, legal persons, or organizations that are not non-legal persons, which are authorized to exercise sovereign authority and have engaged in activities based on such authorization from the sovereign state as defined by Section (1) [author's translation]. See the Postscript.

2.2 SOEs' status under Article 10(3) of the *UNCSI*

Paragraph 3 of Article 10's "commercial transaction" exception provides that a state's immunity would not be impacted by their "state enterprises" (*i.e.*, "SOEs") that are engaging in commercial activities. In doing so, Article 10(3) provides a definition for SOE:

> Article 10 Commercial Transaction
>
> […]
>
> 3. Where a [s]tate enterprise or other entity established by a [s]tate which has an independent legal personality and is capable of:
>
> (a) suing or being sued; and
>
> (b) acquiring, owning or possessing and disposing of property, including property which that [s]tate has authorized it to operate or manage, is involved in a proceeding which relates to a commercial transaction in which that entity is engaged, the immunity from jurisdiction enjoyed by that [s]tate shall not be affected.[803]

The draft articles on Jurisdictional Immunities of States and Their Property adopted by the ILC for the first reading did not contain any special provision regarding SOEs.[804] Article 10(3) was added to address socialist countries' concerns about their sovereign immunity as states. Before the ILC, two socialist states, namely the Byelorussian Soviet Socialist Republic and the Union of Soviet Socialist Republics, proposed that an article on segregated property in SOEs should be included.[805] According to the ILC Working Group Report produced in 1999, segregated property was widely recognized in the socialist countries at the time. Segregated property speaks to an SOE, "as a legal entity, possessed a segregated part of national property" that is distinct from the state.[806] These socialist countries were concerned that while SOEs'

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[803] Article 10(3), *UNCSI*; see also Stephan Wittich, "Article 10" in O'Keefe & Tams, *supra* note 232 at 180.
[804] ILC Working Group Report 1999, *supra* note 239 at para. 62.
[805] ILC Working Group Report 1999, *ibid*; for a detailed historical account of this proposal, see Fox and Webb, *supra* note 13 at 358-64; Hafner & Kölher, "*The UNCSI*", *supra* note 118 at 27-28.
[806] ILC Working Group Report 1999, *supra* note 239 at para. 62.

creditors can execute against the segregated assets that are at the disposal of the SOEs, the absence of immunity for SOEs would have an impact on the immunity of their home states, thus, a provision that ensures the state's immunity was necessary.[807] Regarding this proposal, Western states were concerned that under-capitalized SOEs could walk away from their liability and wanted a mechanism to hold their home states accountable though "piercing the corporate veil".[808] These different views summarized in the 1999 ILC Working Group Report were taken into account by Hafner in his 2000 Chairman's Report of the Sixth Committee.[809] He produced a few alternatives on the relationship between SOEs' immunity and states' immunity for draft article 10(3) without satisfying all the delegations.[810] He documented that some delegations welcomed[811] and others opposed[812] his alternative suggestions that did not address SOEs' and the states' liability.

The provision on SOEs was finally settled in the 2003 *Ad Hoc* Committee Report, which became the final text of Article 10(3) the *UNCSI* as produced earlier.[813] Also in this Report, an "Understanding" of Article 10(3) was included to declare that the issue of attribution of liability between an SOE and its home state would not be impacted by the *UNCSI*:

> Article 10, paragraph 3, does not pre-judge the question of "piercing the corporate veil", questions relating to a situation where a [s]tate entity has deliberately misrepresented its financial position or subsequently reduced its assets to avoid satisfying a claim, or other related issues.[814]

This Understanding became part of the final text of the *UNCSI*.

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[807] *Ibid* at para. 63.
[808] *Ibid* at para. 68.
[809] Chairman of the Sixth Committee Report 2000, *supra* note 238.
[810] Chairman of the Sixth Committee Report 2000, *ibid* at para. 37. For Hafner's proposals, see paras. 9-11.
[811] *Ibid* at paras. 31 and 36.
[812] *Ibid* at paras. 32 and 35.
[813] Draft article 10(3), *Ad Hoc* Committee Report 2003, *supra* note 244.
[814] Draft Annex II, *Ad* Hoc Committee Report 2003, *ibid*.

Article 10 is in part III of the *UNCSI*—which is entitled "proceedings in which state immunity cannot be invoked"—and is one of the exceptions according to which a state cannot claim jurisdictional immunity.[815] As part of the exception, Article 10(3)'s definition of an SOE suggests that SOEs are not part of the state for immunity purposes when they undertake commercial activities.[816] In other words, SOEs should be excluded from the scope of state agencies/instrumentalities under Article 2(1)(b)(iii) unless sovereign authority was exercised, as discussed next.

2.3 State agency/instrumentality in *UNCSI*, Article 2(1)(b)(iii)

The most relevant provision regarding SOEs in Article 2(1)(b) is subparagraph (iii)'s definition of "state agency, instrumentality or other entity." As the ILC has commented, "[t]he concept of 'agencies or instrumentalities of the [s]tate or other entities' could theoretically include [s]tate enterprises or other entities established by the [s]tate performing commercial transactions."[817] To qualify as a state agency, instrumentality or other entity under the *UNCSI* for immunity purposes, an SOE has to meet two criteria. It has to be "entitled to perform" and "actually performing acts in the exercise of sovereign authority of the state."[818]

The element of "actually performing acts in the exercise of sovereign authority of the state" was included only in the later stage of the drafting process for the current Article

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[815] Rosanne van Alebeek, "Introduction to Part III: Proceedings in which State Immunity Cannot be Invoked" in O'Keefe & Tams, *supra* note 232 at 154.
[816] Wittich, "Article 10" in O'Keefe and Tams, *supra* note 215 at 181; Heß, "The ILC's Draft", *supra* note 217 at 280.
[817] ILC draft articles and commentaries 1991, *supra* note 314, draft article 2, para. 15. In parallel, the term "entity" used in Article 5, *ARSIWA*, "include[s] public corporations," such as SOEs. See Crawford, *ILC's Articles* 2002, *supra* not 98 at 100, para. 2, making the example that "[s]tate-owned airlines may have delegated to them certain powers in relationship to immigration control or quarantine [by the state]."
[818] Article 2(1)(b)(iii), *UNCSI*; see also ILC Commentary 1991, at para. 14: "…in the case of an agency or instrumentality or other entity which is entitled to perform acts in exercise of sovereign authority as well as acts of a private nature, immunity may be invoked only in respect of the acts performed in the exercise of sovereign authority."

2(1)(b)(iii).[819] In the draft articles on Jurisdictional Immunities of States and Their Property, Article 2(1)(b)(iv) provides that:

> "State" means:
>
> (iv) agencies or instrumentalities of the [s]tate and other entities, to the extent that they are entitled to perform acts in the exercise of sovereign authority of the [s]tate[.][820]

Regarding this entitlement of sovereign authority performance, the ILC commented that:

> [I]n the case of an agency or instrumentality or other entity which is entitled to perform acts in exercise of sovereign authority as well as acts of a private nature, immunity may be invoked only in respect of the acts performed in the exercise of sovereign authority.[821]

As discussed above, before the Sixth Committee Working Group, Hafner noted that a qualifier "provided that it was established that such entities were acting in that capacity" was recommended to be added only for draft Article 2(1)(b)(ii) for "constituent units of a federal [s]tate or political subdivisions of the [s]tate" in the ILC Working Group's Report on Jurisdictional Immunities of States and Their Property.[822] Following this recommendation, some delegations suggested that a similar expression should be added in draft Article 2(1)(b)(iii) on "state agencies and instrumentalities."[823] When Hafner produced his Chairman's Report of the Six Committee in 2000, he added the aforementioned recommendations regarding actual

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[819] The element of actual performance was firstly proposed to be added to "constituent units of a federal state and a state's political subdivisions", see ILC Working Group Report 1999, *supra* note 239 at para. 30. It was suggested to be added to the subparagraph on "state agency, instrumentality or other entity" before the Sixth Committee Working Group, see Chairman of the Sixth Committee Report 1999, *supra* note 238 at paras. 18 and 58; Chairman of the Sixth Committee Report 2000, *supra* note 238 at para. 19.
[820] ILC draft articles and commentaries 1991, *supra* note 314, draft article 2(1)(b)(iv).
[821] ILC draft articles and commentaries 1991, *ibid* at para. 14.
[822] Chairman Report of the Sixth Committee 1999, *supra* note 238 at para. 18. Hafner explained the rationale of adding this element: "With regard to the bracketed text [provided that it was established that such entities were acting in that capacity] suggested by the International Law Commission, it might be useful to restrict immunity to cases where at the time of the dispute it was clearly established that the act had been performed in the exercise of governmental authority." See also Chairman Report of the Sixth Committee 1999, *supra* note 238 at para. 56.
[823] Chairman Report of the Sixth Committee 1999, *ibid*.

performance in the proposed draft on state agencies, instrumentalities and other entities.[824] The suggested text in Hafner's 2000 Report became the final text of Article 2(1)(b)(iii) of the *UNCSI*.[825]

Because an agency, instrumentality or other entity of a state as prescribed by Article 2(1)(b)(iii)—unlike state constituent unit or political subdivision (Article 2(1)(b)(ii))—"does not necessarily act in exercise of governmental authority in all circumstances, nor is it necessarily entitled in all circumstances to do so,"[826] the criteria of both "entitlement" and "actual performance" found in Article 2(1)(b)(iii) "may be significant, even pivotal, when [it] is applied."[827] This is particularly true for SOEs where their primary function is commercial.[828] For an SOE to successfully acquire jurisdictional immunity under the *UNCSI*, two steps must be fulfilled. First, it must demonstrate that it has "state" status for immunity purposes by showing that it is entitled to exercise sovereign authority and has done so; secondly, it must demonstrate that the nature of its conduct is sovereign in nature to rebut any claims that its conduct falls into one of the exceptions provided by the *UNCSI*, such as the commercial transaction exception provided by Article 10.

Whether an entity can acquire "state" status for immunity purposes, and subsequently, whether it can attract immunity depends on what it has done—is it an exercise of sovereign

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[824] Chairman Report of the Sixth Committee 2000, *supra* note 238 at para. 88.
[825] Chairman Report of the Sixth Committee 2000, *ibid* at paras. 17, 19, 88.
[826] See Tom Grant, "Article 2(1)(a) and (b)" in O'Keefe & Tams, *supra* note 232 at 51; see also Stephan Wittich, "Article 10", in O'Keefe & Tams, *supra* note 232 at 181 arguing that the conjunctive term "and" used in Article 2(1)(b)(iii) indicates that the treaty requires both criteria of "status/entitlement" and "actual performance" to be applied to an SOE as a state agency/instrumentality.
[827] Grant, *ibid*; Heß, "The ILC's Draft", *supra* note 234 at 280; Crawford, *ILC's Articles* 2002, *supra* not 98 at 100, para. 3: "these entities are empowered, if only to a limited extent or in a specific context, to exercise specified elements of government authority."
[828] Wittich, "Article 10" in O'Keefe & Tams, *supra* note 232 at 181; Chairman of the Sixth Committee Report 1999, *supra* note 238 at para. 56.

authority? However, the *UNCSI* did not define what is "sovereign authority" for sovereign immunity purposes.[829] The ILC's commentaries to the draft articles on Jurisdictional Immunities of States and Their Property were reticent on this matter as well.[830] The ILC's commentaries to the *ARSIWA* made an attempt to elaborate upon what is "governmental authority" as used in Article 5 for state responsibility purposes, which can shed some light on our understanding of "sovereign authority" to be applied in the sovereign immunity context under the *UNCSI*:

> Article 5 [conduct of persons or entities exercising elements of governmental authority] does not attempt to identify precisely the scope of "governmental authority" for the purpose of attribution of the conduct of an entity to the [s]tate. Beyond a certain limit, what is regarded as "governmental" depends on the particular society, its history and tradition. *Of particular importance will be not just the content of the powers, but the way they are conferred on an entity, the purposes for which they are to be exercised and the extent to which the entity is accountable to government for their exercise*. These are essential questions of the application of a general standard to varied circumstances.[831] [emphasis added]

To determine if "governmental authority" exists under the *ARSIWA*'s Article 5, the ILC's commentary said that in addition to the content of powers, the way the powers are conferred on the entity, the purposes for which the powers are to be exercised, and the extent to which the entity is accountable to government for their exercise of such powers are also important elements.[832] Among these factors, the purpose for which the powers are to be exercised should be highlighted, as it shows that the purpose of the conduct in exercising a designated power matters in assessing what constitutes "governmental authority" under the *ARSIWA*'s Article 5.

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[829] Grant, "Article 2(1)(a) and (b)" in O'Keefe and Tams, *supra* note 232 at 50. Neither did *ARSIWA* attempted to define "governmental authority" used in Article 5.
[830] ILC draft articles and commentaries 1991, *supra* note 314, draft article 2.
[831] Crawford, *ILC's Articles* 2002, *supra* not 98 at 101, para. 6.
[832] Crawford, *ILC's Articles* 2002, *ibid*. In his treatise on state responsibility, the late Professor Crawford elaborated upon these four points, see Crawford, *State Responsibility 2013*, *supra* note 98 at 129-32.

This can provide us with some guidance in our assessment of what constitutes "sovereign authority" under Article 2(1)(b)(iii) of the *UNCSI* in light of Article 2(2)'s purpose element.

3. State agencies/instrumentalities' jurisdictional and execution immunities

3.1 The test for the commercial exception to an entity's jurisdictional immunity under the *UNCSI*

Article 5 of the *UNCSI* provides that "A [s]tate enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another [s]tate subject to the provisions of the present Convention."[833] According to Article 5, once a legal or a natural person qualifies as a "state" within the meaning of Article 2(1)(b), it is entitled *ipso facto* to jurisdictional immunity and immunity from execution unless one of the exceptions enumerated in Articles 7 to 17 apply.[834] Among the exceptions stipulated in Articles 7 to 17,[835] Article 10(1) provides the "commercial transaction" exception:

> Article 10 Commercial Transaction
>
> (1) If a [s]tate engages in a commercial transaction with a foreign natural or juridical person and, by virtue of the applicable rules of private international law, differences relating to the commercial transaction fall within the jurisdiction of a court of another [s]tate, the [s]tate cannot invoke immunity from that jurisdiction in a proceeding arising out of that commercial transaction.[836]

Article 10(1) must be read in light of Articles 2(1)(c) and 2(2) in the definition clause. Article 2(1)(c) defines the scope of the "commercial transaction":

> (i) any commercial contract or transaction for the sale of goods or supply of services;

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[833] Article 5, *UNCSI*.
[834] Tom Grant, "Article 5" in O'Keefe & Tams, *supra* note 232 at 99.
[835] These exceptions are Article 7 on express consent, Article 8 on effect of participation in a proceeding before a court, Article 9 on counterclaims, Article 10 on commercial transactions, Article 11 on contracts of employment, Article 12 on personal injuries and property damages, Article 13 on ownership, possession and use of property, Article 14 on intellectual and industrial property, Article 15 on participation in companies or other collective bodies, Article 16 on ships owned or operated by a state and Article 17 on effect of an arbitration agreement.
[836] Article 10, *UNCSI*.

> (ii) any contract for a loan or other transaction of a financial nature, including any obligation of guarantee or of indemnity in respect of any such loan or transaction;
>
> (iii) any other contract or transaction of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons."[837]

Article 2(2) provides the methodology to determine if the character of a transaction is commercial:

> (2) In determining whether a contract or transaction is a "commercial transaction" under paragraph 1(c), reference should be made primarily to the nature of the contract or transaction, but its purpose should be taken into account if the parties to the contract or transaction have so agreed, or if, in the practice of the [s]tate of the forum, that purpose is relevant to determining the non-commercial character of the contract or transaction.[838]

Like the definition of the state, the characterization of "commercial transaction" is another issue that was debated before the conclusion of the *UNCSI*.[839] States were divided on whether to include a purpose element, and if a purpose test was included, what its role would be in the methodology for determining what is commercial.[840] The ILC Working Group examined many alternatives in its 1999 Report,[841] but considered deleting the provision on methodology for determining when a transaction was commercial entirely as the most appropriate option because:

> It was felt that the distinction between the so-called nature and purpose tests might be less significant in practice than the long debate about it might imply.[842]

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[837] Article 2(1)(c), *UNCSI*.
[838] Article 2(2), *UNCSI*.
[839] ILC Working Group Report 1999, *supra* note 239.
[840] Wittich, "Article 2(1)(c) and (2) and (3) in O'Keefe and Tams, *supra* note 232 at 58.
[841] ILC Working Group Report 1999, *supra* note 222 at para. 59: (a) the nature test as the sole criterion; (b) the nature test as a primary criterion; (c) Primary emphasis on the nature test supplemented by the purpose test with a declaration of each State about its internal legal rules or policy; (d) Primary emphasis on the nature test supplemented by the purpose test; (e) Primary emphasis on the nature test supplemented by the purpose test with some restrictions on the extent of "purpose" or with some enumeration of "purpose", such purpose goes beyond to reference to humanitarian grounds; (f) Reference in article 2 only to "commercial contracts or transactions", without further explication; (g) Adopt the approach taken by the Institute of International Law in its 1991 recommendations.
[842] ILC Working Group Report 1999, *supra* note 239 at para. 60.

Noting delegations' different views and the ILC's recommendation for deletion in his 1999 Chairman Report of the Six Committee,[843] Hafner put forward a few alternatives in his 2000 Chairman Report of the Sixth Committee. [844] The methodology of commercial transaction was finally settled in the 2003 Report of the *Ad Hoc* Committee on Jurisdictional Immunities of States and Their Property.[845] Under an informal consultative group led by Chusei Yamada, a draft article was agreed, which became the final text of Article 2(2) of the *UNCSI*.[846]

The final text of Article 2(2) adopts a primary nature test that is complemented by a purpose test in two situations: (1) parties have agreed that a purpose test could be applied, or (2) the forum law applies a purpose test.[847] The explicit inclusion of a purpose test in the *UNCSI*'s methodology in determining what constitutes a commercial conduct/transaction distinguishes the *UNCSI* from the US *FSIA* that explicitly rejects a purpose test and applies a sole nature test. As we will see in Chapter 6, the UK and Canada—similar to the *UNCSI*—apply a test that considers both the nature and purpose of an entity's transaction in their judicial practice. The UK and Canadian courts defined such an approach as a "contextual" one, which prioritizes the nature of the conduct in characterizing a transaction.[848]

Regarding the application of the nature and the purpose elements found in Article 2(2), Stephan Wittich observes that the nature element should be prioritized and even applied alone in clear-cut cases:

> [T]he gist of Article 2(2) would seem to be that, unless one of the two exceptions to the general proposition applies, the 'nature' test alone should be

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[843] Chairman of the Sixth Committee Report 1999, *supra* note 238 at paras. 19-23.
[844] Chairman of the Sixth Committee Report 2000, *supra* note 238 at para. 88: Item 2: Definition of commercial character of a contract or transaction; Wittich, "Article 2(1)(c) and (2) and (3)" in O'Keefe & Tams, at 58.
[845] *Ad Hoc* Committee Report 2003, *supra* note 244.
[846] Hafner & Kölher, "*The UNCSI*", *supra* note 118 at 21.
[847] Wittich, "Article 2(1)(c) and (2) and (3) in O'Keefe and Tams, *supra* note 232 at 68.
[848] See Chapter 6, Section 3.

> employed; and that if either of the exceptions applies, both the 'nature' test and the 'purpose' test should be used.[849]

In his commentary to Article 2(2), Wittich expressed his doubt over the role of the purpose test could play since a "nature" test is embedded in Article 2(1)(c), which lists the content of commercial transaction. He found that Articles 2(1)(c)(ii) and 2(1)(c)(iii) explicitly refer to contract or transaction with a financial, commercial, industrial, trading or professional "nature" and such a nature test can be inferred from Article 2(1)(c)(i)—"any commercial contract or transaction for the sale of goods or supply of services[.]"[850]

It is probably rare for parties to agree ahead of time that a purpose test would be applied to their commercial conduct/transaction. Thus, the practice of the forum state that applies a purpose test potentially has greater significance. Courts in some states—including those that profess to consider the nature of the contract or transaction the sole or primary criterion—rely in practice on the contract's or transaction's purpose in assessing what constitutes commercial and non-commercial.[851] Wittich found that the Italian, French, Japanese, Austrian, Canadian, and English courts have considered sovereign purposes in addition to their assessment of the contract or the transaction's nature.[852] Despite his earlier reservation about the role of a purpose element, Wittich concluded that at least in some cases, a meaningful characterization of a contract or transaction cannot be achieved without taking into account the underlying purposes.[853]

A key question left open is to what extent Article 2(2)'s methodology reflects customary international law, particularly when there are only a few states that have been documented as

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[849] Wittich, "Article 2(1)(c) and (2) and (3)" in O'Keefe & Tams, *supra* note 232 at 68.
[850] Wittich, *ibid* at 60, 69.
[851] *Ibid* at 71.
[852] *Ibid*. See also Yang, *supra* note 13 at 98-103 discussing the Canadian, Italian, and French state practice that includes assessment of the purpose of the underlying contract and transaction. See also China's *Foreign State Immunity Law (Draft)*, paragraph 2 of draft Article 7.
[853] *Ibid*, 69, 71; see also Chapter, Section 4.

considering the purpose of the conduct/transaction in assessing the character of a transaction. This uncertainty was also found in the debate that led up to the conclusion of the *UNCSI* among states. Three schools of thought exist. In the first group, states maintained that either the nature test should be the only relevant criterion, or that purpose should be relevant only when the state in question has notified the private party of its relevance, or when both parties to the transaction have expressly agreed.[854] The second group consists of states that insisted purpose be treated as an independent criterion alongside nature; *i.e.*, they do not object to "nature" playing the main role, but they argued that a governmental purpose should also be taken into consideration notwithstanding the apparently commercial nature of a contract or transaction. This group of states includes China.[855] The third group of states took a more flexible approach and expressed their readiness to accept a role for "purpose", as the ILC has done in draft article 2(2).[856] The final text of Article 2(2) of the *UNCSI* has taken an approach that primarily examines the nature of the conduct with the purpose playing a role in limited situations. The divergent views taken by states in the *UNCSI*'s drafting on the role of purpose and limited state practice that incorporates a purpose test suggest that a consensus on focusing on the nature of the conduct in determining what is commercial probably has been formed, but not on the role of the purpose of the conduct.

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[854] Yang, *supra* note 13 at 448, footnote 56, noting key proponents for a nature only approach include the US, the UK, Austria, Germany.
[855] Yang, *ibid*, footnote 57, noting states that argue for an inclusion of a purpose element include China, France, Japan, Madagascar, India, Bahrain, Algeria, Cameroon, Lebanon, Qatar. See also China's *Foreign State Immunity Law (Draft)*, paragraph 2 of draft Article 7 endorses the *UNCSI*'s approach by giving weight to purpose of the conduct for determining what constitutes commercial transaction in Chinese courts. It provides that: "The commercial activity used in this law is any activity that is not an exercise of sovereign authority, which relates to transactions of goods, services, investments, or other activities that are commercial in nature. *When a Chinese court determines if an activity is a commercial activity, the nature and the purpose of the activity shall be considered altogether*" [emphasis added]. See also the Postscript.
[856] Yang, *ibid*, footnote 58, these states include Germany, Bulgaria, Indonesia, UK, Australia, Canada, New Zealand.

This leaves states with space to choose whether they would incorporate the purpose as part of the test in their laws and judicial practice.[857]

3.1.1 An overlapping issue exists when assessing SOEs' "state" status under Article 2(1)(b)(iii) and their jurisdictional immunity under Articles 2(1)(c), 2(2) and 10 of the *UNCSI*

For an SOE to attract immunity under the *UNCSI*, an SOE has to demonstrate that it has immunity *ratione personae* under Article 2(1)(b)(iii), which requires that SOE to demonstrate that it is "entitled to perform and [is] actually performing acts in the exercise of sovereign authority of the [s]tate" so that it is a state agency/instrumentality.[858] As discussed earlier, the *UNCSI* is silent on what are immune sovereign acts. To dismiss an SOE's claim of "state" status as a state agency/instrumentality, we often do so by demonstrating that it is acting in a commercial capacity by relying on Article 10(1)—the commercial exception to jurisdictional immunity, which requires an application of Article 2(1)(c)—the scope of commercial transaction and Article 2(2)—the methodology of determining commercial transaction. In doing so, two separate issues—whether an entity constitutes a part of the state and whether an entity's act is commercial in nature—become overlapped.

Let us use an example to illustrate this overlapping issue. An SOE that carries out commercial transportation services claims jurisdictional immunity when it is sued by its passengers in a domestic court that applies the *UNCSI*. To determine that SOE's immunity, the court must first determine if the SOE is a state agency/instrumentality under Article 2(1)(b)(iii) for having immunity *ratione personae*. By demonstrating that an SOE's transportation of

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[857] As noted in Chapter 1, China has just published a *Foreign State Immunity Law (Draft)* for public consultation on 30 December 2022, *supra* note 31. Paragraph 2 of draft Article 7 of China's *Foreign State Immunity Law (Draft)* considers both the nature and the purpose of the conduct in assessing whether a transaction is commercial. See the Postscript.

[858] Article 2(1)(b)(iii), *UNCSI*.

passengers is commercial in nature with an application of Articles 2(1)(c), 2(2) by way of Article 10(1), we can deny the SOE's "state" status as a state agency/instrumentality under Article 2(1)(b)(iii) of the *UNCSI*. Although such an application overlaps with further examination of whether an SOE's immunity is barred by Article 10's commercial exception if it is a state agency/instrumentality, the purposes of each test are different: the former is to determine an entity's "state" status; the latter is to determine that entity's actual immunity if it qualifies to be part of a state for actions relating to the claim against it.

3.2 State agencies/instrumentalities' immunity from measures of constraint regarding their assets under the *UNCSI*

3.2.1 The terminology used in the *UNCSI* regarding immunity from execution against the state's assets

Unlike the US *FSIA*, which uses the term of "immunity from attachment or execution"[859] or the UK *SIA*, which uses the term "enforcement" to regulate a sovereign state's immunity from execution,[860] the *UNCSI* uses the term "measures of constraint" in Articles 18 and 19. According to the ILC, "measures of constraint" is a generic term to encompass different terminologies used by domestic laws, such as attachment, arrest and execution, to cover methods of constraint against property in different jurisdictions.[861] In this Chapter, the term of "immunity from measures of constraint" will be used interchangeably with the term of "immunity from execution" in the context of *UNCSI*. Further, the terms "property" and "asset" are used interchangeably for execution purposes.

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[859] Section 1610, US *FSIA*.
[860] Section 13, UK *SIA*.
[861] ILC draft articles and commentaries 1991, *supra* note 314, draft article 18, para. 4.

3.2.2 The commercial exception to post-judgment immunity from measures of constraint under Article 19(c), and whether has it acquired customary international law status

As noted in Chapter 2, customary international law treats jurisdictional immunity and immunity from execution as two separate immunities.[862] The implication of such a distinction is that measures of execution are to be treated as a separate procedure from the jurisdictional proceeding.[863] Articles 18 and 19 provide the general rule that no pre- and post-judgment measures of constraint can be levied against a state's properties unless certain exceptions arise. Notably, Article 19(c) provides a commercial exception to post-judgment measures of constraint, which Article 18 does not have regarding pre-judgment measures of constraint.

A difficult question to answer is whether Article 19 has acquired customary international law status. The ICJ chose not to answer this question directly in *Jurisdictional Immunities* but held that only commercial state property can be subject to forced execution:

> When the [UNCSI] was being drafted, these provisions gave rise to long and difficult discussion. The Court considers that it is unnecessary for purposes of the present case for it to decide whether all aspects of Article 19 reflect current customary international law.
>
> Indeed, it suffices for the Court to find there is at least one condition that has to be satisfied before any measure of constraint may be taken against property belonging to a foreign [s]tate: that the property in question must be in use for an activity not pursuing government non-commercial purposes.[864]

In light of the ICJ's above findings in *Jurisdictional Immunities*, I will examine two issues below. First, the scope of the state's assets that are subject to execution under the treaty

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[862] ILC draft articles and commentaries 1991, *ibid*, draft article 18, para. 1; Michael Wood, "Immunity from Jurisdiction and Immunity from Measures of Constraint", in O'Keefe & Tams, *supra* note 232 at 13; *Jurisdictional Immunities*, *supra* note 12 at para. 113.

[863] ILC draft articles and commentaries 1991, *ibid*, draft article 18, paras. 1 and 2; ILC Working Group Report 1999, *supra* note 239 at para. 109.

[864] *Jurisdictional Immunities*, *supra* note 12 at paras. 117-18; see also Kelsey A. Rose, "When Immunity Means Impunity: Lessons for Canada from Recent Cases on State Immunity from Execution" (2017) 55 The Canadian Yearbook of International Law 335, 340-41 [Rose, When Immunity Means Impunity].

(Subsection 3.2.2.1). Secondly, the commercial usage exception to immunity from execution under Article 19(c) (Subsection 3.2.2.2).

3.2.2.1 The scope of the assets that are subject to execution under Article 19(c)

Article 19 of the *UNCSI* is entitled "[s]tate immunity from post-judgment measures of constraint" and its paragraph (c) provides that:

> No post-judgment measures of constraint, such as attachment, arrest or execution, against property of a [s]tate may be taken in connection with a proceeding before a court of another [s]tate unless and except to the extent that:
>
> […]
>
> (c) it has been established that the property is specifically in use or intended for use by the [s]tate for other than government non-commercial purposes and is in the territory of the [s]tate of the forum, provided that post-judgment measures of constraint may only be taken against property that has a connection with the entity against which the proceeding was directed.[865]

Article 19(c) uses the term "property of a state" to describe the scope of the state assets that are subject to the commercial usage exception. The ILC Commentary, the ILC Working Group Report 1999, and the two Chairman Reports of the Sixth Committee did not shed much light on the scope of state property that could be subject to execution.[866] Article 21(1) of the *UNCSI* details specific state assets that are not in use or intended for use by the state for "other than government non-commercial purposes" under Article 19(c). They are: (1) property for diplomatic functions, including bank accounts; (2) property of a military character or used or intended for use for military functions; (3) property of a central bank or other monetary authority; (4) cultural heritage property, including property not placed or intended to be placed for sale; (5) property forming exhibition of objects of scientific, cultural and historical interest

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[865] Article 19(c), *UNCSI.*
[866] ILC draft articles and commentaries 1991, *supra* note 314, article 18, para. 5, pointing out that the phrase "or property in which [the state] has a legally protected interest" was deleted and replaced by "property of a State." This is not helpful in understanding the scope of such property.

and not placed or intended to be placed for sale.[867] The five categories of assets are not subject to execution unless and to the extent that the state has expressly consented to the takings of such measures under Article 19(a) or has allocated or earmarked the property for the execution purposes as per Article 19(b).

The "property of a state" used in Article 19(c)—in addition to those covered by Article 21(1) (although not subject to execution without states' consent)—should be understood as properties over which the state has a title, whether proprietary or possessory; and not simply having a legal interest since the phrase "or property in which it has a legally protected interest" was deleted in the second reading of the ILC Draft Articles.[868] This denotes a narrow scope of available state property for execution purposes under Article 19(c). But as we will see below, the connection requirement between state property and the entity—a particular term used in Article 19(c)—subject to the execution proceeding found in Article 19(c) potentially expands the scope of state property that could be subject to execution.[869]

3.2.2.2 A threefold test of the commercial usage exception to execution immunity against states' assets under the *UNCSI*

Article 19(c) imposes a threefold test for the commercial usage exception. First, it assesses the purpose of usage of the properties "at the time the proceeding for attachment or execution is instituted."[870] Secondly, there is a territorial connection requirement—the state property must be

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[867] Article 21, *UNCSI*.
[868] ILC draft articles and commentaries 1991, *supra* note 314, draft article 18, para. 5; Fox and Webb, *supra* note 13 at 502-03; Brown & O'Keefe, "Article 19" in O'Keefe & Tams, *supra* note 232 at 316.
[869] Fox and Webb, *supra* note 13 at 503-04; Yang, *supra* note 13 at 401-02.
[870] ILC draft articles and commentaries 1991, *supra* note 314, Article 18, para. 11: the term "is" in this provision is deliberately used to confine the measures of execution to a limited time frame so as not to "fetter [s]tates' freedom to dispose of their property." *Cf* Section 1610 of the US *FSIA*, which allows execution measures regardless of the current use of the state assets by using a phrase "is or was used" so long as the property has been used for a commercial activity in the past at some point. Section 13(4) of the UK *SIA* provides that the property of a state shall not be immune from execution if the property "is for the time being in use or intended for the use for commercial

in the forum state. Thirdly, there is a connection requirement between the property and the entity against which the proceeding is instituted. My assessment below focuses on the first one—the commercial usage purpose and the third one—the connection requirement between the property and the entity against which the proceeding is instituted. The territorial requirement is often not the hurdle for execution once the property has been identified in the forum court.[871]

(a) Commercial usage purposes in Article 19(c)

Compared to the Articles 19(a) and 19(b), Article 19(c)'s commercial usage exception to post-judgment execution against a state's assets does not need a state's explicit consent.[872] As for the qualifying terms "government" and "non-commercial", they are cumulative.[873] To invoke this commercial usage exception, the claimant must demonstrate that the underlying "purpose" of the usage of state property is "other than government and non-commercial."[874] The purpose test applied here is in contrast with restrictive immunity's emphasis on the nature of a conduct/transaction in the commercial exception to jurisdictional immunity,[875] such as the one found in Articles 2(1)(c), 2(2) and 10 discussed above.[876] Yang commented that in the context of execution immunity, the purpose test—much discredited under the jurisdictional immunity—comes back with a vengeance.[877] The ILC Commentary did not provide much guidance on how

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purposes" The word "is" used in Section 13(4) of the UK *SIA* brings the UK law—compared to the US law—closer to the *UNCSI*.

[871] Fox and Webb, *supra* note 13 at 505; Brown & O'Keefe, "Article 19" in O'Keefe & Tams, *supra* note 232 at 323-324; Yang, *supra* note 13 at 402-404.

[872] Brown & O'Keefe, "Article 19" in O'Keefe & Tams, *ibid* at 322.

[873] Some argue that they are redundant, see Brown & O'Keefe, "Article 19", *ibid* at 323; see also ILC draft articles and commentaries 1991, *supra* note 314, Article 18, para. 11.

[874] See *Jurisdictional Immunities*, *supra* note 12 at para 118: "that the property in question must be in use for an activity not pursuing government non-commercial purposes[.]"

[875] *Cf* Article 10 of the *UNCSI* discussed in Section 2 above; see Yang's discussion regarding the revival of the purpose test in execution immunity in Yang, *supra* note 13 at 362; see also Brown & O'Keefe, "Article 19" in O'Keefe & Tams, *supra* note 232 at 323.

[876] See Sections 2 and 3.1 above; see also Chapter 5, Section 2 and Chapter 6 Section 2 on commercial exception to jurisdictional immunity under the US *FSIA* and the UK *SIA*.

[877] Yang, *supra* note 13 at 362.

to assess the usage purpose of state assets. Chester Brown and Roger O'Keefe suggest that the interpretation of the "commercial transaction" found in Articles 2(1)(c), 2(2) and 10 should inform the interpretation of Article 19(c).[878] In their view, the term "government non-commercial purposes" in Article 19(c) is to be construed as "purposes other than a 'commercial transaction" as defined in Article 2(1)(c)."[879] In other words, state property that is used for "government non-commercial purposes" within Article 19(c) is property not used for the purpose of commercial transaction as understood by the *UNCSI*.[880] Brown and O'Keefe argue that such an interpretation is in line with some national legislation that defines the term "commercial purposes" by referring to the "commercial transaction" or "commercial activity" exception to jurisdictional immunity.[881] While this approach might be helpful, it should be applied with caution. The underlying transaction that creates the property and the transaction that the property is to be used for shall be distinguished. This is because the property against which execution is sought can be used for a transaction that is totally irrelevant from the underlying transaction it arises from. As the UK Supreme Court has held in *SerVaas v. Rafidian Bank*: "[p]roperty will only be subject to enforcement where it can be established that it is currently 'in use or intended for use' in a commercial transaction. It is not sufficient that the property 'relates to' or is 'connected with' a

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[878] Brown & O'Keefe, "Article 19" in O'Keefe & Tams, *supra* note 232 at 323.
[879] Brown & O'Keefe, *ibid*.
[880] Brown & O'Keefe, *ibid*.
[881] See Section 17(1) of the UK *SIA*, which provides that "'commercial purposes' means purposes of such transactions or activities as are mentioned in section 3(3) above." Section 3(3) of the UK *SIA* defines "commercial transaction"; Section 7(1) of the Canadian *State Immunity Act* which provides that "the ship was being used or was intended for use in a commercial activity." Section 2 defines "commercial activity"; Section 1610 of the US *FSIA* also refers to "[t]he property … used for a commercial activity." Section 1603(e) defines "commercial activity"; Section 2(1) of the *Singapore SIA*, which provides that "commercial purposes" means "purposes of such transactions or activities as are mentioned in section 5(3)[.]" Section 5(3) defines "commercial transaction"; Section 1 of the South Africa *Foreign States Immunities Act* provides that "commercial purposes" means "purposes of any commercial transaction as defined in section 4(3)[.]" Section 4(3) defines "commercial transaction."

commercial transaction [such as what creates it]."[882] The approach taken by the UK Supreme Court is instructive to our application of the *UNCSI*, which allows us to focus on the current and future usage of the property, irrespective of its origin.

(b) The connection requirement between the property and the entity against which the proceeding was instituted

Article 19(c) requires a connection between the property that is subject to execution and the entity against which the proceeding is instituted.[883] It does not use the defined term "state" in Article 2(1)(b) to qualify the property that would be subject to execution but instead the term "entity." The Annex to the *UNCSI* explains that such "entity" encompasses the components of a state as defined by Article 2(1)(b) of the *UNCSI*:

> The expression "entity" in subparagraph (c) [of Article 19] means the [s]tate as an independent legal personality, a constituent unit of a federal [s]tate, a subdivision of a [s]tate, an agency or instrumentality of a [s]tate or other entity, which enjoys independent legal personality.[884]

In light of the broad scope of the term "entity" as defined by the Annex and with the word "connection" undefined, Article 19(c) may permit the levying of execution upon the property of a state to satisfy a judgment against a state entity, or *vice versa*, provided some connection with the entity can be shown.[885] This argument is supported by a comparison with the draft article 18 of the ILC's draft articles on Jurisdictional Immunities of States and Their Property, in which the connection requirement was more strict and must be established to the underlying claim:

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[882] *SerVaas Incorporated v. Rafidian Bank and Others* [2012] UKSC 40, para. 37 [*SerVaas v. Rafidian Bank*]. For further discussion on this case, see Chapter 6, Section 4.1.

[883] The relevant part of Article 19(c) states that: "provided that post-judgment measures of constraint may only be taken against property that has a connection with the entity against which the proceeding was directed."

[884] Annex to the Convention, *UNCSI*.

[885] Yang, *supra* note 13 at 402; Brown & O'Keefe, "Article 19" in O'Keefe & Tams, *supra* note 232 at 325-26. The Annex of the *UNCSI* with respect to Article 19 explains that: "Article 19 does not prejudge the question of 'piercing the corporate veil', questions relating to a situation where a State entity has deliberately misrepresented its financial position or subsequently reduced its assets to avoid satisfying a claim, or other related issues."

> (c) the property is specifically in use or intended for use by the [s]tate for other than government non-commercial purposes…and has *a connection with the claim which is the object of the proceeding*[.][886] [emphasis added]

Further, the term "connection" used in Article 19(c) has arguably broadened the scope of state assets that could be subject to execution under the *UNCSI*. As the second paragraph of the Annex to the *UNCSI* with respect to Article 19 has pointed out:

> The words "property that has a connection with the entity" in subparagraph (c) are to be understood as broader than ownership or possession.[887]

What is broader than ownership and possession potentially includes "the lesser links of control or interest."[888] Brown and O'Keefe argue that the control or interest here should be understood as "legally protected interest" that was included in square brackets in the text of draft article 18(1) as adopted on first reading, which was rejected on second reading by the ILC.[889] They argue that the implication for such a reading of the second paragraph of the Annex to the *UNCSI* with respect to Article 19 is that:

> a judgment obtained against a [s]tate instrumentality may be executed not only against property owned or possessed or controlled by that instrumentality but also against any property in which that instrumentality has a legally protected interest.[890]

Jean-Marc Thouvenin and Victor Grandaubert agree with O'Keefe and Brown's reading. They observe that "[t]o simply exclude property in which a [s]tate has an interest, in particular when it may be difficult to draw a line between ownership possession or control and an interest, is not convincing today from the point of view of globalization and the expanding

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[886] ILC draft articles and commentaries 1991, *supra* note 314, draft article 18(1)(c); *cf* Section 1610(a)(2) of the US *FSIA*, which also imposes a connection with the claim: "the property is or was used for the commercial activity upon which the claim is based."
[887] Annex to the Convention, *UNCSI*.
[888] Fox and Webb, *supra* note 13 at 503; see Section 6(4) of the UK *SIA*, which provides that: "A court may entertain proceedings against a person other than a State notwithstanding that the proceedings relate to property—(a) which is in the possession or *control* of a State; or (b) in which a State *claims an interest*" [emphasis added].
[889] Brown and O'Keefe, *supra* note 232 at 326.
[890] Brown and O'Keefe, *ibid*.

financialization of the economy."[891] They support their view by referring to the US Supreme Court decision *Bank Markazi v. Peterson* that came out in 2016. In this case, the US Supreme Court held that the scope of state assets includes assets that a state holds an equitable title or has beneficial interests.[892]

Bank Markazi v. Peterson dealt with creditors' enforcement effort against the Iranian central bank's (Bank Markazi) interests in bond assets held in a New York bank account under the US *FSIA*'s terrorism exception permitting enforcement of assets of Iran.[893] Although this case was about the expanded scope of assets for execution purposes authorized under the *Iran Threat Reduction and Syria Human Rights Act of 2012*, its finding is insightful for our understanding of the scope of state assets that are available for execution in the commercial context.[894] In this case, the US Supreme Court found that Bank Markazi, through a Luxembourg-based bank and an Italian bank, held bond interests on behalf of Iran in the Citibank in New York. Moreover, in the judicial proceeding before the US courts, Bank Markazi conceded that Iran held equitable title to, or beneficial interest in the targeted assets.[895] The US Supreme Court concluded that Bank Markazi's interests in bond assets held in a New York bank account were Iran's assets under the *Iran Threat Reduction and Syria Human Rights Act of 2012* and allowed the creditors to execute against them. This case shows that a weaker connection of beneficial

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[891] Thouvenin & Grandaubert, "The Material Scope of State Immunity from Execution", *supra* note 59 at 254; Dicey, Morris & Collins argue that what the state has an interest in could even include something the state only has a legal title, see *Dicey, Morris & Collins on The Conflict of Laws*, *supra* note 221 at 344 : "if a foreign [s]tate has an interest in property situated within the jurisdiction, whether proprietary, possessory or of some less nature, a claim which affects its interests will be stayed, even though it is not brought against it personally… the rule is not limited to ownership, and applies to lesser interests which may not merely be proprietary but not even possessory, so that it applies to property under the control of the foreign [s]tate, and perhaps also to property in respect of which it has no beneficial interest but only the legal title."
[892] *Bank Markazi v. Peterson*, 136 S.Ct. 1310 (2016).
[893] *Bank Markazi v. Peterson*, *ibid* at 1314.
[894] Thouvenin & Grandaubert, "The Material Scope of State Immunity from Execution", *supra* note 59 at 254-55.
[895] *Bank Markazi v. Peterson*, *supra* note 892 at 1321, 1335.

interest would still qualify an asset to become state asset, which aligns with the expanded scope of state assets under the *UNCSI*—so long as the state has an interest in the asset at issue.

4. Examining Chinese SOEs' "state" status and immunity in a hypothetical jurisdiction that applies the *UNCSI* by using some facts from the *FG Hemisphere 1* case

4.1 Analyzing a hypothetical *FG Hemisphere 1* case in an *UNCSI* jurisdiction

To assess the 97 central SASAC-owned SOEs' "state" status and immunity under the *UNCSI*, I will apply the *UNCSI* to a hypothetical situation based on the *FG Hemisphere 1* case discussed in Chapter 3.

Recall that a *Collaboration Agreement* was signed between China Railway, Sinohydro and the Congo in 2008 under an umbrella agreement signed between China and the Congo. Both China Railway and Sinohydro are solely and directly owned by the central SASAC. Pursuant to Article 5.1 of the *Collaboration Agreement*, the two Chinese SOEs would pay the Congo $350 million US dollars in entry fees.[896] Pursuant to Article 5.2 of the *Collaboration Agreement*, the two Chinese SOEs would loan Gécamines—a Congolese SOE designated by the Congo for implementing further collaboration—$50 million US dollars.[897]

Let us imagine that a dispute arises between China Railway, Sinohydro, the Congo and Gécamines as the two Chinese SOEs failed to pay entry fees to the Congo or provide loans to Gécamines as required by the *Collaboration Agreement*.[898] In this hypothetical situation, there

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[896] Article 5.1, *Collaboration Agreement*, *supra* note 413.
[897] Article 5.2, *Collaboration Agreement*, *ibid*.
[898] According to Maiza-Larrarte & Claudio-Quiroga's account, the collaboration between the Chinese and Congolese parties has been going well. See Maiza-Larrarte & Claudio-Quiroga, "The Impact of Sicomines on Development in the Democratic Republic of Congo", *supra* note 503 at 430, mentioning the production output of 2016. The hypothetical facts that are created here sought to present a dispute in which Chinese SOEs' dual identity makes an impact on our assessment of their conduct/transactions; and subsequently their immunity.

was no ICSID arbitration clause in the *Collaboration Agreement*. After negotiations failed, the Congo and Gecamines sued China Railway and Sinohydro in a domestic court in a jurisdiction that applies the *UNCSI* ("*UNCSI* jurisdiction") because assets of China Railway and Sinohydro were discovered there. Before the court in the *UNCSI* jurisdiction, China Railway and Sinohydro both argue that they enjoy jurisdictional and execution immunities under the *UNCSI* as they have exercised sovereign authority in their investments in the Congo because their transactions in the Congo were implementing China's infrastructure-for-resources policies pursuant to the umbrella agreement made between China and the Congo and the *Collaboration Agreement*. The following issues arise in this hypothetical situation:

(1) Under what circumstances would Chinese SOEs be recognized as state agencies/instrumentalities under Article 2(1)(b)(iii) of the *UNCSI*?

(2) Under what circumstances would Chinese SOEs attract jurisdictional immunity as state agencies/instrumentalities?

(3) Can Chinese SOEs claim post-judgment immunity from measures of constraint regarding their assets pursuant to Article 19(c) of the *UNCSI*?

4.2 Analysis

4.2.1 Issue 1: Under what circumstances would Chinese SOEs be recognized as state agencies/instrumentalities under Article 2(1)(b)(iii) of the *UNCSI*?

As discussed above, Article 2(1)(b)(iii) provides that for an entity to be a state agency/instrumentality, it must be "entitled to perform and [is] actually performing acts in exercise of sovereign authority of the [s]tate."[899] Neither the *UNCSI* nor the ILC's commentaries to the draft articles on Jurisdictional Immunities of States and Their Property has provided any

[899] Article 2(1)(b)(iii), *UNCSI*.

guidance on the interpretation of "sovereign authority" under Article 2(1)(b)(iii). As noted above, when we assess if an entity has exercised sovereign authority without knowing the exact scope of "sovereign authority", we often do so by demonstrating if the opposite—a commercial transaction—has been engaged in, *i.e.*, whether the actions can be taken by a private person. If a private person can take the action—like signing a purchase or investment contract—then it is unlikely to be an exercise of sovereign authority.[900]

In our hypothetical situation, whether China Railway and Sinohydro are state agencies/instrumentalities per Article 2(1)(b)(iii) depends on whether they have performed acts of sovereign authority by engaging in the *Collaboration Agreement* to which they are parties. In Chapter 4, I concluded that China Railway and Sinohydro are "commercial SOEs in industries and sectors of national security and lifeline of national economy" given their primary businesses fall into the CPC's identified sectors that are related to national security.[901]

Article 2(1)(c) of the *UNCSI* provides that "any commercial contract or transaction for the … supply of services", "any contract for a loan", and any other transaction of an industrial nature are commercial transactions. Consistently, writers argue[902] and case law suggests[903] that certain transactions—like goods and services contracts and loan agreements—are only

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[900] See the judicial practice of the US, UK, and Canada discussed in subsequent chapters.
[901] Chapter 4, Section 3.2.
[902] Wittich, "Article 2(1)(c) and (2) and (3)" in O'Keefe & Tams, *supra* note 232 at 68; Hayk Kupelyants, *Sovereign Defaults before Domestic Courts* (Oxford: Oxford University Press, 2018) 283 [Kupelyants, *Sovereign Defaults before Domestic Courts*]; Kei Nakajima, *The International law of Sovereign Debt Dispute Settlement* (Cambridge: Cambridge University Press, 2022) 65-78 [Nakajima, *The International law of Sovereign Debt Dispute Settlement*].
[903] As we will see in Chapter 6, Section 3 of the UK *SIA* identifies three categories of commercial transactions. In *Alcom Ltd. v. Republic of Colombia*, 74 ILR 170, 185, Lord Diplock held that if a sovereign state engages in the first two categories of commercial transactions, *i.e.*, "any contract for the supply for the goods or services" or "any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation", they are engaging in non-immune commercial transactions regardless of the sovereign purposes attached; see also *Orascom Telecom Holdings v. Chad* [2008] EWHC 1841 (Comm), para. 14; *NML Capital Limited v. Republic of Argentina*, Judgment, [2011] UKSC 31 holding that state activities in capital markets are acts *jure gestionis*.

commercial transactions regardless of their purposes. If this view is taken, we can conclude that the underlying transactions found in the *Collaboration Agreement* are commercial transactions as defined by Article 2(1)(c) of the *UNCSI*.

Article 2(2) provides that whether a transaction is commercial in nature or not should be determined primarily by the nature of the transaction, with a purpose element being considered only in two scenarios: (1) the parties have agreed that the purpose of the agreement should be taken into account; or (2) the forum law considers the purpose in characterizing the nature of the transaction. In the *Collaboration Agreement*, nothing indicated that the purpose should be considered. So, it depends on the forum state's law regarding the applicability of the purpose of the agreement in characterizing the nature of a transaction. The analysis thus will be conducted in two scenarios: the first one is that the purpose has no role in this hypothetical *UNCSI* jurisdiction; and in the second one the purpose has a role.

In the first scenario when the purpose is not considered:

- As just noted, investing in infrastructure construction and natural resources exploitation should be treated as commercial transactions as the former is a transaction for the supply of services (Article 2(1)(c)(i)) and the latter is a transaction of industrial nature (Article 2(1)(c)(iii)). The loans provided fall into Article 2(1)(c)(ii).
- Further, the provisions of the *Collaboration Agreement* show that the two Chinese SOEs are profit-driven, and compensation mechanisms have been established if the Congo defaults. Seen from these perspectives, China Railway's and Sinohydro's activities carried out pursuant to the *Collaboration Agreement* are commercial, not sovereign, in nature. As a result, China Railway and Sinohydro are not state agencies/instrumentalities per Article 2(1)(b)(iii) as they have not exercised any sovereign authority in their

transactions with the Congo and Gécamines. Rather, they were engaging in commercial activities as foreign investors.

In the second scenario when the purpose is considered by the forum court that applies the *UNCSI*:

- In addition to the above analysis, the court has to assess whether the two Chinese SOEs' contribution to China's infrastructure-for-resources foreign policy as purpose reflected in their conduct could be seen as an exercise of sovereign authority, and thus, have an impact on our assessment of the two Chinese SOEs' underlying commercial activities. The *UNCSI* does not provide the weight that purpose should be given in this exercise. This depends on the forum's law. As we will see in the next Chapter, the UK courts and the Supreme Court of Canada have held that although purpose should be given consideration in the context, it often plays an assisting, not predominant, role. When the nature of the underlying transaction is commercial, the attached sovereign purpose cannot convert that commercial transaction into a sovereign one in most circumstances.[904]
- China's infrastructure-for-resources policy connotes China's political and geo-political policies in addition to its economic considerations. As noted by the majority of the Hong Kong Court of Final Appeal in *FG Hemisphere 1*:

> The rapid evolution of China's foreign policy in Africa and elsewhere over that last decade is well-known. It often involves international agreements for large-scale development projects such as the agreement for mineral rights in exchange for infrastructural development in the present case. It follows that [China's] foreign policy, which obviously differs from many other countries' foreign policy, requires it to invest heavily abroad on projects which may arguably be characterized as having "commercial" elements.[905]

[904] Chapter 6, Sections 3.1.2 and 3.2.
[905] *FG Hemisphere 1*, *supra* not 407 at 199, para 280.

Although the state's influence and sovereign purpose is undeniable in the case of China Railway and Sinohydro, it may not change the underlying commercial nature of China Railway's and Sinohydro's investments in the Congo and loans made to Gécamines. The ILC indicated that the purposes of the conduct have to be "clearly public and supported by *raison d'état*" when it commented on the draft articles on Jurisdictional Immunities of States and Their Property it produced in 1991. The weight of the purposes to be given effect to depends on whether a defendant state in a forum court would argue so, and that argument is subject to the forum court's final approval:

> Defendant [s]tates should be given an opportunity to provide that, in their practice, a given contract or transaction should be treated as non-commercial because its purpose is clearly public and supported by *raison d'état*, such as the procurement of food supplies to feed a population, relieve a famine situation or revitalize a vulnerable area, or supply medicaments to combat a spreading epidemic, provided that it is the practice of that [s]tate to conclude such contracts or transactions for such public ends. It should be noted, however, that it is the competent court, and not the defendant [s]tate, which determines in each case the commercial or non-commercial character of a contract or transaction taking into account the practice of the defendant [s]tate.[906]

Based on the ILC's commentary, whether China Railway's and Sinohyrdo's investments in the Congo are an exercise of sovereign authority depends on China's view whether these transactions have a sovereign purpose even though they are commercial transactions, and China's view is eventually subject to the forum court's final decision regarding the weight to be given to such a purpose. From Chapter 3 we know that China's view is that Chinese SOEs' business operations, which include their foreign investments, are commercial transactions, not an exercise of sovereign authority. Further, China takes the view that Chinese SOEs should bear

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[906] ILC draft articles and commentaries 1991, *supra* note 314, article 2(1)(c), para. 25. But at this time, some delegations in both the Six Committee and the ILC have expressed their preference to exclude the purpose test, which was liable to subjective interpretation in their view.

commercial responsibilities for their overseas undertakings.[907] Hence, it is unlikely that China will argue on behalf of Chinese SOEs in foreign domestic courts that Chinese SOEs' commercial transactions have a sovereign element when China seeks to draw a line among them on the international plane.

China's preference to characterize Chinese SOEs' foreign investments as commercial in nature has been affirmed by Chinese SOEs' contractual practice. Chinese SOEs have been defining their transactions with foreign states or foreign state agencies/instrumentalities as commercial ones in their agreements. In three previously confidential loan agreements made between Kenya and the Chinese state-owned and policy-driven Export-Import Bank of China publicized by the Kenya government in November 2022, each agreement defines the underlying project that the loan agreement would finance as a "Commercial Contract."[908] Take Article 1.10 of the Kenya-Ex-Im Bank of China Agreement 1 as an example:

> "Commercial Contract" means, the contract for Construction of the Civil Works of Mombasa-Nairobi Standard Gauge Railway Project EPC Turnkey Commercial Contract and the contract for Supply and Installation of the Facilities, Locomotives and Rolling Stocks for the Mombasa-Nairobi Standard Gauge Railway Project entered by and between Kenya Railways Corporation and China Road and Bridge Corporation respectively in July and October 2012[.][909]

Paragraph 7, Appendix 6 of Kenya-Ex-Im Bank of China Agreement 1 adds that the Kenya-Ex-Im Bank of China Agreement 1 itself is commercial in nature so that Kenya cannot invoke sovereign immunity in foreign domestic courts when litigation arises:

> The signing and performance of the Loan Agreement by the Borrower constitute commercial acts, and the declaration that the Borrower shall not have any right of immunity in connection with any proceedings or any enforcement

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[907] See Chapter 3, Section 3; Permanent Mission of the PRC to the UN, "Statement of Mr. Guan", *supra* note 481.
[908] For example, see Article 1.10, Kenya-Ex-Im Bank of China Agreement 1, *supra* note 72, identified by a signature date of 11 May 2014 and a China EXIMBank PBC No. (2014) 13 Total No. (307).
[909] Article 1.10, Kenya-Ex-Im Bank of China Agreement 1, *ibid*. See also Article 8.1, *ibid*.

> of arbitral award or court decision on the grounds of sovereignty or otherwise is valid and irrevocably binding on the Borrower.[910]

Recall that under the *UNCSI*'s Article 2(2), in addition to the forum law's consideration of the purpose of the transaction in determining whether a transaction is sovereign or commercial, the parties can agree on the purpose of the contract. In the example of Kenya-Ex-Im Bank of China Agreement 1, the parties explicitly characterized their loan agreements and the projects to be financed by the loan agreements as commercial transactions.

China Railway's and Sinohydro's investments in the Congo or their loans provided to Gécamines arguably do not have a "purpose [that] is clearly public and supported by *raison d'état*" as indicated by the ILC.[911] China is unlikely to explicitly argue the deal is for sovereign purposes. Even though no "commercial transaction" definition clause was found in the *Collaboration Agreement* signed between China Railway, Sinohydro, and the Congo. In our hypothetical situation, China Railway's and Sinohyrdo's contribution to China's foreign policy or economic policy goals as a result of their investments should be treated as peripheral compared to their primary goal which is to invest in minerals in the Congo.[912] Thus, China Railway's and Sinohydro's transactions with the Congo and Gécamines should be treated as commercial transactions, even though they have China's foreign policy imprint. As a result, Chinese SOEs like Railway and Sinohydro are unlikely to become state agencies/instrumentalities under Article 2(1)(b)(iii) under the *UNCSI*. This conclusion aligns with the spirit of restrictive immunity, which seeks to constrain states and their emanations from claiming sovereign immunity for their commercial activities in foreign domestic courts. It also

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[910] Paragraph 7, Appendix 6, Kenya-Ex-Im Bank of China Agreement 1, *ibid*.
[911] ILC draft articles and commentaries 1991, *supra* note 314, article 2(1)(c), para. 25.
[912] Article 1.1.2, *Collaboration Agreement*, *supra* note 413.

ensures Chinese SOEs' and China's counterparts know that, when disputes arise, Chinese SOEs cannot use sovereign immunity as a procedural bar in litigation.

However, if a Chinese SOE's transactions are closely related to an inherently sovereign function as demonstrated by their purposes, such as developing the state's military capabilities,[913] our conclusion is likely to change. From Chapter 4, we know that the US put China Electronics's No. 28 Research Institute—a central SASAC-owned SOE—on an *Entity List* to prevent it from importing certain US technologies that can be used both for civilian and military purposes.[914] The US's rationale is that such dual-use technologies could deployed by the China Electronics's No. 28 Research Institute for potential military usage purpose. If we take this approach in the context of sovereign immunity law, China Electronics and its No. 28 Institute are state agencies/instrumentalities per Article 2(1)(b)(iii) as they "are entitled to perform" and "are actually performing acts in the exercise of sovereign authority" of the state when they import dual-usage technologies and apply such technologies in a military capacity.

Moreover, Chinese public welfare SOEs that provide poverty relief and natural disasters relief can possibly fall into the category of state agencies/instrumentalities given they are designated by the state to provide public goods and services to the society. When they engage in commercial transactions for these purposes, such as importing food or medications for the citizens suffered in a natural disaster, they should be treated as state agencies/instrumentalities as they are exercising important public authority for the sovereign goals they achieve, even though the importation of food or medications, seen on their own, can be treated as commercial activities. As the ILC has noted, certain transactions such as "the procurement of food supplies to

[913] Mégret, "Are There 'Inherently Sovereign Functions' in International Law?", *supra* note 344 at 454.
[914] Chapter 4, Section 3.2.1.

feed a population, relieve a famine situation or revitalize a vulnerable area, or supply medicaments to combat a spreading epidemic" could be treated as sovereign transactions based on their purposes.[915] In the latter two scenarios, commercial SOEs and public welfare SOEs can potentially become state agencies/instrumentalities under Article 2(1)(b)(iii) of the *UNCSI*.

4.2.2 Issue 2: Under what circumstances would Chinese SOEs attract jurisdictional immunity as state agencies/instrumentalities?

Under the *UNCSI*, only a state, including state agency/instrumentality, can acquire immunity *ratione materiae*. Based on our prior analysis, commercial SOEs like China Railway and Sinohydro are unlikely to be treated as state agencies/instrumentalities under Article 2(1)(b)(iii) by a court in the *UNCSI* jurisdiction even if they have contributed to China's foreign policy in their commercial transactions when state purposes are considered. When commercial Chinese SOEs fail to become state agencies/instrumentalities under Article 2(1)(b)(iii), they have no capacity to assert jurisdictional immunity in an *UNCSI* jurisdiction.

However, commercial SOEs like China Electronics and its No. 28 Research Institute which are state agencies/instrumentalities as discussed above can potentially assert jurisdictional immunity under the *UNCSI* for having exercised sovereign authority. When we treat China Electronics's No. 28 Research Institute's importation of semi-conductors as sovereign transactions based on their military use purpose, such as developing China's weaponry capabilities, such transactions will be immune under the *UNCSI*. The challenge of applying such a purpose test is how to distinguish it from transactions like purchasing boots for the state army. Because both importing semi-conductors and boots can be carried out by individuals—a private person test applied under restrictive immunity theory by some domestic courts. State practice on

[915] See ILC draft articles and commentaries 1991, *supra* note 314, article 2(1)(c), para. 25.

the role to be given to the purpose of the conduct for jurisdictional immunity is inconsistent as we will see in subsequent Chapters. Suffice to say here is that if the purpose of the conduct—for having close relationship to an inherently sovereign function—is given weight by a domestic court that applies the *UNCSI*, China Electronics's No. 28 Research Institute's importation of semi-conductors is likely to be treated as an exercise of sovereign authority and attract jurisdictional immunity under the *UNCSI*. Otherwise, such transactions will be treated as commercial transactions and cannot attract jurisdictional immunity under the *UNCSI*.

Regarding the two examples of public functions SOEs—poverty relief and natural disasters relief SOEs—they are likely to attract jurisdictional immunity to the extent that they are carrying out activities in reliving poverty and natural disaster such as their effort to procure food supplies to feed the population or supply medicaments.[916] Of course, this is subject to the court's interpretation that such sovereign purpose is closely related to a state's inherently sovereign function.

4.2.3 Issue 3: Can Chinese SOEs claim post-judgment immunity from measures of constraint regarding their assets pursuant to Article 19(c) of the *UNCSI*?

The prior analysis show that commercial SOEs like China Railway and Sinohydro are unlikely to be treated as state agencies/instrumentalities. One consequence is that they cannot attract jurisdictional immunity as discussed earlier and another consequence is their inability to attract execution immunity under the *UNCSI*. As Articles 18 and 19 provide, only state property can attract immunity from pre- and post-judgment measures of constrain.[917] Thus, in our hypothetical situation, China Railway's and Sinohydro's creditors—the Congo and Gécamines—could

[916] See ILC draft articles and commentaries 1991, *supra* note 314, article 2(1)(c), para. 25.
[917] Articles 18 and 19 of the *UNCSI* respectively provides state property with immunity from measures of constraint in pre- and post-judgment proceedings.

execute against their assets without immunity hurdles in a jurisdiction in which the *UNCSI* is applied if other jurisdiction requirements under the forum law are met. The *Collaboration Agreement* specified five subsidiaries of the two Chinese SOEs in Article 1.5.[918] So, the Congo and Gécamines can seek execution against China Railway's and Sinohydro's shares and interests in their subsidiaries if these subsidiaries are located in the hypothetical *UNCSI* jurisdiction.

For commercial SOEs like China Electronics's No. 28 Research Institute, which have satisfied the requirement of state agencies/instrumentalities under Article 2(1)(b)(iii) by exercising sovereign authority in their commercial operations, they have a high probability to attract execution immunity. Article 21(1)(b) of the *UNCSI* specifically provides that "property of a military character or used or intended for use in the performance of military functions" are not state property used for "other than government non-commercial purposes" under Article 19(c).[919] Hence, the assets of commercial SOEs like China Electronics's No. 28 Research Institute could attract execution immunity under the *UNCSI* if they demonstrate their current or intended military use purposes. There are other SOEs like China Electronics that are closely related to China's military apparatus, such as China North Industries Group Corporation Limited and China South Industries Group Co. Ltd. Their official English names do not show their main businesses but their Chinese names' literal translation do: the former is China Weapon Industry Group Limited,[920] the latter is China Military Equipment Group Limited.[921] Like China

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[918] Article 1.5, *Collaboration Agreement*, *supra* note 413, the five subsidiaries are China Railway Group (Hong Kong) Limited, China Railway Sino-Congo Mining Limited, China Railway Resources Development Limited, Sinohydro Corporation Limited, and Sinohydro Harbour Co. Ltd.
[919] Article 21(1)(b), *UNCSI*.
[920] China North Industries Group Corporation Limited (中国兵器工业集团有限公司), "业务与服务" [Business and Services] describing its primary responsibility is to "enhance the military", and provides strategic and sophisticated equipment to the "army, navy, air force, rocket force, as well as police with force", online: <http://www.norincogroup.com.cn/col/col5/index.html>.
[921] China South Industries Group Co. Ltd (中国兵器装备集团有限公司), "集团简介" [Introduction to the Group], online: <https://www.csgc.com.cn/1064.html>.

Electronics, these two central SASAC-owned SOEs are likely to fall into the scope of state agencies/instrumentalities of Article 2(1)(b)(iii) for exercising military authority in their commercial operations, and subsequently, attract jurisdictional immunity and execution immunity under the *UNCSI*.

To the extent the public function SOEs have attracted jurisdictional immunity as noted above, they are likely to attract execution immunity for their assets if they can demonstrate their purposes are used or intended to be used for poverty relief or natural disasters relief, such as to feed the population or to provide medications to the people affected by the natural disasters.[922]

5. Conclusion

This Chapter examined the definition of state, its customary international law nature, and the tests for state agency/instrumentality and the commercial exceptions for jurisdictional and execution immunities under the *UNCSI*. It found that neither the tests for the definition of the state nor the commercial exception to jurisdictional immunity of the *UNCSI* has crystalized as a rule of customary international law for a lack of substantive and uniform state practice.

Regarding the definition of the state agency/instrumentality, Article 2(1)(b)(iii) of the *UNCSI* prevents SOEs from acquiring "state" status by its ownership relationship with the state. To become a state agency/instrumentality under Article 2(1)(b)(iii), an SOE has to demonstrate that it is entitled to perform and has actually performed acts of sovereign authority.

In analyzing SOEs' "state" status, we need to assess whether an SOE's transaction is a commercial transaction under Articles 2(1)(c)—the scope of commercial transaction and 2(2)—the methodology in determining if a transaction is a commercial one, an exercise often conducted under Article 10—the commercial exception to jurisdictional immunity that denies a state's

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[922] See ILC draft articles and commentaries 1991, *supra* note 314, article 2(1)(c), para. 25.

jurisdictional immunity claim. By establishing the existence of a commercial transaction undertaken by an SOE, we deny that SOE's claim that it has exercised sovereign authority under Article 2(1)(b)(iii). Although it seems the tests applied under Articles 2(1)(b)(iii) and 10 overlap with each other when the SOE is claiming itself to be part of the state, their purposes are different. Under Article 2(1)(b)(iii), assessing the nature and the purpose of an SOE's conduct is to ascertain if it has exercised sovereign authority so it is part of the state. Applying Articles 2(1)(c) and 2(2) under Article 10 ensures that an SOE, even if it is a state agency/instrumentality in one scenario, cannot attract jurisdictional immunity if it has engaged in a commercial transaction that is unrelated to its exercise of authority, which gives rise to a claim in a foreign domestic court that applies the *UNCSI*.

The *UNCSI*'s methodology that distinguishes commercial from non-commercial transaction provided in Article 2(2) as applied under Article 10 requires domestic courts to primarily look at the nature of the transaction with the purpose providing an assisting role only in two situations: (1) the parties agree to it and (2) the forum court permits so. Only a few states consider the purpose, including the UK and Canada, as we will see in the next Chapter. The UK courts and the Supreme Court of Canada affirm the *UNCSI*'s approach: prioritizing the nature of the conduct and considering the purpose of the conduct in the context.

The hypothetical situation shows that there are three scenarios for central SASAC-owned SOEs' immunity under the *UNCSI* based on their dual identity. First, for commercial SOEs like China Railway and Sinohydro investing in foreign states with purposes of contributing to the state's and the CPC's political and policy goals, such purposes would not appear to convert their commercial acts into sovereign acts in most cases, thus, in this scenario, these SOEs are not state agencies/instrumentalities for engaging in commercial transactions. Consequently, they cannot

claim either jurisdictional immunity in judicial proceedings or execution immunity regarding their assets. Chinese SOEs' creditors can sue them and execute against their assets without immunity hurdles in an *UNCSI* jurisdiction.

Secondly, if a commercial SOE, like China Electronics, has exercised sovereign authority—such as developing China's military capabilities in their business operations as demonstrated in their purposes—are likely to be treated as state agencies/instrumentalities under Article 2(1)(b)(iii) of the *UNCSI*. Consequently, they will attract jurisdictional immunity if the military use purposes of their commercial transactions are considered. Additionally, their assets, if qualified to be assets that have "a military character or used or intended for use in the performance of military functions", will be treated as immune state assets under Article 21(1)(b) of the *UNCSI*.

Thirdly, for public function SOEs, they are likely to be treated as state agencies/instrumentalities under Article 2(1)(b)(iii) because they provide public goods and services such as poverty relief or natural disasters relief. The commercial activities they undertake for poverty relief or natural disasters relief purposes—such as buying food for the population or providing medications to the people affected by the natural disasters can attract jurisdictional immunity if their public purposes—for having close relationship to their exercise of inherently sovereign functions—are considered. Consequently, their assets are also likely to attract execution immunity if they are used for or intended to be used for those sovereign purposes.

Like this Chapter, the next Chapter examines the 97 central SASAC-owned SOEs' "state" status and immunity under the UK *SIA*.

Chapter 6: Chinese SOEs' Status and Immunity under the 1978 United Kingdom *State Immunity Act*

1. Introduction

This Chapter examines the status and immunity of the 97 SOEs owned by the central SASAC under the UK *SIA*. I chose to investigate the UK regime following the *UNCSI* because the UK *SIA*, like the *UNCSI*, considers the purpose of the conduct in distinguishing commercial from non-commercial transactions.

This Chapter finds that most of the 97 central SASAC-owned SOEs fall into the category of separate entities as per Section 14(1) of the UK *SIA* as applied in *Trendtex*. Some Chinese SOEs—like China Electronics as we have seen in previous Chapters—are likely to fall into the category of "state organs" if their purpose of developing China's military capabilities in their business operation is considered as an exercise of sovereign authority under the UK *SIA*. Otherwise, they are separate entities under the UK *SIA*. Further, public welfare SOEs are likely to fall in the category of "state organ" as well if their primary public functions and purposes are considered.

For SOEs that are separate entities to attract jurisdictional immunity, they must demonstrate that they have exercised sovereign authority and a state would have been immune in the same situation under Section 14(2). In determining whether sovereign authority has been exercised for the purposes of commercial exception, the UK courts apply a "contextual" approach. The "contextual" approach considers, among other factors, the nature and purpose of the conduct. The Supreme Court of Canada also applies a "contextual" approach in its assessment of the commercial exception to jurisdictional immunity under the Canadian *State Immunity Act* ("Canadian *SIA*"), which will be highlighted in this Chapter. Regarding execution immunity, Section 14(3) of the UK *SIA* explicitly provides that a separate entity cannot attract

execution immunity if it does not attract jurisdictional immunity under Section 14(2). Nonetheless, states can claim execution immunity for their share of profits in SOEs that have been earmarked and will be repatriated to the state as found in the *SerVaas v. Rafidian Bank* case.

This Chapter includes the following parts. Section 2 addresses the relationship between the UK *SIA* as a domestic statute, the *UNCSI*, and customary international law. Section 3 examines how Section 14(1) of the *SIA* defines the state and separate entities for immunity purposes and their jurisdictional immunity under the UK *SIA*. Section 4 investigates SOEs' execution immunity as separate entities. Section 5, by using a hypothetical situation, enquires into the Chinese SOEs' "state" status and immunity under the *SIA* in light of the dual identity they maintain in the Chinese political economy. Section 6 concludes.

2. The relationship between the UK *SIA* as a domestic statute and the *UNCSI* and customary international law

The UK *SIA* was enacted in 1978 to enable the UK to ratify two conventions, namely the *ECSI*[923] and the *Convention for the Unification of Certain Rules concerning the Immunity of State-owned Ships*.[924] In many ways the initial draft of the UK *SIA* followed the *ECSI* with the final version incorporating certain amendments to enlarge the scope of the statute.[925] For example, Section 14's stipulation on the scope of the state, reproduced below, finds its roots in Article 27 of the *ECSI* with a few amendments and additions. Thus, the relevant part of the *Explanatory Report on*

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[923] Council of Europe, *The European Convention on State Immunity*, European Treaty Series – No. 74 (1972).
[924] Preamble, *State Immunity Act* 1978 (UK), c 33; see also Dickinson et al, *supra* note 86 at 329; Fox & Webb, *supra* note 13 at 165; McLachlan, *supra* note 16 at 492; Philippa Webb, "International Immunities in English Law" in Curtis A. Bradley, ed, *The Oxford Handbook of Comparative Foreign Relations Law* (Oxford: Oxford University Press, 2019) at 645 [Webb, International Immunities in English Law].
[925] Dickinson et al, *ibid* at 333 noting that the *SIA* departs from the *ECSI* on commercial transactions; Fox & Webb, *supra* note 13 at 168.

the European Convention on State Immunity ("*Explanatory Report*") will be helpful in understanding the term "separate entity" under the UK *SIA* in addition to Hansard, which documented the parliamentary debates on the draft bills that led to the UK *SIA*.[926] As noted by Lord Lloyd-Jones, there were also legal and practical reasons that brought the UK *SIA* into being. The UK legislators sought to enact a sophisticated domestic law on sovereign immunity that would be in line with international law on the one hand;[927] and compete with the US *FSIA* to ensure London's leading role in adjudication and arbitration of commercial disputes on the other.[928] Since its enactment, the UK *SIA* has become one of the influential domestic laws on sovereign immunity. As the ICJ noted in *Jurisdictional Immunities*, the UK *SIA*, among other domestic legislation, was considered "[s]tate practice of significance."[929] Compared to the US *FSIA*, Dickinson et al. argued that the UK *SIA* was more influential in shaping the other state legislation on sovereign immunity.[930]

Regarding the UK *SIA*'s relationship to the *UNCSI* and customary international law, the UK signed the *UNCSI* on 30 September 2005 but has not yet ratified the treaty. In the UK legal system, treaties require Parliamentary implementation after the executive branch has ratified a treaty.[931] After a treaty is implemented by the English Parliament, the resulting legislation forms part of the UK law and will be applicable by courts.[932] Thus, the *UNCSI* has no formal effect in

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[926] *State Immunity Bill* [HL] (Hansard, 17 January 1978); *State Immunity Bill* [HL] (Hansard, 16 March 1978).
[927] *Alcom Ltd. v. Republic of Colombia*, *supra* note 903 at 182, stating that it is "highly unlikely that Parliament intended to require United Kingdom courts to act contrary to international law unless the clear language of the statute compels such a conclusion"; Webb, "International Immunities in English Law", *supra* note 924 at 645; *Dicey, Morris & Collins on The Conflict of Laws*, *supra* note 221 at 340.
[928] Lord Lloyd-Jones, "Forty Years On", *supra* note 85 at 250-51.
[929] *Jurisdictional Immunities*, *supra* note 12 at para. 55.
[930] Dickinson et al., *supra* note 86 at 333-34; see also Webb, "International Immunities in English Law", *supra* note 924 at 646.
[931] Brownlie, *supra* note 153 at 63; Eileen Denza, "The Relationship between International and National Law" in Malcolm D. Evans, ed, *International Law* 5th ed (Oxford: Oxford University Press, 2018) 383 at 394. [Denza, The Relationship]
[932] Brownlie, *ibid* at 64; Denza, "The Relationship", *ibid*.

the UK courts, but UK courts have referred to the *UNCSI* in their judgments as an expression of customary international law to different extents.[933] In the UK, rules of customary international law are received through an automatic incorporation mechanism unless they are inconsistent with Acts of Parliament.[934] The UK *SIA* does not govern all matters of sovereign immunity. Thus, when the UK *SIA* is silent—such as on the issue of immunity of visiting armed forces—customary international law applies in the UK courts by way of common law incorporation.[935] My analysis in this Chapter focuses on the UK statute—not UK common law rules—on matters of the definition of the state and the commercial exception to jurisdictional and execution immunities. I will refer to cases that interpret the UK *SIA* and pre-UK *SIA* common law jurisprudence that sheds light on our understanding of the relevant provisions in the UK statute.

3. The definitions of the state and separate entities, and their jurisdictional immunity under the UK *SIA*

3.1 State and separate entities under Section 14(1), UK *SIA*

Section 14(1) defines a state for jurisdictional immunity purposes:

> 14.—(1) The immunities and privileges conferred by this Part of the Act apply to any foreign or commonwealth [s]tate other than the United Kingdom; and references to a [s]tate include references to—
>
> (a) the sovereign or other head of that [s]tate in his public capacity;
>
> (b) the government of that [s]tate; and
>
> (c) any department of that government,

[933] *AIG v. Kazakhstan*, *supra* note 251; *Jones v. Minister of Interior*, *supra* note 251; *Svenska v. Lithuania*, *supra* note 251; *Belhaj and another v. Straw and others*; *Rahmatullah (No. 1) v. Ministry of Defence and another*, *supra* note 251; *Benkharbouche v. Secretary of State for Foreign and Commonwealth Affairs*, *supra* note 251.
[934] Brownlie, *supra* note 153 at 67; Denza, "The Relationship", *supra* note 931 at 394. *Trendtex*, *supra* note 174 at 128: "Seeing that the rules of international law have changed—and do change—and that the courts have given effect to the changes without any Act of Parliament, it follows…inexorably that the rules of international law, as existing from time to time, do form part of English law."
[935] Fox and Webb, *supra* note 13 at 167; Denza, "The Relationship", *ibid*.

> but not to any entity (hereafter referred to as a "separate entity") which is distinct from the executive organs of the government of the [s]tate and capable of suing or being sued.[936]

Section 14(1) contains a shorter list of entities that fall into the scope of the state compared to the *UNCSI*. It also specifically excludes separate entities. The definition of the state excludes separate entities that are (1) distinctive from the state; and (2) can sue and be sued.[937] The threshold test for state, often termed as "department of government", "*alter ego*", or "state organ" in the UK context, was established in the *Trendtex* case based on common law before the enactment of the UK *SIA*. UK courts continue to apply *Trendtex* in interpreting the UK *SIA* as discussed next.

3.1.1. The threshold test for the state organ and department of state: *Trendtex*

An entity could become a part of the state (state organ, department of state, or *alter ego*) as per Section 14(1) even though it has a separate legal personality if it is not distinctive from the state.[938] This threshold issue was addressed by the UK Court of Appeal in *Trendtex v. Central Bank of Nigeria* case ("*Trendtex*") as a matter of common law in 1977.[939] Although the case was decided before the UK *SIA* came into force, the decision provided guidance in assessing under what circumstances an entity could rise to become part of the state for immunity purposes, even if it has separate corporate status.

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[936] Section 14(1), UK *SIA*.
[937] See the interesting finding of Justice Burton in *Pearl Petroleum Co Ltd & Ors v Kurdistan Regional Government of Iraq*, [2015] 2 CLC 877, in which he held that the Kurdistan Regional Government of Iraq is a separate entity, not the state itself under Section 14(1). It could be a problematic finding since a regional government is often considered as part of the state, not the separate entity (for example, under the *UNCSI*, the US *FSIA*, and even the UK *SIA*). Under Section 14(1) itself, a separate entity has to be distinct from the executive organ of the state as provided in section 14(1). Kurdistan Regional Government of Iraq is a regional government of the state, it is not distinctive from the state.
[938] Dickinson et al., *supra* note 86 at 403; Yang, *supra* note 13 at 235.
[939] *Trendtex*, *supra* note 174.

The *Trendtex* case arose from the Nigerian government's excessive order of cement from different suppliers. The Nigerian government had the Central Bank of Nigeria issue letters of credit on its behalf to honor the eventual payment. After a change of government following a coup d'état, the new Nigerian administration suspended the importation of the cement and instructed the Central Bank of Nigeria to withdraw payment. The transportation of the surplus order had completely paralyzed Nigeria's seaport.[940] One supplier, Trendtex, shipped cement and presented the letter of the credit to their corresponding bank for payment for demurrage and shipment.[941] Midland Bank refused to pay based on the instructions it received from the Central Bank of Nigeria.[942] Subsequently, Trendtex sued the Central Bank of Nigeria at the UK High Court and issued a writ for demurrage and damages.[943] The Central Bank of Nigeria applied to set aside the writ on the grounds that it was entitled to jurisdictional immunity as a department of the Nigerian state.[944] The UK High Court set aside the writ as it considered Central Bank of Nigeria a department of the state.[945] Trendtex appealed that decision to the Court of Appeal.[946] Writing on behalf of the Court of Appeal, Lord Denning reversed the lower court's decision because he found that the basis of the litigation—the letter of credit—is an "ordinary course of commercial dealings."[947]

Having decided the case on the basis of restrictive immunity, Lord Denning nevertheless considered whether he would reach the same conclusion if absolute immunity were continue to

[940] *Ibid* at 122-123.
[941] *Ibid* at 124-125.
[942] *Ibid* at 125.
[943] *Ibid*.
[944] *Ibid*.
[945] *Ibid*.
[946] *Ibid*.
[947] *Ibid* at 132. In any event, he found that the underlying transaction, the purchase of cement by the Ministry of Defence of Nigeria, just like purchasing boots for the army, was a commercial transaction as it can be performed by a private person.

apply in English courts.[948] He held that only the state, its departments or bodies that can be regarded as an *alter ego* or an organ of the government to claim immunity under the absolute immunity theory.[949] In this context, Lord Denning elaborated upon under what circumstances an entity would become an *alter ego* or an organ of the government. He declared that he "can think of no satisfactory test except that of looking to the functions and control of the organization."[950] In so doing, English courts are not only obliged to apply foreign laws but to consider "all the evidence to see whether the organization was under government control and exercised governmental functions."[951]

Lord Denning applied this governmental "control + function" test to the Central Bank of Nigeria. Although he noted that the Central Bank of Nigeria exercises a wide range of governmental functions,[952] Lord Denning concluded that it is not an "*alter ego*" or an "organ" of the state:

> In these circumstances I have found it difficult to decide whether or not the Central Bank of Nigeria should be considered in international law a department of the Federation of Nigeria, even though it is a separate legal entity. But, on the whole, I do not think it should be.[953]

Before reaching the above conclusion, Lord Denning articulated the factors he considered, which would be instructive in the future when we determine under what circumstances an entity would become an "alter ego" or an "organ" of the state, which is equivalent to a department of the government stipulated in Section 14(1) of the UK *SIA*:

> At the hearing we were taken through the Act of 1958 under which the Central Bank of Nigeria was established, and of the amendments to it by later decrees. All the relevant provisions were closely examined … The upshot of it all may

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[948] *Ibid* at 133.
[949] *Ibid*.
[950] *Ibid* at 134.
[951] *Ibid*; and the opinion of Shaw LJ in *Trendtex*, *ibid* at 147.
[952] *Ibid*.
[953] *Ibid*.

> be summarised as follows: (i) The Central Bank of Nigeria is a central bank modelled on the Bank of England. (ii) It has governmental functions in that it issues legal tender; it safeguards the international value of the currency; and it acts as banker and financial adviser to the government. (iii) Its affairs are under a great deal of government control in that the Federal and Executive Council may overrule the board on monetary and banking policy and on internal administrative policy. (iv) It acts as banker for other banks in Nigeria and abroad, and maintains accounts with other banks. It acts as banker for the states within the federation: but has few, if any, private customers.[954]

In the end, Lord Denning concluded that he preferred to rest his findings on the basis that no immunity will be granted to commercial transactions for a governmental department under restrictive immunity in any event.[955] In this case, Lord Denning also refused to treat a central bank an essential part of the state. The peculiar status of a central bank in a nation's economy was taken into consideration and dealt with in Section 14 of the UK *SIA*. Under Section 14(4), a central bank can either be categorized as a state department or a separate entity depending on how it is structured and what are its functions, and its properties can attract protection from execution that is equal to a state even if it was found to be a separate entity.[956]

Dickinson et al. observed that the UK *SIA* provides no guidance as to the test to be applied to determine whether an entity is a department of the government of the foreign state under Section 14(1). They proposed that some guidance can be drawn from the *Trendtex* decision in interpreting Section 14(1) of the UK *SIA*:

> (a) The characterization of a party to proceedings as a department of the government of a foreign sovereign [s]tate depends not on any single factor, but on a consideration of all relevant circumstances.

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[954] *Ibid*.
[955] *Ibid*.
[956] Section 14(4), UK *SIA* provides that "Property of a [s]tate's central bank or other monetary authority shall not be regarded for the purposes of subsection (4) of section 13 above as in use or intended for use for commercial purposes; and where any such bank or authority is a separate entity[,] subsections (1) to (3) of that section shall apply to it as if references to a [s]tate were references to the bank or authority."

> (b) The status of the party under the law of its home state is one relevant factor, but is not decisive. Nor is the presence of separate legal personality itself decisive against characterizing a party as a department of government.
>
> (c) A detailed analysis of the constitution, function, powers and activities of the party and of its relationship with the state is likely to be essential. The existence of [s]tate control is not, however, a sufficient criterion.
>
> (d) The range of functions performed by and degree of independence usually granted to (and, indeed, required of) a foreign central bank make it unlikely that a separate legal entity performing such a role will be characterized as a department of government.[957]

Dickinson et al. added that these principles are also closely related to and mirror those for determining whether an entity is a "separate entity."[958] This was the issue encountered by the Board of the Privy Council in *Gécamines v. F.G. Hemisphere* in determining whether an entity is a state organ or a separate entity for liability purposes. In *Gécamines v. F.G. Hemisphere*, the Board of the Privy Council referred to *Trendtex*, Dickinson et al., and the *UK SIA* for inspiration (which did not apply in this case).[959] Although *Gécamines v. F.G. Hemisphere* is about liability attribution between a state and a state organ, the Board of the Privy Council's decision in *Gécamines v. F.G. Hemisphere*, applied with caution, can be instructive for our assessment of whether an entity is a state organ or a separate entity for immunity purposes under Section 14(1) as will be discussed below.

3.1.2 *Gécamines v. F.G. Hemisphere*: under what circumstances a juridical entity is a state organ or a separate entity for liability purposes

As discussed in Chapter 3, the company FG Hemisphere purchased two international arbitral awards against the Congo rendered under the auspices of the International Chamber of

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[957] Dickinson et al., *supra* note 86 at 403, cited in para. 33. The UK Privy Council endorsed Dickinson et al.'s summary in para. 34 in *La Générale des Carrières et des Mines v F.G. Hemisphere Associates LLC* [2012] UKPC 27. [*Gécamines v. F.G. Hemisphere*]
[958] Dickinson et al., *ibid*.
[959] *Gécamines v. F.G. Hemisphere*, *supra* note 957.

Commerce.[960] To collect the awards, FG Hemisphere also initiated execution against shares of two Jersey companies in the Royal Court of Jersey held by La Générale des Carrières et des Mines SARL ("Gécamines"), a Congolese SOE, in addition to its execution effort made in Hong Kong ("*Gécamines v. F.G. Hemisphere*").[961] FG Hemisphere's execution attempt against Gécamines' shares in the two Jersey companies was upheld by the Royal Court on the basis that Gécamines was at all material times an organ of the Congolese state, and should be equated therewith.[962] The majority of the Court of Appeal affirmed this judgment.[963] Gécamines appealed to the Board of the Privy Council.[964] The substantive issue in this case was whether the test suggested in *Trendtex* remained applicable or appropriate, either generally or in relation to the questions of substantive liability and enforcement (as opposed to immunity).[965] In this context, the UK *SIA*, which was extended to Jersey by the *State Immunity (Jersey) Order* (hereinafter referred to as *SIA*), was considered by the Board of the Privy Council.[966]

Writing on behalf of the Board of the Privy Council, Lord Mance held that the lower courts erred in finding that Gécamines was an organ of the Congo in relying on *Trendtex*.[967] Whether an entity is a state organ or a separate entity—in this case, for liability and execution purposes—is not solely determined by that entity's separate legal personality. In addition to separate legal personality, a separate entity must be distinctive from the executive organs of the

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[960] See Chapter 3's discussion of FG Hemisphere's execution effort against the entry fees payable from Chinese SOEs to Congo, in which the issue of China's and Hong Kong's positions on sovereign immunity was debated.
[961] *Gécamines v. F.G. Hemisphere*, *supra* note 957. For case comments regarding this proceeding in the UK, see Roger O'Keefe, "Decisions of British Courts during 2012 Involving Questions of Public or Private International Law A. Public International Law" (2014) 83:1 Brit YB Intl L 202; McLachlan, *supra* note 16 at 508.
[962] *Gécamines v. F.G. Hemisphere*, *ibid* at paras 1-2.
[963] *Ibid* at para. 2.
[964] *Ibid*.
[965] *Ibid*, para.19.
[966] *Ibid* at para. 10.
[967] *Ibid* at paras. 4-19. Lord Mance held Lord Denning's test should be discarded as it was too liberal and to pro-creditor. See Kupelyants, *Sovereign Defaults*, *supra* note 902 at 303-04.

state and have the ability to sue and be sued per Section 14(2).[968] In this regard, Lord Mance raised the issue of whether the "control + function" test proposed by the *Trendtex* for immunity purposes remained appropriate regarding the question of execution against an SOE's assets for the state's liability.[969] In Lord Mance's view:

> [The lower courts'] underlying thought was that constitutional and/or factual control might alone suffice to make a state corporation liable for state debts. But that thought could open the way to almost any state trading corporation becoming liable for its state's debts.[970]

Lord Mance cautioned that the separateness between a state and a state corporation cannot be easily pierced in the liability context. This could also be true in the immunity context, since if constitutional and/or factual control might suffice to make a state corporation part of the state for immunity purposes, it could open doors for state trading corporations like SOEs to claim sovereign immunity.

Lord Mance then turned to determine when an SOE was to be treated as an organ that was synonymous with the state, and when it should be treated as a separate entity for liability attribution purposes. Lord Mance looked at the law of sovereign immunity for guidance as he took the view that the answer to that question, whether it arises in the liability or immunity contexts, is the same.[971] He put it this way:

> [A]lthough *Trendtex* was (like the 1978 Act) dealing with immunity, [the dissenting Judge in the Court of Appeal correctly] applied the simple test in *Trendtex* to the present questions of liability and enforcement. In the Board's opinion, *it is now appropriate in both contexts to have regard to the formulation of the more nuanced principles governing immunity in current international and national law*.[972] [emphasis added]

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[968] *Ibid* at para. 16.
[969] *Ibid* at para. 19.
[970] *Ibid*; see also para. 23.
[971] *Ibid* at para. 28; see also McLachlan, *supra* note 16 at 508; Kupelyants, *Sovereign Defaults*, *supra* note 902 at 303-04.
[972] *Ibid* at para. 28.

He added that the application of the test for being a state organ under the law of immunity in the current dispute, which is about liability, must be premised upon the "full and appropriate recognition of the existence of separate juridical entities established by states, particular[ly] for trading purposes."[973] This would be true even when they have carried out sovereign authority and acquired a functional immunity. He stated that:

> They do this [separating juridical entities established by states particularly for trading purposes from the state], even where such entities exercise certain sovereign authority *jure imperii*, providing them in return (as already noted) with a special functional immunity if and so far as they do exercise such a sovereign authority.[974]

Thus, a separate juridical status is not conclusive in determining the separateness between a state and a separate entity.[975] Lord Mance held that without more, a separate entity cannot be treated as an organ of the state for liability purposes.[976] An entity's constitution, control, exercise of sovereign functions are relevant.[977] What has to be proved additionally is extreme circumstances in which the affairs of the state and the separate entity were "so intertwined and confused" and they have assimilated generally.[978] Lord Mance agreed with Dickinson et al. that Lord Denning's view in *Trendtex* was helpful.[979] Particularly, the Board cited Dickinson et al.'s following view:

> [T]he existence of [s]tate control will not be a sufficient criterion, that the possession of a range of functions coupled with the independence in their exercise will militate against a conclusion that an entity is an organ, and, generally, that caution is required before treating a separate legal personality as an organ.[980]

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[973] *Ibid*.
[974] *Ibid*.
[975] *Ibid* at para. 29.
[976] *Ibid*.
[977] *Ibid*.
[978] *Ibid*.
[979] *Ibid* at para. 33; reproduced in Section 3.1 above.
[980] *Ibid* at para. 34.

Accordingly, the Board of the Privy Council held that the lower courts introduced a too general or easily established exception to the strongly presumed separateness of the separate entity by applying *Trendtex*'s governmental "control + function" test.[981] The Board made the following observations in reaching this conclusion:

> (1) State control itself does not overcome the presumption of separateness because the state's control over the SOEs is "an ever present aspect of state-controlled enterprises which are *not* part of the [s]tate";[982]
> (2) Assisting, promoting and advancing development, prosperity and economic welfare and carrying out governmental policies are of the essence of the SOEs' functions. They do not overcome the presumption of separateness unless it was proven that the nature of such act falls in the category of *act jure imperii*;[983] and
> (3) The existence of governmental purposes or motive will not convert what would otherwise be an act *jure gestionis* or an act of private law into one *jure imperii*. Rather, it was necessary to consider "the whole context" in deciding whether relevant act(s) should be considered as commercial or sovereign activities.[984]
> (4) While situating a nature test of the conduct of a separate entity in its context, the Board of the Privy Council qualified that context as one in which a separate entity was performing a sovereign act in the sense of Section 14(2), *SIA*, *i.e.*, whether the very character of the act is governmental in nature.[985]

In the end, the Board of the Privy Council rejected the lower courts' finding that Gécamines had no corporate independence from the Congolese state based on Gécamines' corporate structure and conduct. In particular, it held that operating in a vitally important sector or having state influence would not render Gécamines an organ of the state:

> *There is no doubt that Gécamines had responsibility for operations in a sector of vital importance to the national economy of the [Congo], but that may be said of many state-owned corporations in centrally planned or [directed]*

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[981] *Ibid* at para. 43.
[982] *Ibid* [emphasis in the original].
[983] *Ibid* at para. 44; see also para. 69: "A ministerial statement in a national assembly may not be the surest guidance to correct legal characterization [*sic*], but, even in its own terms, its description of state-owned companies as instruments of governmental economic and social policies is unremarkable[.]"
[984] *Ibid* at paras. 46, 48, 49. In particular para 48: trading activities cannot be viewed as governmental activities only because they were "ancillary to a principle of function of carrying out governmental policies."
[985] *Ibid* at paras. 46-47.

> *economies*… There is no doubt that Gécamines's assets originated in the [s]tate, but there is nothing surprising or significant about that. Once it acquired them, they became its assets, albeit that dispositions and acquisitions were liable to veto by [s]tate authorities. Those in day-to-day charge of Gécamines' affairs were vulnerable to having any important decisions which they took reviewed and vetoed by other [s]tate authorities. But that does not mean that Gécamines had no real existence as a separate entity, or that it should be viewed for all purposes as assimilated to the [Congo].[986] [emphasis added]

The Board of the Privy Council ultimately allowed Gécamines' appeal and set aside the lower courts' decisions which found that Gécamines was an organ of the Congolese state.[987]

Lord Mance affirmed that the common law test for state organ for immunity purposes set by *Trendtex* is still of relevance to our interpretation of Section 14(1) of the UK *SIA*.[988] But he qualified the application of *Trendtex* in *Gécamines v. FG Hemisphere*. He reached the decision based on a multitude of facts, including the key fact that FG Hemisphere sought to attach the assets of Gécamines—an SOE and a separate entity—for the Congo's liability.[989] Commenting on the case, Campbell McLachlan suggests that the test developed in *Gécamines v. FG Hemisphere* would be applicable in the immunity law context. He stated that the test for whether an entity is a state organ for immunity or liability purposes is the same: "[t]he true search is for actual activity which can in its whole context properly be described as sovereign in nature."[990] In fact, subsequent UK courts have referred to *Gécamines v. FG Hemisphere*'s test in cases in which whether an entity was a state organ or a separate entity for immunity purposes under Section 14(1) was at play.[991]

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[986] *Ibid* at para. 54. See also paras. 55-56, 70.
[987] *Ibid* at para. 78.
[988] *Ibid* at paras. 33-34.
[989] To Lord Mance's view, the close connection between the Congo and Gécamines in this case might render Gécamines' creditors seek execution against the Congo's assets, not the *vice versa* as this case has indicated. See paras. 29, 73-74.
[990] McLachlan, *supra* note 16 at 508.
[991] See *Taurus Petroleum Ltd v State Oil Co of the Ministry of Oil, Iraq*, [2015] 2 CLC 284 discussed in Section 4.2 below [*Taurus*].

Both *Trendtex* and *Gécamines v. FG Hemisphere* provide us guidance in interpreting whether an SOE is a state organ or department of government for immunity purposes under Section 14(1). The key takeaway from the *Trendtex* decision is that the presence of separate legal personality itself is not decisive in characterizing whether an entity is a state organ or department of government. A detailed analysis of the entity's corporate constitution, function, powers, and the nature and purpose of its activities should be undertaken.[992] This is endorsed by the Board of the Privy Council in its decision in *Gécamines v. FG Hemisphere*. The Board of the Privy Council made three important observations that are helpful in examining whether an SOE is a state organ or department of government:

> (1) Assisting, promoting and advancing development, prosperity and economic welfare and carrying out governmental policies are of the essence of the SOEs' functions. They do not overcome the presumption of separateness unless it was proven that the nature of such act falls in the category of *act jure imperii*;[993]
> (2) The existence of governmental purposes or motive will not convert what would otherwise be an act *jure gestionis* into an act *jure imperii*. Rather, it was necessary to consider "the whole context" in deciding whether relevant act(s) should be considered as commercial or sovereign activities;[994] and
> (3) Operating in a sector of vital importance to the national economy does not change the commercial nature of the SOE or its separateness from the state, since that could be said of many state-owned corporations in centrally planned economies.[995]

All these three points speak to our assessment of Chinese SOEs' "state" status for immunity purposes because (1) Chinese SOEs are legally required to promote Chinese state economy and contribute to the state's and the CPC's policy goals; (2) Chinese SOEs' actions often involve the state's and the CPC's governmental and political purposes; and (3) many Chinese SOEs operate in a sector that is deemed to be important to the national economy or national security by China. According to the Board of the Privy Council, having these characters does not automatically

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[992] Dickinson et al., *supra* note 86 at 403.
[993] *Gécamines v. F.G. Hemisphere*, *supra* note 957 at paras. 44, 69.
[994] *Ibid* at paras. 46, 48, 49.
[995] *Ibid* at para. 54. See also paras. 55-56, 70.

render a Chinese SOE a state organ or department of state for immunity purposes under the UK *SIA*. More is required. A court thus must look at the Chinese SOE's corporate constitution, function, powers, the nature and purposes of its activities in the overall context to determine if there exists a clear boundary between the state and the SOE.

From Chapter 4 we know that the sovereign aspect of the Chinese SOEs' dual identity requires commercial Chinese SOEs to further the political and policy goals of the state and the CPC.[996] Based on Lord Mance's above findings, we can make the following conclusions. First, Chinese SOE's contribution to the state's and the CPC's policy and political goals (as their purposes) in their commercial transactions is unlikely to render them part of the state if their underlying transactions are commercial in nature. An additional step has to be taken to demonstrate the underlying transaction itself is an act *jure imperii* so as to trigger Chinese SOEs' immunity *ratione materiae* under Section 14(2) of the UK *SIA*. The purpose of Chinese SOEs' operations will only be an element to be considered in the overall context by an UK court. A large number of Chinese SOEs operate in important economic and national security sectors as defined by the CPC and some of them invest abroad. According to Lord Mance, this is an inherent characteristic of a centrally planned economy and that does not automatically render them part of the state. Hence, to assess Chinese SOEs' "state" status—whether they are state organs or departments of the state—under Section 14(1), key factors are whether they have independent business decision-making power,[997] what are the nature and purposes of their acts,[998] and whether they have independent corporate assets.[999] I will return to this point in

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[996] Chapter 4, Section 3.2.
[997] *Trendtex*, *supra* note 174 at 134.
[998] *Trendtex*, *ibid*.
[999] See the *Boru v. Tepe* case discussed in Section 4.2 below.

Section 5 in a hypothetical situation that analyzes Chinese SOEs' "state" status under Section 14(1) of the UK *SIA*.

3.1.3 The commercial exception to the state's jurisdictional immunity under the UK *SIA*: A contextual approach

Having found a person or an entity is deemed to be part of the state under Section 14(1), that person or entity enjoys presumptive jurisdictional immunity as granted by the UK *SIA*'s Section 1(1), which provides that "[a] [s]tate is immune from the jurisdiction of the courts of the United Kingdom excepted as provided in the following provisions of this Part of this Act."[1000] Section 3(1) provides the commercial exception to this presumptive jurisdictional immunity and Section 3(3) defines "commercial transaction":

> 3.—(1) A [s]tate is not immune as respects proceedings relating to:
>
> (a) a commercial transaction entered into by the [s]tate[.]
>
> […]
>
> (3) In this section "commercial transaction" means—
>
> (a) any contract for the supply of goods or services;
>
> (b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and
>
> (c) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) *into which a [s]tate enters or in which it engages otherwise than in the exercise of sovereign authority*[.][1001] [emphasis added]

[1000] Section 1(1), UK *SIA*. Part I of the UK *SIA* is entitled "proceedings in United Kingdom by or against other states." Sections 2-11 provide exception from jurisdiction immunity.
[1001] Section 3, *SIA*; D. W. Bowett, "The State Immunity Act 1978" (1978) 37:2 Cambridge LJ 193, noting that the phrase "which a [s]tate enters or in which it engages otherwise than in the exercise of sovereign authority" will be "genesis" of future litigation since it remains open for states to determine what are acts *jure imperii* and acts *jure gestionis* [Bowett, The SIA 1978].

I Congreso is considered the classic exposition of the common law test on the interpretation of what constitutes a commercial transaction.[1002] The test on the interpretation of the commercial transaction exception developed in this case sheds light on our understanding of Section 3 of the UK *SIA*. The case concerned the liability of a Cuban SOE's failure to deliver a quantity of sugar because of Cuba's instruction and intervention. Lord Wilberforce provided the following five elements to guide us in deciding whether an act is an act *jure imperii* or an act *jure gestionis*:

> (1) Whenever a claim is raised against a state it is necessary to consider whether the relevant act which forms the basis of the claim is a sovereign act or a private act;
>
> (2) A private act is one that a private citizen might have entered into;
>
> (3) It is the nature of the act that is decisive, not its purpose;
>
> (4) This requires the court to characterize the activity into which the defendant state has entered (not the particular cause of action alleged); and
>
> (5) In arriving this characterization, the court must consider the whole context in which the claim against the state is made.[1003]

Lord Wilberforce's contextual approach that takes into account of the nature of the act and the purpose of the state entering in to the activity—although the role of the purpose is not decisive—has been affirmed by the House of Lords (but applied restrictively) in *KAC v. IAC*,[1004] a case about the Iraqi state-owned Iraq Airways Company—a separate entity's immunity claim that will be discussed below when we examine separate entities' jurisdictional immunity.[1005] But we will first turn to the Supreme Court of Canada decision in *Re Canada Labour Code*, a case about a

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[1002] McLachlan, *supra* note 16 at 504, commenting on *I Congreso del Partido*.
[1003] *I Congreso del Partido*, *supra* note 91 at 314-18; see also McLachlan, *ibid*.
[1004] *KAC v. IAC*, *supra* note 92.
[1005] McLachlan, *supra* note 16 at 504-05.

state itself—the United States—claiming immunity, in which the contextual approach set out by Lord Wilberforce was applied and articulated.[1006]

In *Re Canada Labour Code*, the US claimed sovereign immunity under the Canadian *SIA* in proceedings involving Canadian civilians who worked at a US naval base in Newfoundland and Labrador[1007]—mainly as tradespersons for maintenance work—who sought union certification before the Canada Labour Board ("Labour Board").[1008] The Labour Board took the view that an employment contract fell into the scope of commercial exception provided in the Canadian *SIA*,[1009] which was affirmed by the Canadian Federal Court of Appeal.[1010] Justice La Forest, writing for the majority of the bench, reversed the Federal Court of Appeal's decision and held that the labour relations at the US naval base in Newfoundland and Labrador did not fall into the commercial exception of the Canadian *SIA* and held that the US was immune from the Canadian courts and labour tribunals.[1011]

To Justice La Forest, the key to the dispute was the interpretation of Section 5, Canadian *SIA*, which provides the commercial exception:

> 5. A foreign state is not immune from the jurisdiction of a court in any proceedings that relate to any commercial activity of the foreign state.[1012]

He held that the proper interpretation of Section 5 should be divided into two parts. First, what is the "nature" of the activity in question—does the employment at the US naval base constitute a

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[1006] *Re Canada Labour Code*, *supra* note 89.
[1007] *Re Canada Labour Code*, *ibid* at 58. There was a *Lease Bases Agreement* signed between the US and Newfoundland and Labrador (UK) in the 1940s, which became part of Canada's obligations after Newfoundland and Labrador's union with Canada.
[1008] *Ibid* at 60-61.
[1009] *Ibid* at 63.
[1010] *Ibid* at 66.
[1011] *Ibid* at 69.
[1012] Section 5, Canadian *SIA*.

commercial activity? Second, are the proceedings in this case—a union certification application—"related" to that activity?[1013] Justice La Forest added that:

> The two questions are, of course, interrelated, and neither can be answered in absolute terms. Certain aspects of employment at the base are commercial, but in other respects the employment relationship is infused with sovereign attributes. Accordingly, the certification proceeding affects both the commercial and sovereign aspects of employment at the base. The issue then becomes whether the effect on the commercial realm is sufficiently strong as to form a "nexus" so that it can truly be said that the proceedings "relate" to commercial activity. In my view, a nexus exists only between the certification proceedings and the <u>sovereign</u> attributes of labour relations at the base. The effect on commercial activity is merely incidental and cannot trigger the application of s.5 of the *State Immunity Act*.[1014] [emphasis in the original]

Justice La Forest declined to take a binary approach toward the nature and purpose of the employment relationships in this case. He also dismissed the application of a nature only approach in interpreting what is commercial. He held that:

> Nature and purpose are interrelated, and it is impossible to determine the former without considering the latter…if consideration of purpose is helpful in determining the nature of an activity, then such consideration should be and are allowed under the [Canadian *SIA*]. Further, when an activity is multifaceted in nature (as in the instant case) consideration of its purpose will assist in determining which facets are truly "related" to the proceedings in issue.[1015]

To support his view that "the state activity in question will often possess a hybrid nature—one public, the other private[,]" Justice La Forest referred to Lord Wilberforce's contextual approach taken in the *I Congreso* case,[1016] and concluded that "[t]he entire context includes both the nature and purpose of the act."[1017] He held that:

> It seems to me that a contextual approach is the only reasonable basis of applying the doctrine of restrictive immunity. The alternative is to attempt the impossible—an antiseptic distillation of a "once-and-for-all" characterization of the activity in question, entirely divorced from its purpose. It is true that the purpose should not predominate, as this approach would convert virtually every

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[1013] *Re Canada Labour Code*, *supra* note 89 at 69.
[1014] *Ibid* at 69-70.
[1015] *Ibid* at 70.
[1016] *I Congreso del Partido*, *supra* note 91.
[1017] *Re Canada Labour Code*, *supra* note 89 at 73.

> act by commercial agents of the state into an act *jure imperii*. However, the converse is also true. Rigid adherence to the "nature" of an act to the exclusion of purpose would render innumerable government activities *jure gestionis*. Neither of these extremes offers an appropriate resolution of the problem.[1018]

After establishing the applicable "contextual" test, Justice La Forest held that the labour relationship at the naval base had both sovereign and commercial characters.[1019] Regarding the sovereign aspect, Justice La Forest stated that the US's right to operate the naval base as it sees fit is inherently sovereign and cannot be subject to a foreign tribunal's scrutiny.[1020] He then found that the sovereign aspect of the labour relationship at the base (*i.e.*, the management of the base) has a stronger connection with the proceedings before Canadian courts; not the commercial aspect of the labour relationship at the base (*i.e.*, hiring contracts). He concluded that subjecting the base's management to Canadian courts and tribunals would constitute an intrusion on the US sovereign immunity in an area critical to its national security in both peacetime and wartime.[1021] As a result, the Canadian Supreme Court allowed the US's appeal and held the US was immune from the proceedings before the Labour Board.[1022]

The Supreme Court of Canada's decision in *Re Canada Labour Code* case will be particularly relevant to the interpretation of the UK *SIA*'s Section 3—commercial transaction exception—since the Supreme Court of Canada's interpretation of the Canadian *SIA*'s commercial exception relied heavily on *I Congreso*, which continues to shed light on Section 3 of the UK *SIA*.[1023] To determine whether a transaction or activity that has sovereign purposes

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[1018] *Ibid* at 73. Endorsed by *KAC. v. Iraq*, *supra* note 90 at para. 31.
[1019] *Ibid* at 77.
[1020] *Ibid* at 78, 80.
[1021] *Ibid*, 82-83.
[1022] Currie, *supra* note 16 at 397 commenting that: "[t]his [decision] brings the Canadian approach to determining whether an activity is commercial more or less in line with that espoused in Article 2(2) of the [*UNCSI*]." See Article 2(2) of the *UNCSI* provides the methodology of determining what is a commercial transaction, which includes a purpose element. See Chapter 5.
[1023] See *KAC v. IAC*, *supra* note 92, discussed in Section 3.2.1 below on the relevance of Section 3 in interpretating Section 14(2)(a) of the UK *SIA*.

attached is commercial or not, Justice La Forest's analysis suggests that we need to find which aspect of these contracts—the sovereign or the commercial aspect—has the stronger connection with the underlying dispute.[1024] To him, that sovereign aspect—as evidenced in this case—can be heavily influenced by the state's sovereign purpose in the overall context. These conclusions, if applied in a case, can affect our assessment of the state's or the SOE's immunity. But later cases such as *KAC v. IAC* decided by the UK House of Lords[1025] and *KAC. v. Iraq* decided by the Supreme Court of Canada[1026] have restricted the application of the state's sovereign purpose in applying the "contextual" approach.

3.2 Separate entities' immunity under Section 14(2)

Section 14(2) regulates under what circumstance a separate entity could attract jurisdictional immunity:

> (2) A separate entity is immune from the jurisdiction of the courts of the United Kingdom if, and only if—
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> (a) the proceedings relate to anything done by it in the exercise of sovereign authority; and
>
> (b) the circumstances are such that a [s]tate […] would have been so immune.[1027]

[1024] This was also the approach taken by Lord Wilberforce in *I Congreso del Partido*, *supra* note 91 at 318-20.
[1025] *KAC v. IAC*, *supra* note 92.
[1026] *KAC. v. Iraq*, *supra* note 90.
[1027] Section 14(2), UK *SIA*. *Cf* Section 14(2) with Article 27 of the *ECSI*, which provides that:

> 1. For the purposes of the present Convention, the expression "Contracting State" shall not include any legal entity of a Contracting State which is distinct therefrom and is capable of suing or being sued, even if the entity has been entrusted with public functions.
>
> 2. Proceedings may be instituted against any entity referred to in paragraph 1 before the courts of another Contracting State in the same manner as against a private person; however, the courts may not entertain proceedings in respect of acts performed by the entity in the exercise of sovereign authority (*acta jure imperii*).

Section 14(2) establishes that separate entities enjoy immunity not by their status but their exercise of sovereign authority.[1028] A two-step test exists under Section 14(2) for courts to apply. First, the court has to determine whether an entity is truly separate from the state, *i.e.*, it must be distinctive from the state, as discussed in Section 3.1.1 above.[1029] In this regard, *Trendtex* is applicable. If an entity does not qualify to be a state organ or department of state under Section 14(1), it would be treated as a separate entity if it has a separate legal personality and can sue and be sued. Secondly, if the entity is a separate entity that falls into Section 14(2), the court has to decide whether the entity would nonetheless be immune if the two conditions imposed by Section 14(2) are met. Where an entity's separateness is not in issue, the focus will be the second step of the test on whether that entity has exercised sovereign authority. This is the exact question that was debated in *KAC v. IAC* before the House of Lords.[1030]

3.2.1 The interpretation of Section 14(2)'s requirement of exercising sovereign authority: *KAC v. IAC*

(1) Background and findings of the High Court and Court of Appeal

The dispute between Kuwait Airways Corporation ("KAC") and Iraqi Airways Company ("IAC") arose from Iraq's invasion of Kuwait on 2 August 1990[1031] and Iraq's expropriation of

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3. Proceedings may in any event be instituted against any such entity before those courts if, in the corresponding circumstances, the courts would have had jurisdiction if the proceedings had been instituted against a Contracting State.

[1028] Fox and Webb, *supra* note 13 at 177-178; McLachlan, *supra* note 16 at 506. *Cf Dicey, Morris & Collins on The Conflict of Laws*, *supra* note 221 at 342, maintaining that there must exists an ownership or control relationship between the entity and the state for a separate entity (*i.e*., status), although Section 14(2) is silent on this matter. Otherwise, it would be an extension of the doctrine of sovereign immunity to apply the notion of separate entity to any agent of the foreign state.
[1029] Yang, *supra* note 13 at 235; McLachlan, *supra* note 16 at 506; Dickinson et al., *supra* note 86 at 403-04.
[1030] *KAC v. IAC*, *supra* note 92.
[1031] For an account of the Gulf War, see Erika de Wet, "The Gulf War—1990-91" in Tom Ruys, Olivier Corten & Alexandra Hofer eds. *The Use of Force in International Law: A Case-based Approach* (Oxford: Oxford University Press 2018) at 456 [de Wet, The Gulf War].

the aircraft of KAC through IAC.[1032] IAC flew ten of KAC's aircraft to Iraq between 6 and 17 September 1990 as instructed by the Iraqi Minister of Transport and Communications. During this time, IAC carried out basic maintenance and made no use of the aircraft.[1033] Directed by Revolutionary Council Resolution 369 ("Resolution 369"), which came into effect on 17 September 1990, KAC was dissolved and all of its assets were transferred to IAC. IAC incorporated the ten aircraft into its fleet and started to use them in a limited commercial capacity.[1034] KAC initiated legal actions against both IAC and Iraq in the English High Court, claiming for return of the aircraft or compensation for damages.[1035] Among its jurisdictional challenges, IAC argued that it was entitled to jurisdictional immunity as a separate entity per Section 14(2) of the *SIA* since the litigation was related to things done by it in the exercise of sovereign authority.[1036]

Justice Evans at the High Court dismissed IAC's sovereign immunity claim per Article 14(2). Although the invasion and occupation of Kuwait and its airport were sovereign acts, he held that the removal of the aircraft and their subsequent use by IAC for commercial purposes were separate acts which were commercial in character.[1037] The three judges at the Court of Appeal reversed Justice Evans's decision as they considered that IAC's conduct could not be viewed in isolation from the Iraqi state's conduct. Lord Justice Nourse concluded that IAC's conduct can only be seen as a sovereign act because "IAC was a dutiful accomplice of Iraq's in the forcible confiscation of the aircraft; as clear an act *jure imperii* as could possibly be

[1032] *KAC v. IAC*, *supra* note 92 at 391.
[1033] *Ibid.*
[1034] *Ibid* at 391-392.
[1035] *Ibid* at 392.
[1036] *Ibid.*
[1037] *KAC v. IAC*, High Court, Queen's Bench Division, 16 April 1992, *supra* note 92 at 352-355.

imagined".[1038] As such, Lord Justice Nourse rejected KAC's argument that IAC's conduct was severable from the state's conduct. He did not accept that once the aircraft had arrived in Iraq, their subsequent use became commercial.[1039] Lord Justice Leggatt took a similar view.[1040] He held that although "IAC may have treated the aircraft or some of them as part of its civil airline fleet, its ability to do so stemmed solely from the exercise of sovereign authority by the Republic of Iraq."[1041] Lord Justice Simon Brown's rationale regarding the nature of IAC's conduct aligned with the other two judges.[1042] He stated that characterizing an otherwise intrusive sovereign action as a commercial one would provide IAC inappropriate respectability in law:

> To characterise as a commercial activity what in reality was IAC's willing participation in naked acts of forcible seizure and expropriation, sanitised although these eventually were under colour of domestic legislation, would seem to me to do no service to the rule of law; rather it would afford IAC an apparent respectability it does not merit.[1043]

Lord Justice Simon Brown thus concluded that IAC's conduct was not detachable from the Iraqi state's conduct over the different periods.[1044] Accordingly, the three judges at the Court of Appeal unanimously reversed the High Court's finding and held that IAC was entitled to immunity per Section 14(2).[1045]

(2) The House of Lords' majority decision

Writing for a 3 - 2 majority, Lord Goff held that the examination of the two conditions set in Section 14(2) should focus on whether the acts performed by IAC were performed in the exercise of sovereign authority, i.e., *acta jure imperii*; and additionally, whether the state would

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[1038] *KAC v. IAC*, Court of Appeal, 21 October 1993, *ibid* at 373.
[1039] *Ibid* at 374.
[1040] *Ibid* at 380 per Lord Justice Leggatt.
[1041] *Ibid* at 381.
[1042] *Ibid* at 386 per Lord Justice Simon Brown "So far as the seizure of KAC's ten aircraft was concerned, IAC was no more and no less than Iraq's tool and partner in the adventure."
[1043] *Ibid*.
[1044] *Ibid* at 388.
[1045] *Ibid* at 370 per Lord Justice Nourse; 382 per Lord Justice Leggatt; 388 per Lord Justice Simon Brown.

have been so immune if it has done the act.[1046] In this regard, he noted that *acta jure imperii* found in Section 14(2)(a) should be interpreted in light of Section 3, which regulates the commercial exception to jurisdictional immunity.[1047] Lord Goff held the view that the commercial transaction exception as found in Section 3 should be applied under Section 14(2)(a)[1048] instead of 14(2)(b)[1049] to avoid redundancy. In his view, applying Section 14(2)(a) would have the effect of excluding *acta jure gestionis*, with the practical effect that questions relating to commercial transactions should not arise under Section 14(2)(b).[1050] Lord Goff then held that English authorities relating to the distinction between *acta jure imperii* and *acta jure gestionis* as found in *I Congreso* would be instructive:

> [T]he ultimate test of what constitutes an act *jure imperii* is whether the act in question is of its own character a governmental act, as opposed to an act which any private citizen can perform. It follows that, in the case of acts done by a separate entity, *it is not enough that the entity should have acted on the direction of the state, because such an act need not possess the character of a governmental act*. To attract immunity under section 14(2), therefore, what is done by the separate entity must be something which possesses that character*…[I]n the absence of such character, the mere fact that the purpose or motive of the act was to serve the purposes of the state will not be sufficient to enable the separate entity to claim immunity under section 14(2) of the [UK SIA]*.[1051] [emphasis added]

Although he referred to *I Congreso*'s contextual approach, Lord Goff held that to distinguish an act *jure imperii* and an act *jure gestionis*, what matters is that the act itself has to possess the character of a government or sovereign act. In the absence of such character, the state's

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[1046] *KAC v. IAC*, House of Lords, *supra* note 92 at 397.
[1047] Section 3(1) provides the commercial transaction exception and Section 3(3) articulates "commercial transactions."
[1048] Section 14(2)(a), reproduced in Section 3.2.1 above.
[1049] Section 14(2)(b), reproduced in Section 3.2.1 above.
[1050] *KAC v. IAC*, House of Lords, *supra* note 92 at 400.
[1051] *KAC v. IAC*, *ibid* at 401-02. Cited with approval in *Dicey, Morris & Collins on The Conflict of Laws*, *supra* note 221 at 342-43; *cf* Yang, *supra* note 13 at 240, criticizing that such a narrow interpretation would not allow English courts to consider the purposes of the act in the context.

instruction and the motive or purpose of the act are insufficient.[1052] Hence, the inherent nature of the underlying conduct on its own is the decisive factor that determines whether an act is an act *jure imperii* or an act act *jure gestionis*, its purpose only provides an assisting role. In absence of such stand-alone sovereign character of the conduct, the existence of a sovereign purpose cannot convert the underlying conduct into a sovereign one.

Focusing on the character of the act itself, Lord Goff noted that KAC's claims were based on four different time periods.[1053] Lord Goff held that the key date was 17 September 1990 when Resolution 369 came into effect, which dissolved KAC and vested all of its assets in IAC. Divided by that date, he categorized IAC's actions into two groups: (1) the removal of the aircraft from Kuwait Airport to Iraq in assisting Iraq's expropriatory act, and (2) incorporating KAC's aircraft as part of IAC's commercial fleet after Resolution 369 came into effect.[1054] Lord Goff explained that before 17 September 1990, IAC's taking of the aircraft and their removal from Kuwait Airport to Iraq constituted an exercise of governmental power by Iraq as it was closely involved in the seizure and incorporation of the KAC's flee into IAC's as directed by the Iraqi state.[1055] However, the coming into effect of Resolution 369 changed the situation. IAC's retention and use of the aircraft on its own after 17 September 1990 could not be categorized as governmental conduct simply because they flowed from the Resolution 369 or outward

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[1052] *I Congreso*, *supra* note 91 at 314.
[1053] *KAC v. IAC*, *supra* note 92 at 402, KAC raised four claims: "(a) On 2 August 1990 the second defendants invaded Kuwait, took control of the airport and deprived the plaintiffs of possession and control of, inter alia, the aircraft particularised above. (b) Between 2 August and 9 August the aircraft were removed from the airport. (c) On a date or dates between 9 August and 17 September the second defendants unlawfully transferred possession and control of the aircraft to the first defendants. The stated intention of the defendants was to incorporate the aircraft within the First Defendants' fleet and to sue them for commercial purposes, (d) The first and second defendants have continued wrongfully to interfere with the aircraft by their unlawful possession and control of the aircraft and refusal and/or failure to deliver up the aircraft to the plaintiffs."
[1054] *Ibid* at 403.
[1055] *Ibid* at 405.

manifestations of a denial of title which occurred at the time of seizure of the aircraft. Rather, they constituted fresh acts of conversion.[1056] In this regard, he held that a separate entity's actions are severable according to their specific situations:

> I for my part cannot see that the characterization as an act *jure imperii* of the earlier involvement by the entity in the act of seizure can, on the facts of the present case, be determinative of the characterization of the subsequent retention and use of the property by the state entity following the formal vesting of the property in the entity by a legislative act of the state.[1057]

Because IAC's conduct was severable, Lord Goff held that in treating the aircraft of KAC as its own and doing so pursuant to Resolution 369 after 17 September 1990, IAC was not acting under Iraq's sovereign authority.[1058] Accordingly, the House of Lords by majority reversed the part of the Court of Appeal's decision which held that IAC could claim sovereign immunity under Section 14(2) for its retention and use of KAC's aircraft after Resolution 369 came into effect.[1059]

(3) The dissenting opinions of Lords Mustill and Slynn

The dissenting judges took the view that IAC's actions after Resolution 369 came into effect were inseparable from the Iraqi state's expropriatory conduct, and hence continued to carry a sovereign nature and enjoy jurisdictional immunity per Section 14(2).[1060] In his dissenting opinion, Lord Mustill concluded that the focus of the IAC's conduct should be its retention and refusal to return the aircraft, not the peripheral activities of maintenance and removal from one place to another.[1061] Further, Lord Mustill disagreed with the majority's finding that when reviewing whether an entity qualifies as a separate entity per Section 14(2), Section 14(2)(b)—if

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[1056] *Ibid*.
[1057] *Ibid*.
[1058] *Ibid* at 405-406.
[1059] *Ibid* at 406; see also 411 per Lord Jauncey; 419 per Lord Nichollis.
[1060] *Ibid* at 415 per Lord Mustill; 419 per Lord Slynn.
[1061] *Ibid* at 414 per Lord Mustill.

a state would have been so immune in the same situation—is irrelevant and is a repetition of Section 14(2)(a)—if a separate entity had engaged in conduct *jure imperii*. In his view, Section 14(2)(a) is not a simple duplication of Section 3 (the commercial exception), or Part I of the UK *SIA* as a whole; otherwise it would render Section 14(2)(b) duplicative and meaningless.[1062] This is because Section 14 as a whole presumes that the state may be immune in circumstances where an entity is not because the immunities enjoyed by a sovereign state and separate entities are different in nature.[1063] For the former it is a matter of status whereas for the latter it is to be decided on a case-by-case basis based on the nature of the conduct at issue. Put differently, if Section 14(2) was designed to create an additional requirement for immunity for separate entities, the key question is "what is meant by the reference to things done by the entity in the exercise of a sovereign authority which the entity does not possess."[1064] Looking at the issue in this manner, Lord Mustill agreed with Court of Appeal and concluded that IAC's conduct after 17 September 1990 continued to be sovereign in nature because IAC's conduct was not independent from but a manifestation of Iraq's sovereign authority:

> In my opinion I.A.C. was not acting autonomously, but in harness with the Republic of Iraq, and under the shadow of the sovereign authority by which the latter itself was acting, so that its acts were a manifestation of that authority.[1065]

Similarly, Lord Slynn held that IAC did not play any independent role in the entire expropriatory process.[1066] In his view, the nature of IAC's acts did not change after Resolution 369 came into effect. Lord Slynn highlighted that the crux of the case was the deprivation of, not the operation of KAC's aircraft:

[1062] *Ibid*.
[1063] *Ibid* at 414-415.
[1064] *Ibid* at 415.
[1065] *Ibid*.
[1066] *Ibid* at 418 per Lord Slynn.

> Iraq is not being sued for carelessly flying an aircraft or running a commercial airline in such a way as to cause damage to people or property. It is being sued because of the direct consequences of its act of aggression towards Kuwait, the seizure of K.A.C.'s aircraft and their subsequent detention and use. This is not in any sense the kind of commercial transaction contemplated by the restricted immunity doctrine; it is certainly not within the words in section 3(3) [on commercial transaction].[1067]

Accordingly, Lord Slynn would have upheld IAC's immunity claim under Section 14(2).[1068]

The two minority judges' approach make sense as they did not artificially divide IAC's conduct before and after Resolution 369, but rather, put IAC's actions in the overall context of Iraq's invasion. Recall that KAC's legal claims were primarily for damages for the forcible seizure of its aircraft.[1069] As such, the underlying claim is one of expropriatory deprivation, not commercial operation of the aircraft by IAC even after Resolution 369 came into effect. In his comment on this case, Yang pointed out the flaws of the majority decision which partially applied a seemingly contextual approach before and a straightforward nature test after the resolution 369 came into effect:

> One either views the activity of the IAC solely in the light of its character and outside its context, in which case the acts of the IAC (checking, preparing and flying the aircraft), both before and after 17 September 1990, would constitute commercial or private activity. Or one considers what was done by the IAC within the whole context of the claim, in which case one has to hold, as did the Court of Appeal and the dissenting judges in the House of Lords, that the acts of the IAC, both before and after 17 September 1990, were done pursuant to the actions of Iraq in its sovereign capacity; such acts were so closely connected with sovereign authority as to partake of the sovereign character of the acts of the Iraqi Government. Either way, there should not, and cannot, be a fine distinction between what was done before 17 September 1990 and what was done after that.[1070]

The split decision in *KAC v. IAC* shows that a straightforward nature or nature-dominant test is not easy to apply. The majority decided that Section 14(2)(b) was irrelevant and it was a

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[1067] *Ibid* at 419.
[1068] *Ibid*.
[1069] *Ibid* at 412 per Lord Mustill.
[1070] Yang, *supra* note 13 at 241.

duplication of Section 14(2)(a). But as the minority judge Lord Mustill correctly held, Section 14(2)(b) is crucial in understanding whether a separate entity has exercised a sovereign authority that it does not possess.[1071] Section 14(2)(b) allows English courts to apply a contextual interpretative approach and consider the overall circumstances such as what is the state's motive behind its instructions to a separate entity as well as the nature of the separate entity's conduct, as found by Lord Mustill. The consideration of the state's purpose and instruction in its larger context would enable us to appreciate the complex cases like this one: an SOE who engaged in seemingly commercial transactions if seen in isolation, but in fact has exercised sovereign authority as the state's accomplice in an expropriatory act.

As we will see in the related case of *KAC v. IAC* in Canada, the role of the purpose in the contextual approach was restricted by the Supreme Court of Canada as its decision was based on the House of Lords' majority decision. In this way, the Supreme Court of Canada deviated from its own support for the role of state purpose in applying the contextual approach in *Re Canada Labour Code*.

(4) A subsequent case in Canada: *KAC. v. Iraq*

KAC. v. Iraq[1072] was an enforcement effort made by KAC against Iraq after it obtained a compensation judgment against Iraq for Iraq's perjury, forgery, and other misconduct in the English court proceedings in *KAC v. IAC*, rendered by the UK High Court of Justice in 2008. KAC turned to Quebec courts to recognize and enforce the UK High Court of Justice decision. The Quebec Superior Court and Court of Appeal declined to recognize the judgment because, among other reasons, Iraq enjoyed sovereign immunity under the Canadian *SIA*. The Supreme

[1071] *KAC v. IAC*, *supra* note 92 at 415 per Lord Mustill.
[1072] *KAC. v. Iraq*, *supra* note 92.

Court of Canada allowed the appeal from KAC because Iraq's involvement in the English court proceedings, *i.e.*, Iraq's acts in controlling IAC's defense, were not sovereign acts but commercial acts that fell in the commercial exception of the Canadian *SIA*.[1073] In reaching this conclusion, Justice LeBel, writing for a unanimous bench, referred to *Re Canada Labour Code* and put Iraq's claims in the context of the litigation between KAC and IAC discussed above:

> For the purposes of this appeal, therefore, the first step is to review the nature of the acts in issue in KAC's action against Iraq in the English courts in their full context, which includes the purpose of the acts. It is not enough to determine whether those acts were authorized or desired by Iraq, or whether they were performed to preserve certain public interests of that state. The nature of the acts must be examined carefully to ensure a proper legal characterization.
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> [S]tarting in 1991, the sole proprietor of IAC, its state-owned corporation, had controlled and funded IAC's defence throughout the long series of actions for damages brought against IAC in the English courts by the appellant. *Iraq had participated throughout this commercial litigation in the hope of protecting its interests in IAC.* In doing so, it was responsible for numerous acts of forgery, concealing evidence and lies…
>
> …It is true that the acts alleged against Iraq that resulted in the litigation were carried out by a state for the benefit of a state-owned corporation. However, the specific acts in issue here are instead those performed by Iraq in the course of the proceedings in the United Kingdom courts. When all is said and done, the subject of the litigation was the seizure of the aircraft by Iraq. The original appropriation of the aircraft was a sovereign act, but the subsequent retention and use of the aircraft by IAC were commercial acts. *The English litigation, in which the respondent intervened to defend IAC, concerned the retention of the aircraft. There was no connection between that commercial litigation and the initial sovereign act of seizing the aircraft.* As a result, Iraq could not rely on the state immunity provided for in s.3 of the *SIA*.[1074] [emphasis added]

Relying on Lord Goff's characterization of IAC's commercial retention of KAC's aircraft, which is distinctive from Iraq's expropriation of the aircraft through IAC, Justice LeBel found that Iraq's participation in UK courts—which was the basis for the enforcement claim before Canadian courts—were commercial in nature as they were only related to IAC's conduct that

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[1073] *Ibid* at para. 35.
[1074] *Ibid* at paras. 33-35.

was found to be commercial by the majority of the House of Lords. Hence, Justice LeBel held that the recognition and enforcement proceeding KAC launched against Iraq in Canadian courts fell into Canadian *SIA*'s commercial exception and KAC's appeal should be allowed.

To reach the above decision, Justice LeBel also referred to the US and UK practice and held that it is the nature of the conduct, not the state's instruction, that is the paramount signpost in determining whether an act of the state is sovereign or commercial in the contextual approach:

> Thus, in both U.S. and English law, the characterization of acts for purposes of the application of state immunity is based on an analysis that focusses on their nature. It is therefore not sufficient to ask whether the act in question was the result of a state decision and whether it was performed to protect a state interest or attain a public policy objective.[1075]

This is because if the state's decision/instruction or purpose of protecting state interest or pursuing state policy objective were given to much weight, it could erode restrictive immunity:

> If that were the case, all acts of a state or even of a state-controlled organization would be considered sovereign acts. This would be inconsistent with the restrictive theory of state immunity in contemporary public international law and would have the effect of eviscerating the exceptions applicable to acts of private management, such as the commercial activity exception.[1076]

The Supreme Court of Canada's decision, although it claimed that it had applied a contextual approach as Lord Goff had done in *KAC v. IAC*, in fact applied an approach that focuses only or primarily on the nature of the conduct that is more aligned with the US practice (see the next Chapter). In reaching its conclusion, the Supreme Court of Canada gave deference to the House of Lords' distinction between Iraq's expropriation (and IAC's accomplice role in it) and IAC's usage of KAC's aircrafts in a commercial capacity. Because the actions of Iraq addressed in Quebec courts are related to Iraq's participation in commercial litigation in UK courts and its defense for IAC's commercial act—retention of KAC's aircraft, the Supreme Court of Canada

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[1075] *Ibid* at para. 30.
[1076] *Ibid*.

concluded that Iraq could not enjoy jurisdictional immunity in Canadian courts. In deciding so, Justice LeBel held that the purpose of the state—Iraq's intention to protect its state interests in an SOE—should not be given too much weight as part of the context. Otherwise, most things done by a state or an SOE could be categorized as sovereign in nature. By relying on the majority of the House of Lords' decision in *KAC v. IAC*, the Supreme Court of Canada in *KAC v. Iraq* have departed from Lord Wilberforce's and Justice La Forest's observations made in *I Congreso* and *Re Canada Labour Code* that the purpose of the conduct must be taken into account in the overall context even though the purpose itself is not determinative.[1077]

The sovereign interests at stake in *KAC v. Iraq* and *Re Canada Labour Code* cases were different. The former were the property interests that Iraq held in IAC, for which the UK courts found that IAC's defense was tainted by Iraq's misconduct such as perjury and forgery.[1078] The latter were the US's national security interests in a foreign naval base. The context of Iraq's participation in the English High Court of Justice stemmed from the *IAC v. KAC* case, the backdrop of which is Iraq's invasion of Kuwait—a sovereign act—although it is unlawful under international law.[1079] If the minority judges' views in *KAC v. IAC*—the purpose in the context should also be considered—were taken into account by the Supreme Court of Canada, the result might have been different. As recognized by the minority judges in *KAC v. IAC*, IAC should be

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[1077] See Yang, *supra* note 13 at 240 commenting on Lord Goff's approach in *KAC v. IAC*.
[1078] See *SerVaas v. Rafidian Bank*, *supra* note 882, discussed in Section 4.1 below, in which the UK Supreme Court held that the underlying transaction is irrelevant for determining the state's usage purpose of the profits arising therefrom. If this rationale is applied here, given that the Supreme Court of Canada held that Iraq's participation was to protect its property interest in IAC, the Supreme Court of Canada's final decision might be impacted if Iraq's sovereign usage purpose of its interests in IAC is considered in the overall context.
[1079] de Wet, "The Gulf War", *supra* note 1031 at 456 noting that the United Nations Security Council passed Resolution 660, determining that the Iraqi invasion of Kuwait constituted an international breach of peace and demanding that Iraq immediately and unconditionally withdraw all its forces from Kuwait. Regarding the impact of public international law breach on recourses to domestic courts, see Martin Davies, "Kuwait Airways Corp v. Iraqi Airways Co: The Effect in Private International Law of a Breach of Public International Law by a State Actor" (2001) 2(2) Melb J of Int'l L 523.

treated as an accomplice of Iraq in expropriating IAC's aircraft in the whole process during Iraq's invasion of Kuwait. If this context was considered, Iraq's instruction to IAC in IAC's defense in UK courts was not purely commercial activities but also related to the underlying expropriatory action within the context of the invasion.

By decreasing the weight of the purpose as well as the context of the dispute in the contextual approach in *KAC v. Iraq* compared to the *Re Canada Labour Code* case, the Supreme Court of Canada deviated from its own previous decision. The two Canadian cases suggest that a greater emphasis on the purposes and the context can lead to a conclusion that a state is immune (*Re Canada Labour Code*) and less emphasis can reduce the scope of a state's immunity (*KAC v. Iraq*). The exercise of judicial discretion regarding the weight to be given to purpose and context will have a significant impact on the scope of the state's jurisdictional immunity. When it comes to SOEs as claimants arguing for jurisdictional immunity under Section 14(2), if the more constrained approach—giving the nature of the conduct decisive weight—taken by the majority of the House of Lords in *KAC v. IAC* or the Supreme Court of Canada in *KAC v. Iraq* are applied, SOEs are less likely to enjoy jurisdictional immunity in UK or Canadian courts. To the contrary, when the sovereign purposes of an SOE's conduct which reflects that SOE's exercise of sovereign authority—like the minority judges in *KAC v. IAC* had observed in the overall context—is given some weight, SOEs could potentially gain jurisdictional immunity in UK and Canadian courts.

4. Execution immunity under Section 13 of the UK *SIA*

4.1 The current and future use purposes of commercial assets in Section 13: *SerVaas v. Rafidian Bank*

Section 13 of the UK *SIA* shields a state from execution with two exceptions: (1) prior consent (Section 13(3)); and (2) measures taken against property in use or intended for use for commercial purposes (Section 13(4)).[1080] Sections 13(2)(b), 13(3), and 13(4) read as:

> Section 13
>
> (2) Subject to subsections (3) and (4) below—
>
> […]
>
> (b) the property of a [s]tate shall not be subject to any process for the enforcement of a judgment or arbitration award or, in an action in rem, for its arrest, detention or sale.
>
> (3) Subsection (2) above does not prevent the giving of any relief or the issue of any process with the written consent of the [s]tate concerned[.]
>
> (4) Subsection (2)(b) above does not prevent the issue of any process in respect of property which is for the time being in use or intended for use for commercial purposes[.]

Section 17(1), UK *SIA* defines commercial purposes through Section 3(3) and says: " 'commercial purposes' means purposes of such transactions or activities as are mentioned in section 3(3) above."[1081] The UK Supreme Court in *SerVaas v. Rafidian Bank* established that the test of "use or intended use for commercial purposes" used for execution immunity is a narrower concept than the equivalent test for jurisdictional immunity.[1082] The issue presented before the UK Supreme Court in this case was:

[1080] Sections 13(3) and 13(4), UK *SIA*.
[1081] Section 17(1), UK *SIA*.
[1082] *SerVaas v. Rafidian Bank*, *supra* note 882; see also *Dicey, Morris & Collins on The Conflict of Laws*, *supra* note 221 at 345-46; Kupelyants, *Sovereign Defaults before Domestic Courts*, supra note 902 at 290.

> [W]hat is the true construction of the expression "property which is for the time being in use or intended for use for commercial purposes" in section 13(4) of the [UK] *State Immunity Act* 1978.[1083]

The case was about the appellant SerVaas's execution efforts against Iraq's assets in the Rafidian Bank, which Iraq has earmarked for transfer to its development fund. In construing the language of Section 13(4), Lord Clarke stated:

> The language of section 13(4) is to be contrasted with other parts of the Act. It is, for example, to be contrasted with section 3(1), which refers to proceedings "relating to" a commercial transaction, and section 10, which refers to claims "in connection with" a ship. In enacting section 13(4), Parliament could have referred to property that "related to" a commercial transaction, or arose "in connection with" a commercial transaction as being susceptible to enforcement. *It chose not to do so, which suggests that it intended a difference in meaning. Property will only be subject to enforcement where it can be established that it is currently "in use or intended for use" for a commercial transaction. It is not sufficient that the property "relates to" or is "connected with" a commercial transaction.*[1084] [emphasis added]

Since Iraq's money in the present case was to be transferred to its development fund and was intended to be used for sovereign purposes, it was therefore non-commercial, even though the funds originated from a commercial transaction.[1085] On this basis, the UK Supreme Court dismissed SerVaas's appeal.[1086] The takeaway of this case is that the nature of the original transaction—even if it is commercial—that produces the targeted property is irrelevant; what matters is the property's current and future usage purpose.[1087]

[1083] *SerVaas v. Rafidian Bank*, *ibid* at para. 1.
[1084] *Ibid* at para. 17.
[1085] *Ibid* at paras. 30, 32.
[1086] *Ibid* at para. 34.
[1087] *Ibid* at para. 16: "it would not be an ordinary use of language to say that a debt arising from a transaction is 'in use' for that transaction. Parliament did not intend a retrospective analysis of all the circumstances which gave rise to property, but an assessment of the use to which the state had chosen to put the property."; see also Roger O'Keefe, "Decisions of British Courts during 2012 Involving Questions of Public or Private International Law A. Public International Law" (2014) 83:1 Brit YB Intl L 243, 244-45: "*SerVaas Incorporated v. Rafidian Bank and Others* [2012] UKSC 40."

4.2 Separate entities' execution immunity regarding their assets under Section 13 by way of the application of Section 14(3)

Section 14(3) provides that:

> If a separate entity (not being a [s]tate's central bank or other monetary authority) submits to the jurisdiction in respect of proceedings in the case of which it is entitled to immunity by virtue of subsection (2) [jurisdictional immunity] above, subsection (1) to (4) of section 13 [states' execution immunity] above shall apply to it in respect of those proceedings as if references to a [s]tate were references to that entity.[1088]

Section 14(3) means when separate entities attract jurisdictional immunity and waive such jurisdictional immunity, execution immunity still apples to them like that applies to a state. It also means that unlike states, separate entities generally do not enjoy execution immunity unless they have successfully attracted jurisdictional immunity under Section 14(2).[1089] This conclusion aligns with Section 14(1)'s general exclusion of separate entities from the scope of the state and conditions must be met for a separate entity to attract jurisdictional immunity under Section 14(2).

Generally, separate entities' assets are distinct from the state's assets. However, as will be shown in section 4.2.2 below, the Board of the Privy Council in *Boru v. Tepe* held that SOEs as separate entities can hold certain assets—that are distinct from SOEs' assets—on behalf of their home state.[1090] Creditors' execution effort against such assets would fail if states have successfully invoked execution immunity for them based on their sovereign usage purposes.[1091]

[1088] Section 14(3), UK *SIA*.
[1089] Fox and Webb, *supra* note 13 at 215; Yang, *supra* note 13 at 397.
[1090] *Boru Hatlari Ile Petrol Taşima AŞ and others (also known as Botaş Petroleum Pipeline Corporation) v Tepe Insaat Sanayii AS* [2018] UKPC 31, para. 21: "assets held by a separate entity could be held for or in trust for the [s]tate." [*Boru v. Tepe*]
[1091] *SerVaas v. Rafidian Bank*, *supra* note 882 at paras. 17, 30, 32.

4.2.1 *Taurus Petroleum Ltd v. State Oil Co of the Ministry of Oil, Iraq*: when an SOE does not attract jurisdictional immunity as a separate entity under Section 14(2), it cannot attract execution immunity like a state under Section 13(2)(b)

In *Taurus Petroleum Ltd v. State Oil Co of the Ministry of Oil, Iraq* ("*Taurus*"), the UK Court of Appeal held in 2015 that an SOE's execution immunity claim for their assets should fail when the SOE as a separate entity fails to attract jurisdictional immunity.[1092] This part of the decision of the Court of Appeal was not appealed to the UK Supreme Court.[1093]

The *Taurus* case arose from Taurus's execution effort against State Oil Marketing Company of Iraq ("SOMO") of an arbitral award the latter failed to honor. After discovering that a company had purchased crude oil from SOMO, the price of which was to be paid by a letter of credit ("L/C") issued by the London branch of a French bank—Crédit Agricole, Taurus made an execution effort against the L/C. The L/C was unique in the way that it was addressed to the Central Bank of Iraq indicating that Crédit Agricole had set up a credit in favour of SOMO. The L/C contains a special condition for the credits, which provides that the proceeds would be paid to Central Bank of Iraq's account in New York. Crédit Agricole promised SOMO and Central Bank of Iraq that documents drawn under and in compliance with the terms of this credit would be duly honored upon presentation as specified to credit Central Bank of Iraq's New York account.

Taurus applied to the UK High Court to enforce the award by way of an interim third-party debt order with an appointment of a receiver in respect of the funds receivable under the L/C, which the UK High Court granted. SOMO applied to set aside the order on the grounds of

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[1092] *Taurus*, *supra* note 991.

[1093] *Taurus Petroleum Ltd v State Oil Marketing Company of the Ministry of Oil, Republic of Iraq*, [2017] UKSC 64, para. 28: "Before the judge and the Court of Appeal[,] SOMO argued that it had state immunity against execution on the ground that it was an emanation of the Iraqi state. However, that argument was rejected in both courts below and is no longer pursued."

sovereign immunity, among others, by arguing that the targeted debts in the L/C were property of the Republic of Iraq, therefore immune from execution. Justice Field at the UK High Court held that the court could not make a third-party debt order because the debts belong to the Central Bank of Iraq, thus, were immune under the UK *SIA*. Justice Field thus set aside the third-party order made by the UK High Court. Taurus appealed the decision to the UK Court of Appeal.[1094]

Regarding the status of SOMO, by relying on *Gécamines v. FG Hemisphere* discussed above, the UK Court of Appeal held that SOMO was not an organ of the state because it was incorporated as a company in 1998, exercises a wide range of powers typical to commercial organizations, and enjoys independent legal personality under Iraqi laws. Thus, it is a separate entity under Section 14, UK *SIA*.[1095] Further, the Court of Appeal dismissed Taurus' argument that "[e]xploitation of Iraq's oil reserves is an exercise of sovereign authority in which SOMO is engaged" because selling crude oil and entering into ancillary transactions of the kind represented by the L/C are ordinary commercial transactions, even if the oil itself is produced by companies acting on the state's behalf and is owned by the state at all times before it is delivered to a buyer.[1096]

Based on the above reasons, the UK Court of Appeal dismissed SOMO's claim because SOMO cannot attract jurisdictional immunity under Section 14(2) as a separate entity, and subsequently, it cannot attract execution immunity for its assets like a state under Section 13(2)(b)—which provides that states' assets are immune from execution in UK courts.[1097]

[1094] *Taurus*, *supra* note 991 at 284-85.
[1095] *Ibid* at 299-301.
[1096] *Ibid* at 301-02, paras. 46-47.
[1097] *Ibid* at 302, para. 48.

4.2.2 *Boru v. Tepe*: separate entities' assets are not state assets that can enjoy execution immunity; nevertheless, a separate entity can hold assets that are separate from its own assets on behalf of the state

Boru v. Tepe was a case about a creditor's execution effort against an SOE's shares in its subsidiaries, for which the SOE claimed execution immunity. Boru and Tepe were two Turkish companies and 99% of Boru's shares were owned by the Turkish state.[1098] The dispute between the two companies before the English courts arose from Boru's failure to pay damages to Tepe as required by arbitration awards in favour of Tepe.[1099] Tepe initiated enforcement of the awards in Jersey against shares owned by Boru in two Jersey subsidiaries. The Jersey courts granted an enforcement order on Boru's shares in the Jersey companies.[1100] Boru challenged this interim order under the UK *SIA* as extended to Jersey by the UK's *State Immunity (Jersey) Order* (hereinafter referred to UK *SIA*). Boru argued that its shares in the two Jersey companies were assets of the Turkish state, and thus enjoyed immunity from execution per Section 13 of the UK *SIA*. Both the Royal Court and the Court of Appeal dismissed Boru's argument.[1101] Boru appealed to the Board of the Privy Council, which also rejected its appeal.[1102] The relevant provisions in the UK *SIA* that were disputed before the Board of the Privy Council were Sections 13 (2)(b)—state assets are immune from execution, 13(3)—commercial exception to execution immunity, and 13(4)—a separate entity attracts execution immunity under Section 13(2)(b), which is subject to commercial exception applied under Section 13(4) if the separate entity attracts jurisdictional immunity under Section 14(2).[1103]

[1098] *Boru v. Tepe*, *supra* note 1090 at paras. 1, 4 per Lord Mance.
[1099] *Boru v. Tepe*, *ibid* at para. 1.
[1100] *Ibid* at para. 2.
[1101] *Ibid* at para. 2.
[1102] *Ibid* at paras. 35-36.
[1103] The relevant excerpts of the UK *SIA* are reproduced in the Appendix of the thesis.

In their briefings, the two parties agreed that Boru was a separate entity under Section 14(2) and did not enjoy jurisdictional immunity per section 14(2).[1104] They disagreed on whether Boru's shares in the Jersey companies were properties of the Turkish state under Section 13(2)(b).[1105] Boru submitted that the concept of "property of a [s]tate" of Section 13(2)(b) is not an independent pre-condition to state immunity from execution in section 13(4) and should not be examined in isolation.[1106] The concept of state property should be "determined functionally, by the answer to the question [of]whether the asset was 'for the time being in use or intended for use for commercial purposes" as Section 13(4) indicates.[1107] Alternatively, Boru submitted that if the operation of section 13(4) requires a finding of "property of a [s]tate" per Section 13(2)(b), and the scope of state property should be "broad enough to embrace not merely assets in which the Turkish [s]tate enjoys a proprietary or legal interest, but also assets over the use and disposition of which it exercises significant control."[1108]

The Board of the Privy Council rejected both of Boru's arguments. Regarding Boru's first argument, it held that a finding that property against which execution is sought is "the property of a [s]tate" referred in Section 13(2)—on state property that is immune in UK courts—is a pre-condition to the application of Section 13(4) on commercial exception to execution immunity.[1109] Applying Section 13(4) in isolation without consideration of the scope of "the property of the [s]tate" referred in Section 13(2)(b) would undermine the state's establishment of

[1104] *Ibid* at para. 4.
[1105] *Ibid* at paras. 4-5.
[1106] *Ibid* at para. 8.
[1107] *Ibid*.
[1108]*Ibid* at para. 9.
[1109] *Ibid* at para. 10.

separate entities and the recognition of such by section 14 of the UK *SIA*.[1110] The Board of Privy Council held that:

> The separation of a separate entity and its assets from the state is an important aspect of its ability to carry on business. An open-ended enquiry into whether assets held by a separate entity could be said to be in use or intended for use for commercial or sovereign purposes, without regard to whether the assets belonged to the separate entity, would effectively eliminate any difference between assets held by the state and a separate entity.[1111]

Regarding Boru's alternative argument that the "property of a [s]tate" in Section 13(2)(b) embraces "situations where a state has either possession or control, without claim to any greater proprietary interest",[1112] the Board rejected it with the following reasons.[1113] Firstly, the "property of the [s]tate" has a "limited" scope in Section 13 compared to Sections 6 and 10.[1114] Section 6(1) provides that a state is not immune in proceedings relating to "(a) any interest of the [s]tate in, or its possession or use of, immovable property in the United Kingdom; or (b) any obligation of the [s]tate arising out of its interest in, or its possession or use of, any such property."[1115] However, those sections apply in situations where liability has not already been determined. In stipulating a state's immunity regarding an action *in rem* against a ship belonging to a state or an action *in personam* in Section 10, Section 10(5) provides that the references to a ship or cargo belonging to a state in Section 10 include references to a ship or cargo in the state's possession or control or in which it claims an interest.[1116] Although Sections 6 and 10 provide situations where a state can possess, control or assert an interest in property, Section 13(2)(b)

[1110] *Ibid*.
[1111] *Ibid*.
[1112] *Ibid* at para. 12.
[1113] *Ibid* at para. 17.
[1114] *Ibid*.
[1115] Section 6(1), *SIA*.
[1116] Section 10, in particular Section 10(5), *SIA*.

should be interpreted in a "limited" manner as it only refers to "property of a State" without mentioning possession, control or an assertion of an interest.[1117]

Noting that "property of a [s]tate" in Section 13(2)(b) should be interpreted in a limited manner, the Board of the Privy Council concluded that the property in Section 13(2)(b) includes "all real and personal property and will embrace any right or interest, legal, equitable, or contractual in assets that might be held by a state or any 'emanation of the state'" as suggested by Justice Aikens in *AIG v Kazakhstan*.[1118] Under this test, the Board of the Privy Council held that Boru's shares in its Jersey subsidiaries do not fall into the scope of the "property of a [s]tate" under Section 13(2)(b) because the targeted assets are assets of a state's separate entity:

> The Shares were held by and for [Boru] in Jersey subject to Jersey law of their situs, were capable of disposal and vulnerable to execution accordingly. The existence under Turkish law as between the Turkish [s]tate and [Boru] of rights or obligations which could affect or restrict [Boru]'s dealings with the Shares did not give the Turkish [s]tate any proprietary, legal or direct interest in or in respect of the Shares.[1119]

Further, the "property" referred under Section 13(2)(b) primarily speaks to the property of the state for execution purposes, which "assumes that there has been [litigation] against the [s]tate (rather than a separate entity) … and it is qualified as respects property (of the [s]tate)…in commercial purposes."[1120] In this regard, execution against state assets under section 13(2)(b) assumes liabilities have been established by a judgment or an award against a particular defendant state and any execution attempt should be launched against the property of that defendant state.[1121] Moreover, the issue of whether a property is state property is an issue to be

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[1117] *Boru v. Tepe*, *supra* note 1090 at para. 17; *cf* the different view taken in *Dicey, Morris & Collins on The Conflict of Laws*, *supra* note 221 at 344 arguing that state property has a broader scope for purposes of execution immunity.
[1118] *Ibid*.
[1119] *Ibid* at para. 18.
[1120] *Ibid* at para. 19.
[1121] *Ibid* at para. 20.

fought out in the court before getting into the question of whether that property is in use or intended for use for commercial purposes.[1122] The possession or control of the state is irrelevant under Section 13; what matters under Section 13 is whether the assets at issue belong to the state.[1123] The Board of the Privy Council concluded that:

> If all that the [s]tate has is mere possession or control without any proprietary interest (such as provided by a lien), enforcement will simply fail for want of any proprietary or legal interests on the part of the [s]tate against which to enforce.[1124]

In the end, the Board of the Privy Council held that the assets in dispute—Boru's shares in its Jersey subsidiaries—belong to a separate entity of the Turkish state, not the Turkish state in the sense of Section 13(2)(b):

> There is, in the Board's view, nothing intrinsically odd about a separate entity established by the [s]tate having to meet its liabilities out of its own assets in which the [s]tate has no proprietary or legal interest.[1125]

With this strong separateness of assets between a state and a separate entity in mind, the Board of the Privy Council noted that there could be situations in which "assets held by a separate entity could be held for or in trust for the [s]tate,"[1126] although it does not mean assets of a separate entity can be assets of a state at the same time.[1127] In the end, the Board of the Privy Council concluded that Section 13(2)(b) did not present a hurdle for Tepe to execute against shares of Boru in its Jersey subsidiaries because they were Boru's assets held as a separate entity, not property of the Turkish state.[1128] Further, the issue of control does not arise under Section

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[1122] *Ibid*. See also para. 22: "In the context of enforcement, possession or control are irrelevant, except in so far as they are aspects of some identifiable proprietary or legal interest against which execution could lie…Section 13(2)(b) was not drafted…to preclude execution in the ordinary course against assets belonging to a separate entity on the ground of non-proprietary involvement by the State in the form of mere possession or control."
[1123] *Ibid* at para. 20.
[1124] *Ibid*. See also para. 22.
[1125] *Ibid* at para. 23.
[1126] *Ibid* at para. 21.
[1127] *Ibid*.
[1128] *Ibid* at para. 23.

13(2)(b) at all, so the appeal should simply fail on this ground.[1129] The Board of the Privy Council thus dismissed the appeal and held that Boru's shares in its Jersey subsidiaries do not enjoy immunity from execution under Section 13 of the UK *SIA*.[1130]

The key takeaway of this case is that in principle, the assets of SOEs' subsidiaries are not state property, but rather, the property of SOEs. There are exceptional situations in which "assets held by a separate entity could be held for or in trust for the [s]tate".[1131]

5. Examining the 97 central SASAC-owned SOEs' "state" status and immunity under the UK *SIA* in a hypothetical situation by using some facts of the *FG Hemisphere 1* case

Like Chapter 5's analysis of the *UNCSI*, this Section examines the "state" status and immunity of the 97 SOEs that are owned by the central SASAC under the UK *SIA*. To do so, I will apply the *SIA* to a hypothetical situation based on the *FG Hemisphere 1* case.

5.1 Analyzing a hypothetical *FG Hemisphere 1* case under the UK *SIA*

For the readers' easier reference, I will reproduce the tweaked hypothetical facts used in Chapter 5 under the *UNCSI* here for our analysis of Chinese SOEs' "state" status and immunity under the UK *SIA*. A *Collaboration Agreement* was signed between China Railway, Sinohydro and the Congo in 2008 under an umbrella agreement signed between China and the Congo. Both China Railway and Sinohydro are solely and directly owned by the central SASAC. Pursuant to Article 5.1 of the *Collaboration Agreement*, the two Chinese SOEs would pay the Congo $350 million dollars in entry fees.[1132] Pursuant to Article 5.2 of the *Collaboration Agreement*, the two Chinese

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[1129] *Ibid* at paras. 27, 35.
[1130] *Ibid* at para. 36.
[1131] *Ibid* at para. 21.
[1132] Article 5.1, *Collaboration Agreement*, *supra* note 413.

SOEs would loan Gécamines—a Congolese SOE designated by the Congo for implementing further collaboration—$50 million dollars.[1133]

Let us imagine that a dispute arises between China Railway, Sinohydro, the Congo and Gécamines as the two Chinese SOEs failed to pay to entry fees to the Congo or provide loans to Gécamines as required by the *Collaboration Agreement*.[1134] In this hypothetical situation, we will assume that there was no ICSID arbitration clause in the *Collaboration Agreement*. After negotiations failed, the Congo and Gécamines sued China Railway and Sinohydro in a UK court as they discovered China Railway's and Sinohydro's assets in the UK. Before the UK court, China Railway and Sinohydro both argued that they enjoy jurisdictional and execution immunities under the UK *SIA*. They argue that they are "state organs" or "departments of government" under Section 14(1) for immunity purposes. Further, their contractual engagement with the Congo, including the arrangement for the loan, was sovereign in nature because they exercise sovereign authority by implementing China's infrastructure-for-resources policies pursuant to the umbrella agreement made between China and the Congo and the *Collaboration Agreement*, [1135] so that their immunity is not lost under Section 3—commercial transaction exception and they are immune from the UK court's jurisdiction. In the alternative, the two Chinese SOEs argued that if the court considers them as separate entities that are distinctive from the state for the purposes of Section 14(1), UK *SIA*, they would nonetheless enjoy jurisdictional

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[1133] Article 5.2, *Collaboration Agreement*, *ibid*.
[1134] According to Maiza-Larrarte & Claudio-Quiroga's account, the collaboration between the Chinese and Congolese parties has been going well. See Maiza-Larrarte & Claudio-Quiroga, "The Impact of Sicomines on Development in the Democratic Republic of Congo", *supra* note 503 at 430, mentioning the production output of 2016. The hypothetical facts that are created here sought to present a dispute in which Chinese SOEs' dual identity makes an impact on our assessment of their conduct/transactions; and subsequently their immunity.
[1135] See *FG Hemisphere 1*, *supra* note 407. It is uncertain if Chinese SOEs will make an argument for implementing China's BRI as carrying out sovereign functions. Milhaupt argues that China's BRI "is not simply an economic project to expand markets and trade, but a means of extending China's sphere of influence and military presence in Asia." See the relevant discussion in Chapter 4, Section 3.1.2.c.

immunity as they had exercised sovereign authority in participating in China's infrastructure-for-resources projects in the Congo under Section 14(2), UK *SIA*. The following issues arise in this hypothetical situation:

(1) Are Chinese SOEs state organs (departments of government) for immunity purposes under Section 14(1) of the UK *SIA*?

(2) If they are not state organs or departments of government, can Chinese SOEs attract jurisdictional immunity under the Section 14(2) of the UK *SIA* as separate entities?

(3) Can Chinese SOEs attract execution immunity under the UK *SIA*?

5.2 Analysis

5.2.1 Chinese SOEs' status under Section 14(1): are they state organs (departments of the Chinese government) within the scope of the state or separate entities that are excluded from the scope of the state for immunity purposes?

Like China Railway and Sinohydro, most central SASAC-owned SOEs are wholly and directly owned by the state and established as juridical persons pursuant to Chinese laws. To determine whether they are state organs (departments of government) or separate entities, the common law "control + function" test set by Lord Denning in *Trendtex* would be instructive to our assessment under Section 14(1) of the UK *SIA*. As noted above, the test on whether an entity is a state organ for liability purposes that came out in the *Gécamines v. FG Hemisphere* decision is also instructive in this exercise. According to *Trendtex*, we need to assess SOEs' corporate constitutions, the state's control in their daily operational management, decision-making, executive appointment, and their functions and purposes in the overall context. Regarding SOEs' legal status, in *Gécamines v. FG Hemisphere*, Lord Mance held that SOEs should be treated as separate entities even if they carry out state policy, operate in vital economic sectors, or the state has influences over their significant decision-makings because these are their inherent

characteristics. Lord Mance added that it is only in the extreme situation when the state's intervention was so invasive that an SOE's separate identity will be denied. In *Tepe v. Boru*, the Board of the Privy Council held that the separation of a separate entity and its assets from the state is also an important criterion showing the SOE is not part of the state.

Chapter 4 showed that commercial SOEs, like China Railway and Sinohydro, have the following characteristics:

- Operate in industries and sectors that have an impact on national security and lifeline of national economy.
- Have independent juridical personalities defined by Chinese laws.
- Have day-to-day operational and managerial decision-making capacity even though the SASAC and the CPC assert significant influence in their important decision-making and executive appointments.
- Have corporate assets that are distinct from the state under China's 2009 *State-owned Assets Law*.

Chapter 4 also showed that commercial Chinese SOEs have additional relevant characteristics. China Electronics,[1136] for example, has the following characteristics in addition to the above:

- Have its main businesses in developing technologies and equipment that can be used both for the military and the civilian sectors, the former of which is arguably an exercise of sovereign authority within in China's political economy given that they research in technologies and produce weaponry to be used by the military apparatus.

[1136] Chapter 5 also noted that there are other central SASAC-owned Chinese SOEs that operate in military industries. See Chapter 5, Section 4.2.3 regarding China North Industries Group Corporation Limited and China South Industries Group Co. Ltd, *supra* notes 920 and 921.

- Have the political and corporate mandate to develop China's military capabilities through technologies research, production, and trading as shown in their corporate purposes publicized on their websites.[1137]

Additionally, Chapter 4 concluded that public welfare SOEs that operate in areas of poverty relief and natural disasters relief exercise public functions and should be treated as part of the state.

For commercial Chinese SOEs such as China Railway and Sinohydro, they are likely to fall into the category of separate entities as defined in Section 14(1), UK *SIA* based on *Trendtex*, *Gécamines v. FG Hemisphere*, and *Tepe v. Boru* because even though the state and CPC assert influences in their executive appointments and significant business decision-makings, they can make day-to-day business decisions and have separate assets. Thus, they are separate entities under Section 14(1), UK *SIA*. In this scenario, their immunity must be assessed under Section 14(2) of the UK *SIA* on the basis of whether they have exercised sovereign authority in a particular situation so as to attract immunity *ratione materiae*.

For commercial Chinese SOEs like China Electronics, they may fall into the category of "state organs" or "departments of state" under Section 14(1), UK *SIA* if their operations in the military industry—such as trading technologies to be used for military use purposes—are found to be an exercise of sovereign authority. It is unclear to what extent the state and the CPC assert influence in China Electronics's daily business decision-making as we can find no public financial report of the company as it is not a public company. No such information was revealed

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[1137] China Electronics Technology Group Corporation, News Release, "使命定位" [Designated Purposes], online: <http://cetcdkny.cetc.com.cn/zgdk/1592544/1592559/1687989/index.html>, providing that its key responsibilities, among others, are "modernizing the military force, accelerating the development of digital economy, and providing services to the society." And it is "a main force of the military electronics industry, a national champion of the internet and communications sectors, and a strategic and technological force of the nation."

on the company's website. If a UK court refuses to find that China Electronics is a state organ only on the basis of its operation in military industry, it will be treated as separate entities under Section 14(1), UK *SIA*. In this situation, the immunity of SOEs like China Electronics must be assessed under Section 14(2) of the UK *SIA* on the basis of whether they have exercised sovereign authority in a particular situation so as to attract immunity *ratione materiae*.

For public welfare SOEs that operate in areas of poverty relief and natural disasters relief, they are likely to be treated as "state organs" or "departments of state" for exercising public functions. In this scenario, they enjoy presumptive immunity. Nevertheless, they could also be categorized as separate entities if they are separated from the state, and can sue and be sued as provided in Section 14(1), UK *SIA*. In this situation, their immunity will also be assessed under Section 14(2) of the UK *SIA* on the basis of whether they have exercised sovereign authority in a particular situation so as to attract immunity *ratione materiae*.

5.2.2 Chinese SOEs' jurisdictional immunity as separate entities

This subsection focuses on the jurisdictional immunity of Chinese SOEs that are separate entities under Section 14(1) of the UK *SIA*. The analysis will be divided in two parts: (1) commercial SOEs like China Railway and Sinohydro that are separate entities, which primarily operate in profit-driven fields even though some sovereign purposes are involved in their activities and (2) commercial SOEs like China Electronics and public welfare SOEs that are separate entities whose operations touch upon the state's inherent sovereign authority.

(a) Scenario 1: commercial SOEs like China Railway and Sinohydro as separate entities and their jurisdictional immunity under the UK *SIA*

To successfully claim jurisdictional immunity in UK courts as separate entities, commercial Chinese SOEs like China Railway and Sinohydro must demonstrate that they have exercised sovereign authority (Section 14(2)(a)) and a state would be immune in the same situation if the

state had performed the same acts (Section 14(2)(b)). In interpreting Section 14(2) of the UK *SIA*, the UK courts have relied on an application of Section 3—commercial transaction exception—by adopting a contextual approach that considers both the nature and the purpose of the transaction in the dispute.

In *KAC v. IAC*, Lord Goff gave decisive weight to the nature of the conduct in characterizing a transaction, thus departed from Lord Wilberforce's contextual approach taken in the *I Congreso* case, which was applied by Justice La Forest in *Re Canada Labour Code*. The Supreme Court of Canada in *KAC v. Iraq* followed Lord Goff's decision by holding that if too much weight was given to the purpose of the conduct, all actions of states and SOEs could be considered sovereign actions, thus, eroding restrictive immunity's commercial exception that seeks to constrain a state's sovereign immunity only to their acts *jure imperii*.[1138] The precedence set by the *KAC v. IAC* and *KAC v. Iraq* is that the purpose of the conduct plays a peripheral role in the contextual approach and will rarely convert a commercial transaction into a sovereign transaction under the UK *SIA*. Based on this line of rationale, the nature of the underlying transactions of commercial SOEs are decisive for our assessment of commercial Chinese SOEs' immunity claims.

Take China Railway's and Sinohydro's investments in the Congo and the loans they provided to Gécamines as examples. These transactions must be first examined on their own without consideration of their purposes to participate in or contribute to China's infrastructure-for-resources projects in the larger picture. Looking on its own, the *Collaboration Agreement* is a contract that combines a supply of services—providing infrastructure construction services—under Section 3(3)(a) in an exchange of a supply of goods—the Congo's natural resources—that

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[1138] *KAC v. Iraq*, *supra* note 90 at para. 30.

also falls under Section 3(3)(a) of the UK *SIA*. Further, the loans China Railway and Sinohydro provided to Gécamines constitute "loan[s]…for the provision of finance" provided in Section 3(3)(b) of the UK *SIA*, hence a commercial transaction. In *Alcom Ltd. v. Republic of Colombia*, Lord Diplock held that if a sovereign state engages in transactions that fall under Sections 3(3)(a) and 3(3)(b), such transactions are inherently commercial transactions regardless of their purposes.[1139] In light of Lord Goff's and Lord Diplock's analysis, we can conclude that the underlying transactions arising from the *Collaboration Agreement* are acts *jure gestions*, regardless of their purposes.[1140] Hence, these transactions are not an exercise of sovereign authority and they cannot attract jurisdictional immunity for Chinese SOEs like China Railway and Sinohydro.

But as noted earlier in this Chapter, the minority judges in *KAC v. IAC* and the Supreme Court of Canada in *Re Canada Labour Code* also gave attention to the purpose of the conduct in their assessment matrix, which is arguably closer to Lord Wilberforce's contextual approach taken in the *I Congreso* case. The next subsection shows that when purposes are given some account based on the facts of the case in the overall context as applied in *I Congreso* and *Re Canada Labour Code*, different results could come to surface, particularly when Chinese SOEs' activities and purposes in their commercial transactions demonstrate a certain degree of exercise of sovereign authority.

[1139] *Alcom Ltd. v. Republic of Colombia*, *supra* note 903 at 185, Lord Diplock held that if a sovereign state engages in the commercial transactions provided in Sections 3(3)(a) and 3(3)(b) of the UK *SIA*, they are engaging in non-immune commercial transactions regardless of the sovereign purposes attached; see also *Orascom Telecom Holdings v. Chad* [2008] EWHC 1841 (Comm), para. 14; Kupelyants, *Sovereign Defaults before Domestic Courts*, *supra* note 902 at 283.
[1140] *KAC v. IAC*, *supra* note 92 at 401-02; *Alcom Ltd. v. Republic of Colombia*, *ibid*.

(b) Scenario 2: commercial SOEs like China Electronics and public welfare SOEs as separate entities and their jurisdictional immunity under the UK *SIA*

Chapters 4 and 5 showed some SOEs like China Electronics operate in military industry.[1141] Compared to commercial SOEs like China Railway and Sinohydro, commercial SOEs like China Electronics undertake sovereign functions that are closer to inherently sovereign authority—the military authority—in their business operations.[1142] They at least partially exercise sovereign authority as they have indicated on their websites. Take China Electronics as an example:

- Its key responsibilities include "modernizing the military force, accelerating the development of digital economy, and providing services to the society." The company does so by:
    - Developing military and civil dual-use information infrastructure.
    - Prioritizing the development of the capability to protect cyber security to safeguard the state's holistic security.[1143]

Clearly, in addition to providing civil use products to the public, China Electronis's business operations also contribute to the development of China's military capabilities such as developing the military information infrastructure and defending the state in cyber space. Arguably, such purposes of China Electronis's business operations are inherently more sovereign than investments made in the natural resources in another country or loans made to a foreign government based on China's foreign policy. If such purposes are considered in our characterization of their commercial activities tailored to achieve the sovereign purpose in the

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[1141] China Electronics Technology Group Corporation, "Introduction to the Group", *supra* note 742; China Electronics Technology Group Corporation, "Designated Purposes", *supra* note 1137; China North Industries Group Corporation Limited, "Business and Services", *supra* note 920; China South Industries Group Co. Ltd., "Introduction to the Group", *supra* note 921.
[1142] Mégret, "Are There 'Inherently Sovereign Functions' in International Law?", *supra* note 344.
[1143] China Electronics Technology Group Corporation, "Designated Purposes", *supra* note 1137.

overall context, China Electronis's business operations relating to these activities may be treated as sovereign transactions.[1144] In this regard, these transactions are likely to be immune under the UK *SIA*.[1145] As noted earlier, part of China Electronics's business operation is in the civilian sector. In this regard, China Electronics's transactions that provide products and services for civilian use purposes are commercial transactions for profits, which are unlikely to attract jurisdictional immunity under the UK *SIA*.

Regarding public welfare SOEs, they are likely to attract immunity for their commercial transactions only if they have exercised sovereign authority such as reflected in their purposes. For example, if a public welfare SOE has to purchase food or medications for the population in need, such commercial transactions are carried out not for profit, but for the benefit of the public. Such transactions are likely to be considered as part of the SOEs' mandate in exercising public functions in the overall context. Hence, triggering immunity. However, if the public welfare SOE purchased food for the staff's private party, for example, the purchasing contract should be treated as a commercial transaction because no sovereign authority was exercised and no sovereign purpose was attached to the contract.

5.2.3 Chinese SOEs' execution immunity under the UK *SIA*

(a) Chinese SOEs' execution immunity as separate entities

As discussed in our analysis of the *Taurus* case in Section 4.2 above, Section 13(3) of the UK *SIA* provides that a separate entity can enjoy execution immunity only if it attracts jurisdictional

[1144] Bowett, "The SIA 1978", *supra* note 1001 at 193 arguing that "perhaps a clear example of [acts *jure imperii*] would be a state's purchase or sale of armaments".
[1145] The contrary argument is that research in and trading for technologies used for military use purposes can be performed by private persons, thus, such transactions are not immune from jurisdiction of a foreign domestic court. See Philippa Webb, "International Law and Restraints on the Exercise of Jurisdiction by National Courts of States", in Malcolm D. Evans, ed, *International Law* 5th ed (Oxford: Oxford University Press, 2018) at 337 arguing that sales of military equipment are non-immune transactions as they can be undertaken by private persons under the UK *SIA*.

immunity under Section 14(2) of the UK *SIA*. To the extent that a central SASAC-owned SOE fails to attract jurisdictional immunity as a separate entity for its commercial activities under Section 14(2) of the UK *SIA*, they cannot claim execution immunity for their assets like a state under Section 13(2) by way of Section 14(3) of the UK *SIA*.

However, in the above subsection, we found that a central SASAC-owned SOE like China Electronics are likely to attract jurisdictional immunity if their commercial operations are found to be an exercise of sovereign authority. In this regard, their assets—such as technologies or products to be provided or intended to be provided to the Chinese army—are likely to be treated as assets used for or intended to be used for sovereign purposes and immune from execution under Section 13(2) by way of Section 14(3) of the UK *SIA*. Similarly, public welfare SOEs that are separate entities, if they have acquired jurisdictional immunity, can potentially attract execution immunity for their assets used for or intended to be used for sovereign purposes under Section 13(2) of the UK *SIA*.

(b) Chinese SOEs' execution immunity as state organs

Similar to public welfare SOEs as separate entities, public welfare SOEs as state organs are likely to attract execution immunity for their assets if they can demonstrate those assets are used or intended to be used for purposes like feeding the population or supplying medications to the people affected by a natural disaster.

(c) China's claim of execution immunity for its interests in Chinese SOEs

The *FG Hemisphere 1* hypothetical situation does not involve China as a defendant. For the purpose of discussing the asset relationship between China and Chinese SOEs under the UK *SIA*, we will imagine that a creditor of China sues it and seeks execution in an English court under English law against profits to be repatriated by China Railway and Sinohydro to China. China's creditor argues that the repatriated profits from the two Chinese SOEs to China are China's

commercial assets as they derive from the Chinese SOEs' commercial operations in the UK. China Railway and Sinohydro agree that the repatriated profits are state assets of China they hold on behalf of China. But they disagree on the usage purposes of the repatriated profits. They argue that the repatriated profits to China are China's sovereign assets with a sovereign purpose because they are required to be paid to the Chinese state's social insurance fund for the general public's benefit. The *CPC 2013 Decision* discussed in Chapter 4 provides that by the year of 2020, 30% of Chinese SOEs' profits shall be repatriated to the state's social insurance fund to safeguard and improve people's livelihood.[1146] The two Chinese SOEs argue that the repatriated profits are "assets held by a separate entity [that] could be held for or in trust for the [s]tate" as held by the Board of the Privy Council *Boru v. Tepe*.[1147] Hence, they are immune state assets under Section 13(2)(b) that are not subject to the commercial exception to execution immunity provided in Section 13(4) of the UK *SIA*.

Recall that in *Boru v. Tepe* discusse above, the Board of the Privy Council referred to *AIG v Kazakhstan* and held that the "property of a [s]tate" in Section 13(2)(b) should be interpreted in a limited manner. The Board of the Privy Council concluded that the property in Section 13(2)(b) includes "all real and personal property and will embrace any right or interest, legal, equitable, or contractual in assets that might be held by a state or any 'emanation of the state'."[1148] It added that state possession or control of an asset is not enough, there must be a proprietary interest (such as provided by a lien).[1149] According to Article 2 of the 2009 *State-owned Assets Law*, the Chinese state-owned assets include rights and interests derived from all

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[1146] *CPC 2013 Decision*, Part II, para. 6, *supra* note 726.
[1147] *Ibid* at para. 21.
[1148] *Boru v. Tepe*, *supra* note 1090 at para. 17.
[1149] *Boru v. Tepe*, *ibid*. See also para. 22.

forms of investments China made in the SOEs.[1150] The repatriated profits from China Railway and Sinohydro to China targeted by China's creditor in this hypothetical situation qualify as state assets under Section 13(2)(b) in light of *Boru v. Tepe* because China holds direct legal right in them under Chinese laws. As a temporal issue, when they have not been repatriated back to the state while they are still held by the SOEs, they qualify as state assets that are held by SOEs on behalf of the state as provided in *Boru v. Tepe*.[1151]

The next question is whether the repatriated profits that are targeted by China's creditor in the hypothetical situation are immune sovereign assets under Section 13(2) of the UK *SIA*. This was the question that was addressed by the UK Supreme Court in *SerVaas v. Rafidian Bank* discussed above. Recall that in *SerVaas v. Rafidian Bank* the appellant SerVaas sought to execute against Iraq's assets in the Rafidian Bank, which Iraq has earmarked for transfer to its development fund. The appellant SerVaas, like our creditor of China in the hypothetical situation, argued that the underlying commercial transaction renders Iraq's money in the Rafidian Bank commercial in nature. The UK Supreme Court rejected that argument. It held that even if the underlying transaction that produced the proceeds—Iraq's assets—was commercial in nature, the proceeds from that commercial transaction can still be used for sovereign purposes so long as the proceeds were earmarked with a sovereign purpose. [1152] Because the targeted money was to be transferred to Iraq's development fund and was intended to be used for a sovereign purpose, the UK Supreme Court dismissed SerVaas's appeal. [1153] In our hypothetical situation,

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[1150] Article 2, *State-owned Assets Law*.
[1151] The practical issue such as how to identify such assets to be used for repatriation purposes can be resolved by reviewing SOEs' financial reports and practice, such as how they earmark profits to be repatriated and how to fulfill the repatriation obligation under Chinese laws.
[1152] *SerVaas v. Rafidian*, *supra* note 882 at para. 17: "Property will only be subject to enforcement where it can be established that it is currently 'in use or intended for use' for a commercial transaction. It is not sufficient that the property 'relates to' or is 'connected with' a commercial transaction."
[1153] *SerVaas v. Rafidian*, *ibid* at para. 34.

the repatriated profits are required by Chinese law to be paid to China's social insurance fund that benefits the Chinese public. Hence, the repatriated profits qualify to be state assets used for sovereign purpose under Section 13 of the UK *SIA*, even though they were proceeds from China Railway's and Sinohydro's commercial activities. Consequently, the creditor of China could not successfully execute against China's interests in Chinese SOEs, such as agreed annual 30% profits to be repatriated from Chinese SOEs to the Chinese state under Section 13 of the UK *SIA*.

6. Conclusion

This Chapter examined Chinese SOEs' "state" status and immunity under the UK *SIA*. Unlike the *UNCSI*, the UK *SIA* does not include the notion of state agencies/instrumentalities that encompass SOEs for immunity purposes. The UK *SIA* generally excludes SOEs from the scope of the state by treating them as separate entities under Section 14(1) of the UK *SIA*. SOEs as separate entities can acquire immunity *ratione materiae* if they have exercised sovereign authority and a state would have been immune if the state had done the same in the same situation under Section 14(2) of the UK *SIA*.

In assessing an SOE's "state" status under the UK *SIA*, the threshold test set by Lord Denning in *Trendtex* regarding whether it is a state organ (department of the government) or separate entity (which is distinct from the state) under Section 14(1), is instructive. According to *Trendtex*, an entity's constitution, function, purpose, and the state's control and influence in an SOE's day-to-day operation and decision-making are all relevant elements. This test was applied by the Board of the Privy Council in *FG Hemisphere v. Gécamines*, a case about liability attribution between a state and an SOE. The *FG Hemisphere v. Gécamines* decision is also helpful in the immunity law context as it not only endorsed the aforementioned *Trendtex* test, but also further found that SOEs from a state-driven economy are designed to pursue state policies and established in vital important economic sectors as separate entities. That alone, however,

should not be a reason to treat them as part of the state without further evidence, such as invasive state control and influence. Applying *Trendtex* and *FG Hemisphere v. Gécamines* to the 97 central SASAC-owned SOEs, this Chapter concluded that in most situations, they are separate entities that are distinct from the state under Section 14(1), UK *SIA*. But in exceptional situations, commercial SOEs like China Electronics and public welfares SOEs may be treated as state organs under Section 14(1) of UK *SIA* in the event they have exercised sovereign authorities such as supporting military activities by providing technologies to be used in such capacity or providing poverty relief and natural disasters relief.

The UK courts (as well as the Supreme Court of Canada) have applied a contextual approach in determining whether a state has exercised sovereign authority under Section 14(2) by way of Section 3—the commercial transaction exception. The common law contextual test laid down by Lord Wilberforce in *I Congreso* was instructive regarding our interpretation of what constitutes a commercial transaction under Section 3 of the UK *SIA*. This contextual approach was followed by the House of Lords in *KAC v. IAC* while it sought to determine whether IAC—an SOE which is a separate entity—has exercised sovereign authority under Section 14(2) with reference to the interpretation of Section 3 of the UK *SIA*. The Supreme Court of Canada in *Re Canada Labour Code* also relied on Lord Wilberforce's contextual approach taken in *I Congreso* in interpreting Section 5 of the Canadian *SIA*. The Supreme Court of Canada affirmed this contextual approach in *KAC v. Iraq*. Thus, *Re Canada Labour Code* and *KAC v. Iraq* also provide us with insights in understanding Section 3's commercial exception and Section 14(2)'s requirement of an exercise of sovereign authority under the UK *SIA*.

But it should be noted that in applying the contextual approach, the House of Lords in *KAC v. IAC* gave minimal account to the purpose of the conduct in characterizing a commercial

transaction. This approach was followed by the Supreme Court of Canada's decision in *KAC v. Iraq*. The precedent set by the two cases is that the nature should play a dominant role in the contextual approach in characterizing a transaction.

If we apply the majority decision in *KAC v. IAC* and the decision of *KAC v. Iraq* to our hypothetical situation about Chinese SOEs' immunity under Section 14(2) of the UK *SIA*, commercial SOEs like China Railway and Sinohydro are unlikely to attract jurisdictional immunity because the nature of their transactions will be the decisive stand-alone factor to be considered by courts under the contextual approach as applied by UK courts. For example, China Railway's and Sinohydro's investments in the Congo and their loans provided to Gécamines fall into the scope of commercial transactions as defined by the UK *SIA*'s Section 3. This means that their contribution to the state's and the CPC's political and policy goals will rarely change the underlying commercial nature of the transactions for immunity purposes because the purpose is unlikely to be considered as it is incidental to the underlying commercial activity.

However, if we take into account the purpose of the conduct for characterizing a transaction in the larger context like the minority judges in *KAC v. IAC* and the Supreme Court of Canada in *Re Canada Labour Code* have done, our findings regarding Chinese SOEs' jurisdictional immunity could be different from the *FG Hemisphere-1* hypothetical situation, particularly when SOEs potentially exercised inherently sovereign authority as shown by the purpose of their commercial transactions. In both *KAC v. IAC* and *Re Canada Labour Code*, certain weight were given to the purpose of the conduct in the overall context by the judges. The former case involves IAC's accomplice role in assisting Iraq's unlawful expropriation of the KAC's aircraft and the latter case involves the US's management of its military base in Canada. The minority judges in *KAC v. IAC* held that IAC's incorporation of KAC's aircraft into its own

fleet had to be viewed in the larger context of Iraq's invasion of Kuwait and the state's expropriation intent. In *Re Canada Labour Code*, the Supreme Court of Canada held that the usage purpose of the naval based for the US's security cannot be overlooked or overridden by the complained labour and commercial issues. In the case of China Electronics, the same argument could be applied. China Electronics is an SOE that imports and produces dual-use technologies for military and civilian purposes. Additionally, it provides security services to the state's cyber environment. If such purposes and functions are considered in the overall context, we are likely to conclude that SOEs like China Electronics exercise sovereign authority as shown by their purposes of their business operations. A comparison of the examples of China Railway, Sinohydro, and China Electronics shows that if the SOE's purpose in carrying out a commercial activity is closely related to an inherently sovereign function—such as military function—such purposes can potentially affect our conclusions of Chinese SOEs' jurisdictional immunity under the UK *SIA*.

This Chapter also found that most Chinese SOEs cannot attract execution immunity for their assets because they are unlikely to attract jurisdictional immunity in the first place. In exceptional situations, commercial SOEs like China Electronics are likely to attract execution immunity if they can demonstrate that their assets are used or intended to be used for military purposes, whether they are state organs or separate entities. Similarly for public welfare SOEs, they are likely to enjoy execution immunity for assets that are used for or intended to be used for public purposes like feeding a population or providing medications to people in need.

In a hypothetical situation that China was a defendant and a creditor of China sought to execute against profits to be repatriated from a Chinese SOE to China, we found that, based on the decisions of the Board of the Privy Council in *Boru v. Tepe* and the UK Supreme Court in

SerVaas v. Rafidian Bank, the repatriated profits payable by Chinese SOEs to China as required by Chinese laws are immune sovereign assets as they have been earmarked by Chinese law to be used for a sovereign purpose—to be paid to China's social insurance fund that benefits the entire public.

In the next Chapter, I will turn to the US *FSIA* and examine similar issues covered in this Chapter: how the US *FSIA* determines SOEs' "state" status and immunity.

Chapter 7: Chinese SOEs' Status and Immunities under the 1976 United States *Foreign Sovereign Immunities Act*

1. Introduction

This Chapter examines the "state" status and immunity of the 97 SOEs directly owned by the central SASAC under the US *FSIA*.[1154] It finds that these 97 SOEs are state agencies/instrumentalities based on Section 1603(b)'s direct and majority shareholding requirement. Despite having this state agency/instrumentality status, a Chinese SOE will only be able to attract jurisdictional immunity if its conduct does not fall into one of the exceptions stipulated in Section 1605, which includes an exception for commercial activity that is based on the nature of the disputed conduct/transaction. As a state agency/instrumentality, if an SOE is denied jurisdictional immunity as a state agency/instrumentality under Section 1605(a)(2)—the commercial exception, its assets would not enjoy execution immunity under Section 1610(b)(2).

The US *FSIA* exhibits many distinctive features when compared to the *UNCSI* and the UK *SIA*. Two prominent ones are: (1) the definition of the state and (2) the test to determine commercial transactions for jurisdictional immunity purposes. The US *FSIA*'s definition of state agency/instrumentality is based on a state's direct and majority ownership in an SOE and so deviates from the *UNCSI* and the UK *SIA*'s definitions of the state. The US *FSIA* uses a nature only test to distinguish commercial from non-commercial transactions for jurisdictional immunity purposes which is also different from the *UNCSI* and the UK *SIA* as applied by UK courts.

This Chapter has the following parts. Section 2 discusses the relationship between the US *FSIA* as a domestic statute and customary international law of sovereign immunity on the

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[1154] US *Foreign Sovereign Immunities Act*, 28 USC §§ 1330, 1391(f), 1441(d), and 1602-1611 (1976).

international plane. Section 3 introduces the scope of the state defined by Section 1603 of the US *FSIA*, including the "state itself" and a state agency/instrumentality. Section 4 sketches out the commercial exceptions to jurisdiction and execution immunity provided in Sections 1605(a)(2) and 1610(b)(2) that apply to state agencies/instrumentalities under the US *FSIA*. Given that a state agency/instrumentality's successful claim of execution immunity is predicated on their successful claim for jurisdictional immunity, Section 4 focuses on Section 1605(a)(2)'s nature only test for the commercial exception to jurisdictional immunity, and identifies the inconsistent approaches taken by the US Supreme Court in applying the sole nature test. It shows the limits of a sole nature test. Section 5 investigates Chinese SOEs' "state" status and immunity under the US *FSIA*. Section 6 concludes.

2. The US *FSIA* as a domestic statute and its relationship to customary international law

The US enacted the US *FSIA* in 1976 to codify restrictive immunity as had been asserted by the US Department of State for about 24 years since the Tate Letter.[1155] The purpose of enacting the US *FSIA*—as explained by its legislators—was to: (1) codify restrictive immunity as recognized by international law; (2) ensure restrictive immunity is applied in the US courts; (3) provide a statutory procedure for making service upon a foreign state; and (4) define the circumstances in which creditors of states and SOEs can execute against their assets.[1156]

[1155] Mark B. Feldman, "The United States Foreign Sovereign Immunities Act of 1976 in Perspective: A Founder's View" (1986) 35 ICLQ 302 [Feldman, The US FSIA in Perspective]; Dellapenna, *supra* note 86 at 31-37; Dickinson et al., *supra* note 13 at 217.

[1156] *Jurisdiction of United States Courts in Suits Against Foreign States*, HR Rep No 94-1487, *supra* note 198 at 7-8; Dickinson et al., *ibid* at 217-18; David P. Stewart, "International Immunities in U.S. Law" in Curtis A. Bradley, ed, *The Oxford Handbook of Comparative Foreign Relations Law* (Oxford: Oxford University Press, 2019) [Stewart, International Immunities in U.S. Law].

The US *FSIA*, as a domestic statute,[1157] has two functions. First, it defines a foreign state's immunity in the United States' courts by setting the "sole and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states before Federal and State courts in the United States."[1158] Secondly, it is a jurisdiction-conferring statute.[1159] As the US Supreme Court stated in the *Amarad Hess* case: "We think that the text and structure of the *FSIA* demonstrate Congress' intention that the *FSIA* be the sole basis for obtaining jurisdiction over a foreign state in [the US] courts."[1160] Particularly, Sections 1604[1161] and 1330(a)[1162] work in tandem regarding the subject matter jurisdiction of the US courts. As the Supreme Court explained: "[Section] 1604 bars [F]ederal and [S]tate courts from exercising jurisdiction when a foreign state is entitled to immunity, and [Section] 1330(a) confers jurisdiction on district courts to hear suits brought by United States citizens and aliens when a foreign state is not entitled to

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[1157] See *American Law Institute, Restatement (Fourth) of the Foreign Relations Law of the United States §§ 301-313; 401-464; 481-490 (2017)*, Part IV, Chapter 5: Regarding states' jurisdictional immunity in the US courts, the American Law Institute ("ALI") declared that its restatement focuses on an analysis of its domestic law, the *FSIA*, not international law [ALI, *Fourth Restatement*].

[1158] *Jurisdiction of United States Courts in Suits Against Foreign States*, HR Rep No 94-1487, *supra* note 198 at 12; see also Stewart, "International Immunities in U.S. Law", *supra* note 1156 at 626 noting that the US FSIA is "expressly understood to reflect and codify principles of international law."

[1159] Dellapenna, *supra* note 86 at 117: "the [FSIA] makes the various types of judicial jurisdiction depend on the ultimate tests for immunity…virtually everything in the [FSIA] is jurisdictional." Dellapenna noted that such an approach taken by the *FSIA* can be quite confusing in litigation, see Dellapenna, at 118-20; Feldman, "The US FSIA in Perspective", *supra* note 1155 at 305 noting that the FSIA is "somewhat controversial" in granting jurisdiction to federal courts.

[1160] *Argentine Republic v. Amerada Hess Shipping Corp.*, *supra* note 359. See also *Jurisdiction of United States Courts in Suits Against Foreign States*, HR Rep No 94-1487, *supra* note 198 at 6: "The purpose of the proposed legislation, as amended, is to provide when and how parties can maintain a lawsuit against a foreign state or its entities in the courts of the United States and to provide when a foreign state is entitled to sovereign immunity."

[1161] Section 1604, US *FSIA* is entitled "immunity of a foreign state from jurisdiction." It provides that "Subject to existing international agreements to which the United States is a party at the time of enactment of this Act[,] a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this Chapter."

[1162] Section 1330, US *FSIA* is entitled "actions against foreign states." Its paragraph (a) provides that "The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief *in personam* with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

immunity."[1163] Thus, if one of the specific exceptions to sovereign immunity stipulated in Section 1605 applies, a Federal district court may exercise subject matter jurisdiction over a foreign state under Section 1330(a).[1164]

The Restatement of Law (Fourth): The Foreign Relations Law of the United States ("*Fourth Restatement*") published by American Law Institute ("ALI") in 2017 described the relationship between the *FSIA* and international law as follows:

> The FSIA governs the immunity of foreign states from the jurisdiction of State and [F]ederal courts in the United States. Although customary international law on the jurisdictional immunity of foreign states is therefore not directly applicable in courts in the United States, it can be relevant to interpreting the FSIA and to understanding its significance. Congress and the Department of State considered international law when the FSIA was drafted, debated, and enacted. The FSIA and cases applying it may also contribute to the content, interpretation, and development of international law. Judicial decisions and domestic legislation, if enacted or decided out of a sense of international legal obligation, constitute state practice and evidence of *opinio juris*, the two elements of customary international law.[1165]

In the US legal system, courts prioritize application of domestic laws over customary international law, only when the latter is inconsistent with the former.[1166] As the US Supreme Court explained in *Paquete Habana* in 1900: "customs and usages of civilized nations" should be applied "where there is no treaty and no controlling executive or legislative act or judicial decision."[1167] This explains why the governing law of civil claims against foreign states in the US courts is the US *FSIA*, not international law, even though sovereign immunity is a notion of

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[1163] *Argentine Republic v. Amerada Hess Shipping Corp.*, *supra* note 359.
[1164] Dickinson et al., *supra* note 86 at 220; ALI, *Fourth Restatement*, *supra* note 1157 at Part IV, Chapter 5, § 451, Comment b.
[1165] ALI, *Fourth Restatement*, *ibid* at Part IV, Chapter 5, § 451, Comment c. See also the relevant Reporters' notes, para. 2: "The immunity of foreign states before courts in the United States is governed by FSIA. This statute was enacted in part to give effect to international law, […], and courts have used international law to interpret the statute[.]" See also Roger O'Keefe, "The Restatement of Foreign Sovereign Immunity: Tutto il Mondo è Paese" (2021) 32:4 EJIL 1483 [O'Keefe, The Restatement]; Chimène I. Keitner, "Prosecuting Foreign States" (2021) 61:2 Va J Intl L 222, 270.
[1166] Brownlie, *supra* note 153 at 80-81; Shaw, *supra* note 55 at 120, citing a Court of Appeals decision stating that: "no enactment of Congress can be challenged on the ground that it violates customary international law."
[1167] See *Paquete Habana*, 20 S.Ct. 290 (1900) at 299.

international law. As the ALI has noted, US courts apply the US *FSIA* in cases in which foreign states claim immunity, and customary international law only serves a secondary interpretative function for the understanding of the US *FSIA*.[1168] Customary international law will be able to play a more important role when the US *FSIA* is silent on the matter, for example, regarding states' immunity from criminal proceedings.[1169]

As a domestic statute, the US *FSIA* has features that are distinct from customary international law and the *UNCSI*—a treaty the US has not signed, as Roger O'Keefe has observed:

> [T]he FSIA…differs in certain significant respects, in its precise formulation, and in its broader substance from customary international law, from the only universal multilateral treaty on state immunity, namely the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property[.][1170]

Among these differences, two features stand out. They are the US *FSIA*'s definition of the state and commercial exceptions to jurisdiction and execution immunity, each will be examined in subsequent sections.[1171]

3. The definition of the state under the US *FSIA*

3.1 State itself per Section 1603(a) and state agency/instrumentality per Section 1603(b)

Section 1603 of the US *FSIA* does not define what a state is but rather what a state includes. Hence, understanding the scope of the state is the starting point for understanding the intended subjects to whom the statute offers immunity before assessing the scope of their immunity

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[1168] ALI, *Fourth Restatement*, *supra* note 1157 at Part IV, Chapter 5, § 451, Comment c.

[1169] Keitner, "Prosecuting Foreign States" *supra* note 1165 at 1081; Megan Q. Liu, "The Scope of Sovereign Criminal Immunity: Instrumentalities under the Foreign Sovereign Immunities Act" (2021) 60:1 Colum J Transnat'l L 276.

[1170] Roger O'Keefe, "The Restatement", *supra* note 1165 at 1484; For the US *FSIA*'s unique unlawful expropriation exception and state-sponsored terrorism exception, see Daniel Franchini, "State Immunity as a Tool for Foreign Policy: The Unanswered Question of *Certain Iranian Assets*" (2020) 60:2 Va J Intl L 433.

[1171] O'Keefe, "The Restatement", *ibid* at 1483; Keitner, "Prosecuting Foreign States" *supra* note 1165 at 270.

privileges under the US *FSIA*.[1172] As will be shown below, whether an entity qualifies as a state itself or a state agency/instrumentality under Sections 1603(a) and 1603(b) makes a meaningful impact on the scope of immunity they enjoy under the US *FSIA*.[1173] Section 1603(a) provides that:

> For purposes of this chapter—
>
> (a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).[1174]

Paragraph (a) of Section 1603 shows that a foreign state includes both its political subdivisions and agencies/instrumentalities except as specified by the US *FSIA* such as Section 1608 which set out different rules for the service of documents to states and state agencies/instrumentalities.[1175] Section 1608 is not the only place where the US *FSIA* makes an express distinction between the state itself and state agency/instrumentality regarding their treatment thereunder. Sections 1605(a)(3), 1606 and 1610 (which regulate the unlawful expropriation exception to jurisdictional immunity, the extent of liability, and the exception to execution immunity) distinguish the state itself from a state agency/instrumentality. Section 1605(a)(3) more broadly defines the scope of assets that fall into the unlawful expropriation exception to jurisdictional immunity when it comes to state agency/instrumentality compared to

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[1172] Dellapenna, *supra* note 86 at 43; Curtis A. Bradley, *International Law in the U.S. Legal System* (Oxford: Oxford University Press, 2015) 240 [Bradley, *International Law in the U.S. Legal System*].

[1173] For clarity purposes, I will use the term the "state itself" to describe the state in situations where the US *FSIA* provides tailored treatment only to the state and its political subdivisions in contrast with state agencies/instrumentalities despite that Section 1603(a) generally provides that the state includes both its political subdivisions and agencies/instrumentalities. See Dellapenna, at 43-49 on "The Foreign State Itself" and at 65-71 on "'Agency or Instrumentality' Defined." See Dickinson et al, *supra* note 86 at 229-234.

[1174] Section 1603(a), US *FSIA*; for the excerpt of Section 1603(b), see below.

[1175] Section 1608 provides distinctive service-of-process instruction toward a foreign state, including its political subdivisions and state agencies/instrumentalities in paragraphs (a) and (b).

the state itself.[1176] Section 1606 prevents the state itself from bearing punitive damages in the US federal courts without giving such protection to a state agency/instrumentality.[1177] Sections 1610(a) and 1610(b) govern the varied degrees of exceptions to execution immunity between a state and a state agency/instrumentality, in particular whether the claimant must establish a connection between the claim and the targeted assets owned by the state itself or state agency/instrumentality.[1178] As such, characterizing an entity that claims sovereign immunity either as a state itself or a state agency/instrumentality means there would be different requirements for service of process regarding claims and legal documents (Section 1608), differences in the extent of liability to be determined by US laws other than the US *FSIA* (Section 1606) and in the scope of assets that are subject to execution (Section 1610) in litigation. These statutory distinctions matter particularly in cases of SOEs for their commercial conduct. However, even qualifying as a state agency/instrumentality would provide significant litigation advantages for an SOE under the US *FSIA*.[1179]

[1176] Section 1605(a)(3), US *FSIA* provides that "A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States[.]"
[1177] Section 1606, US *FSIA* provides that in circumstances where a foreign state is not immune per *FSIA*, that foreign state "shall be liable in the same manner and to the same extent as a private individual under like circumstances; but a foreign state except for an agency or instrumentality shall not be liable for punitive damages[.]"
[1178] The most significant difference regarding the scope of assets that are eligible for execution between a state and a state agency/instrumentality is found in Sections 1610 (a)(2) and 1610(b)(2), US *FSIA*. Section 1610 (a)(2) provides that a foreign state's property is not immune from execution if "the property is or was used for the commercial activity upon which the claim is based[.]" whereas Section 1610 (b)(2) does not require such connection. It says that the commercial property of a state agency/instrumentality is not immune for execution if "the judgement relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605[], regardless of whether the property is or was involved in the act upon which the claim is based[.]" *Cf* the connection requirement is imposed for both the state itself and state agency/instrumentality for execution purposes under Article 19(c) of the *UNCSI*, see Chapter 5, Section 3.2.
[1179] Dellapenna, *supra* note 86 at 66 acknowledging that while state agencies and instrumentalities enjoy less privileges compared to the state itself under the US *FSIA*, their privileges should still be recognized; see also Fox and Webb, *supra* note 13 at 252.

3.1.1 The state itself under Section 1603(a)

To define what constitutes the state itself under Section 1603(a), the "core function" test has become the dominant threshold test when the disputed entities are governmental units such as ministries, departments and military forces.[1180] The leading case that distinguishes the state itself from a state agency/instrumentality is *Transaero*.[1181] In this case, the D.C. Circuit Court had to decide whether the Bolivian Air Force is part of a foreign state or a state agency/instrumentality for service of process purposes under Section 1608. Adopting the "core function" test proposed by the United States in its *amicus curiae* brief, the D.C. Circuit Court held that "whether the core functions of the foreign entity are predominantly governmental or commercial … best captures the statutory meaning" of what constitutes the state itself.[1182] In the D.C. Circuit Court's view, "[t]he distinction between foreign states and their instrumentalities establishes two categories of actors that correspond to the restrictive theory's two categories of acts."[1183] The D.C. Circuit concluded that the Bolivian Air Force was a "foreign state or political subdivision" within the meaning of Section 1608 because "armed forces are as a rule so closely bound up with the structure of the state that they must in all cases be considered as the 'foreign state' itself, rather than a separate 'agency or instrumentality' of the state."[1184] It added that the ability to engage in contractual activities did not render the Bolivian Air Force a state agency/instrumentality because "[i]f a separate name and some power to conduct its own affairs suffices to make a foreign department an 'agency' rather than a part of the state itself, the structure of section 1608 will list too far to one side."[1185] Based on this "core function" test, "Ministries of defense,

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[1180] ALI, *Fourth Restatement*, *supra* note 1157 at Part IV, Chapter 5, § 452, Reporters' Notes, para. 4.
[1181] *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148 [*Transaero*].
[1182] *Transaero*, *ibid* at 151.
[1183] *Ibid* at 152.
[1184] *Ibid* at 153.
[1185] *Ibid*; see also ALI, *Fourth Restatement*, *supra* note 1157 at Part IV, Chapter 5, § 452, Reporters' Notes, para. 4.

treasury, and foreign affairs, as well as branches of the armed services" have been found to be foreign states, not state agencies/instrumentalities.[1186] The core function threshold test provided in *Transaero* suggests that SOEs probably were not intended to be treated as the state itself at least to the extent that their core functions are commercial. An SOE is more likely to be a state agency/instrumentality discussed below.

3.1.2 State agency/instrumentality per Section 1603(b)

The US *FSIA* uses a direct and majority shareholding threshold test for state agency/instrumentality. This enables some SOEs to become state agencies/instrumentalities for immunity purposes,[1187] thus, broadening the scope of the state to include corporations owned by states, compared to the UK *SIA*.[1188] Paragraph (b), Section 1603 spells out under what circumstances an SOE would become a state agency/instrumentality for immunity purposes:

> (b) An "agency or instrumentality of a foreign state" means any entity—
>
> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States as defined in section 1332 (c) and (d) of this title, nor created under the laws of any third country.[1189]

Pursuant to this provision, an SOE that is a corporate entity with a majority of its shares directly owned by a foreign state other than the United States falls within the scope of state agency/instrumentality per Section 1603(b).[1190] The US Supreme Court in *Bancec* affirmed that a typical state agency/instrumentality often has a corporate form with a separate juridical status:

[1186] ALI, *Fourth Restatement*, *ibid* at Part IV, Chapter 5, § 452, Reporters' Notes, para. 4.
[1187] ALI, *Fourth Restatement*, *ibid* at Part IV, Chapter 5, § 452, Comment f, Reporters' Notes, para. 6.
[1188] Stewart, "International Immunities in U.S. Law", *supra* note 1156 at 628.
[1189] Section 1603(b), *FSIA*.
[1190] See *Jurisdiction of United States Courts in Suits Against Foreign States*, HR Rep No 94-1487, *supra* note 198 at 15, stating that "[i]f such entities are entirely owned by a foreign state, they would of course be included within the

> A typical government instrumentality, if one can be said to exist, is created by an enabling statute that prescribes the powers and duties of the instrumentality, and specifies that it is to be managed by a board selected by the government in a manner consistent with the enabling law. The instrumentality is typically established as a separate juridical entity, with the powers to hold and sell property and to sue and be sued. Except for appropriations to provide capital or to cover losses, the instrumentality is primarily responsible for its own finances. The instrumentality is run as a distinct economic enterprise; often it is not subject to the same budgetary and personnel requirements with which government agencies must comply.[1191]

It should be noted that in the above excerpts from the *Bancec* decision on the effect of separateness between state agencies/instrumentalities and the state itself, the Supreme Court misused the terminologies of "agency" and "instrumentality" seen in light of Section 1603 and the *Transaero* case discussed above. In instances where it used "instrumentality" it encompasses both agency and instrumentality as prescribed by Sections 1603(a) and (b) of the US *FSIA*. In places where it used the term "agency", reading in light of the decision, the US Supreme Court in fact meant "political subdivision", *i.e.*, the state itself for purposes of the US *FSIA*.

A direct and majority ownership test was confirmed by the US Supreme Court in the *Dole Food* case.[1192] In rejecting the sovereign immunity claim of SOEs' subsidiaries, the US Supreme Court held that only SOEs that are directly owned by the state with majority ownership could qualify as state agencies/instrumentalities per Section 1603(b):

> [O]nly direct ownership of a majority of shares by the foreign state satisfies the statutory requirement" of Section 1603(b)(2).[1193]

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definition. Where ownership is divided between a foreign state and private interests, the entity will be deemed to be an agency or instrumentality of a foreign state only if a majority of the ownership interests (shares or stock or otherwise) is owned by a foreign state or by a foreign state's political subdivision"; see also Dickinson et al, *supra* note 78 at 232; Dellapenna, *supra* note 86 at 69-71.

[1191] *First National City Bank v. Banco par el Comercio Exterior du Cuba, 103 S.Ct. 2591 (1983)* 2598-2599. [*Bancec*]

[1192] *Dole Food*, *supra* note 96.

[1193] *Ibid* at 1660.

In this case, the Israeli state did not have direct ownership of shares in either of the Dead Sea Companies (two petitioners in the case) at any time pertinent to the litigation. These companies were separated from the Israeli state by one or more intermediate corporate tiers.[1194] The US Supreme Court explained that Section 1603(b)(2) speaks only to direct ownership, not control according to the US corporate law principles:

> In issues of corporate law structure often matters. It is evident from the Act's text that Congress was aware of settled principles of corporate law and legislated within that context. The language of [section] 1603(b)(2) refers to ownership of "shares," showing that Congress intended statutory coverage to turn on formal corporate ownership.[1195]

It specified that the meaning of "ownership" should be examined as a matter of corporate law, "irrespective of whether Israel could be said to have owned the Dead Sea Companies in everyday parlance" by control without direct majority ownership.[1196] In the end, the US Supreme Court concluded, for this among other reasons,[1197] that the Dead Sea Companies were not agencies/instrumentalities of the Israeli state under Section 1603(b) of the US *FSIA* since they were not directly owned by the state with majority ownership.[1198] Hence, SOEs' subsidiaries cannot be state agencies/instrumentalities as provided in Section 1603(b).

[1194] *Ibid*.
[1195] *Ibid*.
[1196] *Ibid*.
[1197] *Ibid*: "Even if Israel exerted the control the Dead Sea Companies describe, that would not give Israel a "majority of [the company's] shares or other ownership interests." The statutory language will not support a control test that mandates inquiry in every case into the past details of a foreign nation's relation to a corporate entity in which it does not own a majority of the shares."
[1198] *Ibid* at 1660-1661.

3.1.3 The deviation of Section 1603's definition of the state from the *UNCSI*, the UK *SIA*, and its implications

The US *FSIA*'s inclusion of SOEs as part of the state for immunity purposes by way of direct and majority ownership is a deviation from the *UNCSI*, the UK *SIA* and other domestic laws[1199] and perhaps even contrary to customary international law.[1200] We know from the previous Chapters that the definition of the state in the *UNCSI* includes the concept of state agency/instrumentality but imposes an actual performance test in granting an entity "state" status for immunity purposes.[1201] The UK *SIA* intentionally excluded separate entities (which could include SOEs) from the scope of the state. Unless an SOE demonstrates it is a state organ under Section 14(1), UK *SIA*, an SOE as a separate entity could only acquire immunity *ratione personae* under the UK *SIA*.[1202] Both the *UNCSI* and the UK *SIA* embody a strong presumption of non-immunity for SOEs. But under the US *FSIA*'s direct and majority ownership test, it is easier for SOEs to acquire a "state" status for purposes of claiming immunity.

Regarding the US *FSIA*'s inclusion of SOEs in the scope of the state, scholars have expressed the concern that Section 1603(b) can embolden foreign state-affiliated entities to claim immunity *ratione personae* and create litigation hurdles for establishing courts' jurisdiction.[1203]

[1199] Section 14, UK *SIA*; Section 2, Canada *State Immunity Act*; Section 3(3), Australia *Foreign States Immunities Act*; Section 15, Pakistan *State Immunity Ordinance*; Section 16, Singapore *State Immunity Act*; Section 1(2), South Africa *Foreign States Immunities Act*; Section 1, Israel *Foreign States Immunity Law 5769-2008*.
[1200] Keitner, "Prosecuting Foreign States", *supra* note 1165 at 247 nothing that a Deputy State Department Legal Advisor registered her "doubt the state-owned purely commercial enterprise is considered part of the state for sovereign immunity purposes by the international community generally" while presenting her view on the US *FSIA*. *Cf* Articles 4 and 5, *ARSIWA*.
[1201] Chapter 5, Section 2.2.
[1202] Chapter 6, Section 3.
[1203] Keitner, "Prosecuting Foreign States", *supra* note 1165 at 247; Paula Kates, "Immunity of State-Owned Enterprises: Striking a New Balance" (2019) 51: 4 NYU J Int'l L & Pol 1223, 1228 [Kates, Immunities of SOEs]; Yang, at 245; *cf* Li Qingming, "论中国国有企业在美国民事诉讼中的国家豁免" (State Immunity of Chinese State-Owned Enterprises in the United States Civil Litigation), (2018) 11 Jiangxi Social Science (江西社会科学) 168 at 168, 175-176. [Li, State Immunity of Chinese SOEs in the US] In this article, Li argues that Chinese SOEs should argue for sovereign immunity to their litigation advantages in the US courts to avoid losses; Liang,

For example, in the criminal law context, Chimène Keitner has documented that just in 2018 some SOEs—including Chinese ones—have been claiming immunity as state agencies/instrumentalities in US courts to avoid trial for alleged criminal offenses.[1204] Paula Kates expressed her concern that Section 1603(b) had allowed Chinese SOEs that were directly owned by the central SASAC to successfully invoke the US *FSIA* and walk away from US courts for civil claims.[1205] Seeking to circumvent Chinese SOEs' immunity claims in US courts after the *Chinese-Manufactured Drywall Products Liability Litigation* case,[1206] Senator Chuck Grassley proposed a *State-owned Entity Transparency and Accountability Reform Act of 2016* to the Committee on the Judiciary to amend the US *FSIA*. But his proposal was made from a liability attribution perspective. The core of his amendment was that SOEs that are state agencies/instrumentalities and their subsidiaries are liable for each other's conduct, which is outside the intended subject matters of the US *FSIA*.[1207] His amendment attempt was unsuccessful.

"Sovereign Immunity of State-owned Enterprises", *supra* note 494 at 82, arguing that Chinese SOEs should not claim sovereign immunity in the US courts.

[1204] Keitner, "Prosecuting Foreign States", *ibid* at 223; see also Li, "State Immunity of Chinese SOEs in the US", *ibid* at 169, documenting three high-profile cases in which three central-SASAC owned Chinese SOEs successfully invoked *FSIA*'s Section 1603(b) and were recognized as state agencies/instrumentalities thereunder. Other cases in which Chinese SOEs invoked the *FSIA* include: *First Investment Corporation of the Marshall Islands v. Fujian Mawei Shipping, Limited*, 703 F.3d 742 (5th Cir. 2012), in this case the Chinese SOE is owned by a provincial government; *In Re: Chinese-Manufactured Drywall Pro. Liability* 168 F.Supp.3d 918 (E.D.La. 2016) at 918-919 [*Chinese Manufactured Drywall*]; *In Re: Cathode Ray Tube (CRT) Antitrust Litigation* (N.D. Cal. 2018), 2018 WL 659084; *cf In the Matter of Arbitration between: Trans Chemical Limited and China National Machinery Import and Export* Corporation, 978 F.Supp. 266 (S.D.Tex. 1997), in this case, the Chinese SOE's counterpart invoked the *FSIA* to seize the US court jurisdiction. ["*TCL v. CNMC*"]

[1205] Kates, "Immunities of SOEs", *supra* note 1203 at 1236, criticizing *Chinese Manufactured Drywall*, *ibid*.

[1206] *Chinese Manufactured Drywall*, *supra* note 1204. In this case, the Chinese parent company successfully claimed itself to be a state agency/instrumentality under the US *FSIA* and was exempted from the litigation as the commercial exception did not apply to it.

[1207] S.3323 - *State-owned Entity Transparency and Accountability Reform Act of* 2016, available online: <https://www.congress.gov/bill/114th-congress/senate-bill/3323/text>. The amendment reads as follows: "Section 1603(d) of title 28, United States Code, is amended— (1) by inserting "(1)" before "A"; and (2) by adding at the end the following: "(2) For purposes of section 1605(a)(2), a commercial activity of an agency or instrumentality of a foreign state shall be attributable to any corporate affiliate of the agency or instrumentality that— "(A) directly or indirectly owns a majority of shares of the agency or instrumentality; and "(B) is also an agency or instrumentality of a foreign state." See Kates, "Immunities of SOEs", *supra* note 1140 at 1244.

4. The commercial exceptions to jurisdictional immunity under Section 1605(a)(2) and to execution immunity under Section 1610(b)(2) for state agencies/instrumentalities

Another feature that distinguishes the US *FSIA* from the *UNCSI* and the UK *SIA* is its sole reliance on the nature of the conduct/transaction to determine whether a conduct/transaction is commercial, thus triggering the commercial exception. As we will see in Section 4.1 below, under the US *FSIA*, and as affirmed by the US Supreme Court, the purpose of the conduct is irrelevant in this characterization process.

4.1 State agencies/instrumentalities' "commercial activity" exception to jurisdiction immunity per Section 1605(a)(2) (Step-2a test)

Section 1605(a)(2) provides the "commercial activity" exception to jurisdiction immunity in the US *FSIA*. It says:

> Section 1605 General exceptions to the jurisdictional immunity of a foreign state
>
> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—
>
> (2) in which the action is based upon a *commercial activity* carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States[.][1208] [emphasis added]

Phrased slightly differently from the term "commercial transaction" used in Articles 2(1)(c), 2(2), 10(1) of the *UNCSI*,[1209] or "commercial transaction" used in Section 3 of the UK *SIA*,[1210] Section 1605(a)(2) of the US *FSIA* deploys the term "commercial activity" to articulate the

[1208] Section 1605(a)(2), *FSIA*.
[1209] See Chapter 5, Sections 3.1.
[1210] See Chapter 6, Sections 3.

general kind of commercial exception that implements the restrictive immunity theory in the US *FSIA*.[1211] Section 1603(d) defines "commercial activity" and the methodology for distinguishing commercial from non-commercial transaction:

> A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to *the nature* of the course of conduct or particular transaction or act, rather than by reference to its purpose.[1212] [emphasis added]

Section 1603(d) stipulates that it is only the nature of the conduct/transaction that determines its commercial character.[1213] The legislators explained the rationale for this choice:

> [T]he fact that goods or services to be procured through a contract are to be used for a public purpose is irrelevant; it is the essentially commercial nature of an activity or transaction that is critical. Thus, a contract by a foreign government to buy provisions or equipment for its armed forces or to construct a government building constitutes a commercial activity. The same would be true of a contract to make repairs on an embassy building. Such contracts should be considered to be commercial contracts, even if their ultimate object is to further a public function.[1214]

In practice, the nature of the conduct is assessed on the basis of whether the act could be performed by a private person,[1215] as the US Supreme Court explained in *Weltover* in 1992:

> [B]ecause the [FSIA] provides that the commercial character of an act is to be determined by reference to its "nature" rather than its "purpose", the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the type of actions by which a private party engages in "trade and traffic or commerce[.]" Thus, a foreign government's issuance of regulations limiting foreign currency exchange is a sovereign activity, because such authoritative control of commerce cannot be exercised by a private party; whereas a contract to buy army boots or even bullets is a "commercial" activity,

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[1211] See also "commercial transaction" used in the Australian, Singaporean and South African laws, "commercial transactions and contracts" used in the Pakistan law; *cf* "commercial activity" used in the Canadian law.
[1212] Section 1603(d), *FSIA*.
[1213] Dellapenna, *supra* note 86 at 362-63.
[1214] *Jurisdiction of United States Courts in Suits Against Foreign States*, HR Rep No 94-1487, *supra* note 198 at 16; Dellapenna, *ibid* at 362-63.
[1215] *Jurisdiction of United States Courts in Suits Against Foreign States*, HR Rep No 94-1487, *ibid* at 16; Dellapenna, *ibid* at 360; Bradley, *International Law in the U.S. Legal System*, *supra* note 1172 at 245.

> because private companies can similarly use sales contracts to acquire goods[.][1216]

This excerpt from the *Weltover* decision suggests that what a state buys (army boots, or even bullets) does not matter because any private party can make a contract in the market.[1217] Regarding this sole nature test—on the basis of whether a private party can perform an act—Dellapenna raised doubts over whether the test could "adequately characterize many common acts of modern states" as a result of a general application of the nature test.[1218] He asked:

> [I]f a government orders boots for its army, is it simply making a contract (a private act) or is it providing for the national defense (a public act)? Can an individual contract to buy a nuclear missile? The level of specificity at which one characterizes the activity is decisive for the "nature" test. The process is further complicated by the diverse social organizations of different countries embodying differing concepts of what is the proper sphere of private activity.[1219]

The *Weltover* case well illustrated the difficulty of divorcing the purpose from the nature of the conduct in distinguishing commercial from non-commercial transactions for immunity purposes.[1220] It also exposed the question of at what degrees of specificity we assess conduct or a series of actions. In the *Weltover* case, Argentina issued sovereign bonds for debt restructuring purposes in 1982. As Argentina could not pay those bonds upon maturity starting in 1986, its

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[1216] *Weltover*, *supra* note 384 at 2166. The Supreme Court's *Weltover* decision is endorsed by US Federal Circuit Courts in subsequent cases, see *Embassy of the Arab Republic of Egypt v. Lasheen*, 603 F.3d 1166, 1171 (9th Cir. 2010) holding that "[b]y contracting with a company to manage a health benefits plan and agreeing to indemnify that company, the Egyptian Defendants did not act with the powers peculiar to a sovereign, but instead acted as private players in the market." *Globe Nuclear Servs. & Supply GNSS, Ltd. v. AO Technsabexport*, 376 F.3d 282, 289 (4th Cir. 2004).

[1217] Feldman, "The US FSIA in Perspective", *supra* note 1155 at 308 citing two cases in which US courts have found that a purchase contract for equipment to be used for the army and a supply contract of parts to Iran's military aircraft are commercial transactions under the US *FSIA*, regardless of their purposes. See also *Globe Nuclear Servs. & Supply GNSS, Ltd. v. AO Technsabexport*, *ibid* holding that an agreement to supply uranium hexafluoride that was extracted from nuclear weapons was a commercial activity.

[1218] Dellapenna, *supra* note 86 at 360.

[1219] Dellapenna, *ibid* at 360-61; see also Chapter 2, Section 4.

[1220] Mark B. Baker, "Whither *Weltover*: Has the U.S. Supreme Court Clarified or Confused the Exceptions Enumerated in the Foreign Sovereign Immunities Act" (1995) 9:1 Temp Int'l & Comp LJ 1 [Baker, Whither *Weltover*].

government unilaterally extended the payment time by legislation. Some bond holders sued Argentina in the US, as one of the payment locations identified in the contract was New York.[1221] Argentina argued that although the US *FSIA* barred the consideration of the purpose of a transaction, the overall context of issuing the bonds—which Argentina did to stabilize the economy—should be taken into account when characterizing the deal.[1222] The US Supreme Court rejected this argument because private parties often issue bonds to restructure their debts.[1223] Further, Argentina's intention to fulfill its obligations under a foreign exchange program was irrelevant. The Supreme Court eventually concluded that Argentina's issuance of the bonds was a commercial activity that fell into Section 1605(a)(2):

> However difficult it may be in some cases to separate "purpose" (*i.e.*, the reason why the foreign state engages in the activity) from "nature" (*i.e.*, the outward form of the conduct that the foreign state performs or agrees to perform), the [FSIA] unmistakably commands that [a sole nature test is] to be done…it is irrelevant why Argentina participated in the bond market in the manner of a private actor; it matters only it did so. We conclude that Argentina's issuance of the [bonds] was a 'commercial activity' under the FSIA."[1224]

The uncertainty regarding the nature test is illustrated by the facts in *Weltover*: zooming out to the sales of bonds conceives of the activity as one that any business could conduct, and zooming in to the issuance of the bonds by Argentina for sovereign debt restructuring purposes cast the activity as one that only a sovereign state could undertake in regulating the financial market.[1225] Put differently, the outcome of the analysis would depend on whether an act's nature

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[1221] *Weltover*, *supra* note 384 at 2163-64.
[1222] *Weltover*, *ibid* at 2167.
[1223] *Weltover*, *ibid*.
[1224] *Weltover*, *ibid*; see also Baker, "Whither *Weltover*", supra note 1220 at 22.
[1225] Nakajima, *The International law of Sovereign Debt Dispute Settlement*, supra note 902 at 65-66 comparing the US Supreme Court's and the Italian Court of Cassation's distinctive approaches taken toward Argentina's unilateral debt extension by legislation. In contrast with the US Supreme Court's rejection to look at Argentina's purposes in doing so, the Italian Court of Cassation held that Argentina's unilateral debt extension by legislation is a sovereign act as manifested in their public purposes to regulate the financial market and ensure the economic survival of the state in the context of a serious national emergency. Hence, bondholders cannot sue Argentina in Italian courts.

is determined by viewing it at some higher level of abstraction, or at some more closely detailed assessment of its specific aspects.[1226] Only the latter takes into account the social and economic contexts of the other country.[1227] The *Weltover* decision suggests that zooming out to a higher level of abstraction is the appropriate approach under the US *FSIA*: it does not matter what the substance or the purpose of the contract was or in what context the contract was made, so long there was a contract.[1228] Yet, a year later, in 1993, the Supreme Court did not follow this formula and focused on some specific acts that should be considered in *Saudi Arabia v. Nelson*.[1229]

In *Saudi Arabia v. Nelson*, Mr. Nelson was recruited in the US to work in a Saudi Arabia government-owned hospital in 1983. The contract was signed in the US, his orientation was conducted in the US, and the Saudi recruiting agent resided in the US. Following a whistleblowing report he made to a governmental entity regarding defects he found in the hospital, he was arrested by Saudi Arabia in September 1984 as a result of the hospital's retaliation against him for whistleblowing.[1230] Mr. Nelson claimed that, among other things, he was tortured and unduly detained by Saudi Arabia for whistleblowing.[1231] Mr. Nelson argued that his claim was based upon the contractual relationship he had with the Saudi governmental-owned hospital. Saudi Arabia and the government-owned hospitals should not be immune under the US *FSIA* by an application of the commercial exception stipulated in Section 1605(a)(2), as

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[1226] Dellapenna, *supra* note 86 at 362.
[1227] Dellapenna, *ibid* at 360-61.
[1228] The US legislative and judicial positions find support in literature: Jürgen Bröhmer, "State Immunity and Sovereign Bonds" in Peters et al, *Immunities in the Age of Global Constitutionalism*, *supra* note 137 at 182, 188-92; Kupelyants, *Sovereign Defaults before Domestic Courts*, supra note 902 at 283; Nakajima, *The International law of Sovereign Debt Dispute Settlement*, supra note 902 at 65-66.
[1229] *Saudi Arabia v. Nelson*, 507 U. S. 349 (1993).
[1230] *Ibid* at 352-53.
[1231] *Ibid* at 353-54.

the state's torture and detainment of him arising from that underlying contractual relationship.[1232]

The US Supreme Court rejected this argument and held that:

> [T]he Nelsons have alleged that petitioners recruited Scott Nelson for work at the hospital, signed an employment contract with him, and subsequently employed him. *While these activities led to the conduct that eventually injured the Nelsons, they are not the basis for the Nelsons' suit*. Even taking each of the Nelsons' allegations about Scott Nelson's recruitment and employment as true, those facts alone entitle the Nelsons to nothing under their theory of the case. The Nelsons have not, after all, alleged breach of contract,…, but personal injuries caused by petitioners' intentional wrongs and by petitioners' negligent failure to warn Scott Nelson that they might commit those wrongs. Those torts, and not the arguably commercial activities that preceded their commission, form the basis for the Nelsons' suit.[1233] [emphasis added]

The majority of the US Supreme Court concluded that the key facts that underlined Nelson's claim were the alleged wrongful arrest, imprisonment, and torture, which were "peculiarly sovereign in nature,"[1234] not a breach of contract. It added that the "[e]xercise of the powers of police and penal officers is not the sort of action by which private parties can engage in commerce."[1235] The majority of the US Supreme Court eventually found that the commercial exception did not apply in this case.[1236]

Recall that in *Weltover*, the US Supreme Court said that the key in applying Section 1605(a)(2) is to determine whether a private person can engage in the alleged conduct/transaction, and the Supreme Court looked at Argentina's issuance of bond in its abstraction. It took the view that Argentina's participation in the bond market for the specific purposes of stabilizing the economy was irrelevant. In *Nelson*, the Supreme Court did not follow

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[1232] *Ibid* at 354-55.
[1233] *Ibid* at 358.
[1234] *Ibid* at 361.
[1235] *Ibid* at 362.
[1236] *Ibid* at 363. Recall that individuals' employment rights were also denied in Canadian courts in *Re Canada Labour Code* discussed in the previous Chapter as the Supreme Court of Canada found that the commercial exception did not apply. The two cases showed that the commercial transaction/activity exception does not provide proper protection to individuals' employment rights against a foreign state's intrusive actions.

the methodology of looking at an event in its abstraction as it set in *Weltover*. Instead of looking at a series of actions that arose from the contractual relationship between Mr. Nelson and Saudi Arabia, the government-owned hospital and their US agent as a whole, the US Supreme Court zoomed in on the alleged tort of torture. It is not to say that the US Supreme Court was incorrect to determine that Nelson's claim was "based upon" alleged tort, instead of a contractual breach under Section 1605(a)(2). Rather, the *Nelson* case shows that, compared to *Weltover*, it is difficult to draw a proper line to determine what is commercial and non-commercial when analyzing a series of intertwined events. Additionally, instead of deciding what can be done by a private party in the *Nelson* case, the US Supreme Court's decision was premised upon what can be done by a sovereign—policing. In his concurring opinion in *Nelson*, Justice White (joined by Justice Blackmun) wrote that running a hospital, even a public hospital, is a commercial activity.[1237] Justice White would have found commercial activity existed in this case because:

> As countless cases attest, retaliation for whistle-blowing is not a practice foreign to the marketplace…On occasion, private employers also have been known to retaliate by enlisting the help of police officers to falsely arrest employees. More generally, private parties have been held liable for conspiring with public authorities to effectuate an arrest, and for using private security personnel for the same purposes[.]
>
> Therefore, had the hospital retaliated against Nelson by hiring thugs to do the job, I assume the majority—no longer able to describe this conduct as "a foreign state's exercise of the power of its police,"—would consent to calling it "commercial." For, in such circumstances, the state-run hospital would be operating as any private participant in the marketplace and respondents' action would be based on the operation by Saudi Arabia's agents of a commercial business.[1238] [reference omitted]

In Justice White's view, the police's imprisonment and torture actions taken against Mr. Nelson cannot be seen in its isolation, but with an eye on its perpetrators. In doing so, he found that

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[1237] Justice White (joined by Justice Blackmun), Concurring Opinion, *Saudi Arabia v. Nelson*, 507 U. S. 349 (1993) 364. [Justice White, Concurring Opinion]
[1238] Justice White, Concurring Opinion, *ibid* at 366.

private actors often do so in conspiracy with public authorities in their commercial activities, and these activities should be seen as acts that can be undertaken by private parties, thus, falling into the commercial exception of Section 1605(a)(2). Although under this view, "commercial" is understood to be any act of a private party even if it has nothing, or little, to do with commerce, like detention and torture. The US Supreme Court's decision in *Saudi Arabia v. Nelson* is a deviation from *Weltover* as it relied on the Saudi government's use of police force—one aspect that arises from the employment relationship between Mr. Nelson and Saudi's state-run hospital—to set aside the commercial character of the contractual and employment relationship between Mr. Nelson, Saudi Arabia, and Saudi's state-run hospital established in the US.[1239]

The different interpretative approaches taken by the majority and Justice White's in his concurring opinion in the *Nelson* case, and the US Supreme Court's sole nature test applied in *Weltover*, show that the interpretation of "commercial activity" under Section 1603(d) of the US *FSIA* is not always clear-cut.[1240] The two cases decided by the US Supreme Court did not provide us with satisfactory guidance for future cases, especially in situations where private actors work with public authorities in their commercial ventures as Justice White noted.[1241] I will return to this issue in Section 5 below when we assess the nature of Chinese SOEs' cross-border transactions in light of their dual identity as defined by the Chinese political economy.

[1239] Robert H. Wood, "*Saudi Arabia v. Nelson*: Roll over *Weltover*, Tell Scott Nelson the News" (1994) 2:1 Tul J Int'l & Comp L 175, 190 [Wood, *Saudi Arabia v. Nelson*].
[1240] Wood, "*Saudi Arabia v. Nelson*", *ibid* at 187-89; Baker, "Whither *Weltover*", *supra* note 1220 at 25.
[1241] Avi Lew, "*Republic of Argentina v. Weltover, Inc.*: Interpreting the Foreign Sovereign Immunity Act's Commercial Activity Exception to Jurisdictional Immunity" (1994) 17:3 Fordham Int'l LJ 726, 773 [Lew, *Weltover*].

4.2 The “commercial activity” exception to execution immunity for state agencies/instrumentalities under Section 1610(b)(2)

Section 1610(a) provides exceptions to the state’s immunity from execution and Section 1610(b) provides exceptions to the state agency/instrumentality’s immunity from execution. Paragraph (2) of each section provides a commercial exception that operates differently. Section 1610(a)(2) provides:

> (a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, *used for a commercial activity* in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—
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> (2) the property *is or was used for the commercial activity* upon which the claim is based[.][1242] [emphasis added]

Section 1610(b)(2) provides:

> (b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—
>
> (2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2) [commercial exception to jurisdiction immunity], … of this chapter, regardless of whether the property is or was involved in the act upon which the claim is based.[1243]

Compared to Section 1610(a)(2), which regulates the state’s execution immunity, Section 1610(b)(2) expands the scope of assets of state agencies/instrumentalities that are subject to execution in two ways. First, Section 1610(b)(2) does not impose a purpose test for the usage of the assets that Section 1610(a)(2) imposes. Secondly, there is no connection requirement between the state agency/instrumentality’s assets and the underlying claim that Section

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[1242] Section 1610(a)(2), *FSIA*; Dickinson et al., *supra* note 86 at 313.
[1243] Section 1610(b)(2), *FSIA*; Dickinson et al., *ibid* at 317.

1610(a)(2) imposes in cases against a state.[1244] As long as the claimant has demonstrated that the state agency/instrumentality cannot enjoy jurisdictional immunity, for example, if it was denied by Section 1605(a)(2)' commercial exception, that state agency/instrumentality cannot claim execution immunity for its assets, no matter what the usage purpose of the assets or the assets' relationship to the underlying claim.[1245] Because a state agency/instrumentality's successful claim of execution immunity is subject to its successful claim of jurisdictional immunity, my examination of the Chinese SOEs' immunity under the US *FSIA* below will focus on the "commercial transaction" exception to jurisdictional immunity stipulated in the US *FSIA*'s Section 1605(a)(2) in light of Chinese SOEs' dual identity. Before moving on, we will briefly look at the asset relationships between the state and the SOE for execution purposes under Section 1610.

4.2.1 State assets that are used for commercial purposes

Like the *UNCSI*'s Article 21(1), which specifies state assets that are used for "government non-commercial purposes,"[1246] Section 1611 of the *US FSIA* identified two kinds of assets that are used for sovereign purposes. They are the property of a foreign central bank or a monetary authority; or state property that is, or is intended to be used in connection with military activity.[1247] Like the *UNCSI* and the UK *SIA*, the US *FSIA* provides a general commercial exception to execution but does not specify the scope of commercial state property that can be

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[1244] The *UNCSI* requires a connection requirement with the state, *i.e.*, the defendant state or state agency/instrumentality. See Article 19(c), *UNCSI*. See also Dellapenna, *supra* note 86 at 787-89; Fox and Webb, *supra* note 13 at 279-80; Yang, *supra* note 13 at 363; Rose, "When Immunity Means Impunity", *supra* note 864 at 349.
[1245] Dellapenna, *ibid* at 788; Dickinson et al, *supra* note 86 at 310.
[1246] The *UNCSI*'s Article 21 provides that diplomatic property, central bank or monetary authority's property, property forms part of the cultural heritage, and property forming part of an exhibit of objects of scientific, cultural, and historical interest.
[1247] Section 1611, US *FSIA*.

subject to execution. The interpretation of Section 1610(a)(2)'s commercial usage purpose of a state asset is connected to the interpretation of "commercial activity" as it is defined in Section 1603(d).[1248] This exercise can be confusing in distinguishing commercial state assets from non-commercial state assets because Section 1603(d) provides that "[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."[1249] As discussed above, it is the nature of the act that determines if an act is a "commercial activity" under Section 1603(d). The correct approach in interpreting the purpose test set in Section 1610 is to focus on the usage purpose of the state assets as they are or were "used for," not the nature of the transaction they arise from.[1250] This method is confirmed by the US District Court of Southern District of New York in *Trans Commodities, Inc. v. Kazakstan Trading House and the Republic of Kazakstan* in 1997. In this case, Trans Commodities, Inc. ("TCI") sued Kazakhstan Trading House and Kazakhstan in the US District Court of Southern District of New York. TCI argued that Kazakhstan agreed to guarantee payment for foreign companies that provide food to Kazakhstan pursuant to contracts signed between TCI and Kazakhstan Trading House.[1251] TCI provided fruits to Kazakhstan Trading House and never got paid. Before the District Court of Southern District of New York, TCI sought to execute against the proceeds of loans Kazakhstan obtained through public offerings in New York.[1252] The District Court of Southern District of New York dismissed TCI's claim and held that although the public offerings are commercial activities in light of *Weltover*,

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[1248] Dellapenna, *supra* note 86 at 761.
[1249] Section 1603(d), US *FSIA*.
[1250] Dellapenna, *supra* note 86 at 761; Yang, *supra* note 13 at 364.
[1251] *Trans Commodities, Inc. v. Kazakstan Trading House and the Republic of Kazakstan*, No. 96 CIV. 9782 (BSJ), United States Disctrict Court of Southern District of New York, 1997 WL 811474 ["*TCI v. Kazakstan*"].
[1252] *TCI v. Kazakstan*, *ibid* at 1-2.

"the proceeds resulting by virtue of the offerings are not" because they were to be used for "general governmental purposes."[1253] Like the UK Supreme Court decision *SerVaas v. Rafidian Bank* discussed in the previous Chapter,[1254] the District Court of Southern District of New York held that the original transaction's commercial nature cannot prevent a state from using proceeds arising from that transaction for a sovereign purpose, and thus claiming execution immunity for the proceeds.

4.2.2 SOEs' assets are not the state's assets for execution purposes as a general rule under the US law

Another issue often arises in litigation is to what extent states' creditors can execute against SOEs' assets for states' liability, and to what extent SOEs' creditors can execute against states' assets for SOEs' liability. Section 1610(b)(2) sets an easier pathway for the execution against state agencies/instrumentalities' assets as compared to the execution against the state's assets. Consequently, a state's creditors may want to seek execution against an SOE's assets for the state's liability. Generally, such execution should be impossible because strong separateness exists between a state and an SOE for liability purposes.[1255] The US Supreme Court in *Bancec* held that in extreme circumstances, a court could "lift the corporate veil" and execute a judgment against the SOEs' assets for the state's liability on the basis of common law and international law incorporated therein.[1256]

The context of the *Bancec* case was that the US *FSIA* deprives a state of its immunity when a state sues a private party and that private party counterclaims in US courts.[1257] The

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[1253] *TCI v. Kazakstan*, *ibid* at 2.
[1254] *SerVaas v. Rafidian Bank*, *supra* note 882.
[1255] *Bancec*, *supra* note 1191; Dellapenna, *supra* note 86 at 788; see also *Gécamines v. FG Hemisphere*, *supra* note 957.
[1256] *Bancec*, *ibid* at 2598; Rose, "When Immunity Means Impunity", *supra* note 864 at 350.
[1257] Section 1607, US *FSIA*.

central issue in the case was whether Citibank could claim set off for Cuba's expropriation of Citibank's assets in Cuba against Bancec's letter of credit claim against Citibank in US courts. The reason for the set off, as argued by Citibank, was that Bancec was a state organ that was not separate from the state. Although the substance of the case was about liability attribution, the US Supreme Court referred to the US *FSIA* for guidance. It particularly referred to Section 1610(b), which deals with execution against assets of state agency/instrumentality:

> Section 1610(b) will not permit execution against the property of one agency or instrumentality to satisfy a judgment against another, unrelated agency or instrumentality. There are compelling reasons for this. If U.S. law did not respect the separate juridical identities of different agencies or instrumentalities, it might encourage foreign jurisdictions to disregard the juridical divisions between different U.S. corporations or between a U.S. corporation and its independent subsidiary. However, a court might find that property held by one agency is really the property of another.[1258]

Premised upon this strong endorsement of separateness between a state and its agency/instrumentality, the US Supreme Court explained that there were exceptional situations in which the rule of separateness will be dispensed, such as to ensure equity, or to prevent fraud and injustice.[1259] In this regard, it held that the existence of extensive control, fraud and injustice will overcome that presumed separateness:

> [W]here a corporate entity is *so extensively controlled by its owner* that a relationship of principal and agent is created, we have held that one may be held liable for the actions of the other… In addition, our cases have long recognized "the broader equitable principle that the doctrine of corporate entity, recognized generally and for most purposes, will not be regarded when to do so would work fraud and injustice…In particular, the Court has consistently refused to give effect to the corporate form where it is interposed to defeat legislative policies."[1260] [emphasis added]

[1258] *Jurisdiction of United States Courts in Suits Against Foreign States*, HR Rep No 94-1487, *supra* note 198 at 29-30, cited in *Bancec*, *supra* note 1191 at 2600-01.
[1259] *Bancec*, *ibid* at 2601-03.
[1260] *Ibid* at 2601.

After a detailed review of the corporate structure of the Bancec, the US Supreme Court held that the strong separateness between Cuba and Bancec was overcome in this case because the extensive control Cuban governmental had over Bancec as found by the District Court:

> Under all of the relevant circumstances shown in this record, … it is clear that Bancec lacked an independent existence, and was a mere arm of the Cuban Government, performing a purely governmental function. The control of Bancec was exclusively in the hands of the Government, and Bancec was established solely to further Governmental purposes. Moreover, Bancec was totally dependent on the Government for financing and required to remit all of its profits to the Government.[1261]

The US Supreme Court endorsed the "control" test developed by the District Court. It agreed with the District Court that the following elements were crucial:

- Bancec's functions were governmental: Bancec was empowered to act as the Cuban government's exclusive agent in foreign trade;
- Bancec's purposes were governmental: its purposes were to contribute to, and collaborate with, the international trade policy of the government and the application of the measures concerning foreign trade;
- Cuba provided all the capital to the Bancec, and Bancec repatriated all of its profits back to the state; and
- Cuba controlled the operation of Bancec because there was a governing board consisting of delegates from Cuban governmental ministries that governed and managed Bancec. Bancec's president was the Minister of State and the president of Banco Nacional. A general manager appointed by the governing board was

[1261] *Ibid* at 2595.

> charged with directing Bancec's day-to-day operations in a manner consistent with its enabling statute.[1262]

The above facts demonstrated significant control by the state over Bancec, which led the US Supreme court to hold that Cuba cannot bring a suit in the US courts without subjecting itself to Citibank's counterclaim against Bancec.[1263] The US Supreme Court ruled that Citibank could set off the value of its assets seized by the Cuban government against the amount sought by Bancec. In this vein, it held that sovereign immunity cannot assist Cuba to walk away from its liability in the US courts.[1264]

Like *Gécamines v. FG Hemisphere* discussed in Chapter 6 (which referred to *Bancec* in its decision), this is a liability attribution case which sought guidance from the law of sovereign immunity. The lesson to be taken away from the *Bancec* case is that SOEs' assets are not the state's assets for execution purposes in most situations since SOEs and states are distinct from each other.[1265] Whether states' creditors can execute against an SOE's assets is determined by

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[1262] *Ibid* at 2593: "Law No. 793 contains detailed "By-laws" specifying Bancec's purpose, structure, and administration. *Ibid* at 2595: "Bancec is not a mere private corporation, the stock of which is owned by the Cuban Government, but an agency of the Cuban Government in the conduct of the sort of matters which even in a country characterized by private capitalism, tend to be supervised and managed by Government." See also Schönsteiner, "Attribution of State Responsibility for Actions and Omissions of SOEs", *supra* note 6 at 933-34 provides a list of elements—include the points identified here by the US Supreme Court—in determining if attribution can be found between states and SOEs.

[1263] *Ibid* at 2602.

[1264] *Ibid* at 2603. It should be noted here is that the defendant state was Cuba, a socialist country that had been in ideological and political confrontation with the US for more than half a century. China and the US have been competing and confronting each other with strong ideological and political differences in the last decade on issues from trade to diplomacy and public international law. While the US judiciary is designed to be independent from its executive branch, its decisions are not free of ideological biases as we saw from some of the recent controversial US Supreme Court decisions. (See *Dobbs v. Jackson Women's Health Organization*, 597 U.S. ___ (2022)). Thus, as a side note, the Chinese SOEs' dual identity, particularly its sovereign aspect, could potentially trigger China's liability under the US domestic substantive laws for actions of its SOEs in light of *Bancec*, if Chinese SOEs' sovereign aspect and their close ties to the state and the CPC are given enough weight in the assessment. This is an issue outside the scope of this thesis but worthy of exploration elsewhere. See Caudill, "The Significance of Ideology in Sovereign Immunity of Soviet Commercial Entities", *supra* note 650.

[1265] See also *Boru v. Tepe*, *supra* note 1090.

the principles that govern the "piercing of the corporate veil."[1266] This is a high threshold test to meet. Although Section 1610(b) makes it easier for creditors to execute against the state agencies/instrumentalities' assets, it does not offer the same pathway for states' creditors to execute against state agencies/instrumentalities' assets because they are separate from each other. Unless, of course, exceptional situations such as extensive state control appear like what we saw in *Bancec*, in which case the SOE is considered to be part of the state.[1267]

5. Assessing the 97 central SASAC-owned Chinese SOEs' "state" status and immunity under the US *FSIA* in a hypothetical *FG Hemisphere 1*-based situation

Like in the previous Chapters and for the readers' easier reference, I will reproduce the background and the tweaked hypothetical facts of the *FG Hemisphere 1* case for our analysis of Chinese SOEs' "state" status and immunity under the US *FSIA*. A *Collaboration Agreement* was signed between China Railway, Sinohydro and the Congo in 2008 under an umbrella agreement signed between China and the Congo. Both China Railway and Sinohydro are solely and directly owned by the central SASAC. Pursuant to Article 5.1 of the *Collaboration Agreement*, the two Chinese SOEs would pay the Congo $350 million US dollars in entry fees.[1268] Pursuant to Article 5.2 of the *Collaboration Agreement*, the two Chinese SOEs would loan Gécamines—a Congolese SOE designated by the Congo for implementing further collaboration—$50 million US dollars.[1269]

A dispute arises between China Railway, Sinohydro, and the Congo as the two Chinese SOEs failed to pay the entry fees to the Congo and provide loans to Gécamines as required by

[1266] Schönsteiner, "Attribution of State Responsibility for Actions and Omissions of SOEs", *supra* note 6 at 933-36; Yang, *supra* note 13 at 287.
[1267] Dellapenna, *supra* note 86 at 789.
[1268] Article 5.1, *Collaboration Agreement*, *supra* note 413.
[1269] Article 5.2, *Collaboration Agreement*, *ibid*.

the *Collaboration Agreement*.[1270] There was no ICSID arbitration clause. After negotiations failed, the Congo and Gécamines sued the two Chinese SOEs in a US court as their assets were discovered there. Before the US court, the two Chinese SOEs claim themselves to be state agencies/instrumentalities under Section 1603(b), US *FSIA*, thus, having "state" status for immunity purposes. They further argue that their actions in carrying out the *Collaboration Agreement* were sovereign in nature because they were implementing China's infrastructure-for-resources policies. Thus, their commitments to the Congo and Gécamines are immune from the jurisdiction of the US courts because the commercial exception to jurisdictional immunity stipulated in Section 1605(a)(2) does not apply. They also argue that their assets are immune under the US *FSIA*. The following issues emerge from this hypothetical situation: (1) what is the status of Chinese SOEs under Section 1603(b) of the US *FSIA*? (2) Under what circumstances would Chinese SOEs attract jurisdictional immunity under the US *FSIA*? (3) Under what circumstances would Chinese SOEs attract execution immunity for their assets under the US *FSIA*?

5.1 The status of Chinese SOEs under the US *FSIA*

Because China Railway and Sinohydro are directly and solely owned by the central SASAC,[1271] they are state agencies/instrumentalities and so enjoy presumptive immunity from jurisdiction under Section 1603(b) in light of *Dole Food* decided by the US Supreme Court. This finding would apply to other central SASAC-owned SOEs under the US *FSIA* given their direct and

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[1270] According to Maiza-Larrarte & Claudio-Quiroga's account, the collaboration between the Chinese and Congolese parties has been going well. See Maiza-Larrarte & Claudio-Quiroga, "The Impact of Sicomines on Development in the Democratic Republic of Congo", *supra* note 503 at 430, mentioning the production output of 2016. The hypothetical facts that are created here sought to present a dispute in which Chinese SOEs' dual identity makes an impact on our assessment of their conduct/transactions; and subsequently their immunity.

[1271] See State-owned Assets Supervision and Administration Commission of the State Council, News Release, "央企名录" [The List of Central Enterprises] (23 December 2021), online: SASAC <http://www.sasac.gov.cn/n4422011/n14158800/n14158998/c14159097/content.html>.

full/majority ownership with the state, whether they are public welfare SOEs or commercial SOEs.[1272]

5.2 The scope of Chinese SOEs' jurisdictional immunity under the US *FSIA*

In *Weltover*, the Supreme Court held that its analytical focus is the *nature* of a conduct/transaction when applying the commercial activity exception to jurisdictional immunity. The *purpose* of the conduct/transaction had no role in its assessment of an SOE's conduct for jurisdictional immunity purposes. Based on *Weltover*, we can conclude that:

- Investing in the infrastructure construction, engaging in natural resources exploitation and making a loan are commercial activities as they can be undertaken by any private party. As explained by the US *FSIA*'s legislative history, a regular course of commercial conduct as provided by Section 1603 includes the performance of "a commercial enterprise such as a mineral extraction company."[1273]
- Further, the provisions of the *Collaboration Agreement* show that the two Chinese SOEs are profit-driven, and compensation mechanisms have been established in the event the Congo defaults. Pursuing profits is another characteristic of a commercial transaction, according to the US *FSIA*'s legislative history.[1274]
- In light of these considerations, China Railway's and Sinohydro's activities carried out pursuant to the *Collaboration Agreement* were commercial in nature because any

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[1272] See *Chinese Manufactured Drywall*, *supra* note 1204. In this case, the Chinese SOE directly owned by the central SASAC—China New Building Materials Group—successfully invoked Section 1603(b) as a state agency/instrumentality; see also Li, "State Immunity of Chinese State-Owned Enterprises in the United States Civil Litigation", *supra* note 1203 at 172-73.
[1273] *Jurisdiction of United States Courts in Suits Against Foreign States*, HR Rep No 94-1487, *supra* note 198 at 16; Joseph F. Morrissey, "Simplifying the Foreign Sovereign Immunities Act: If a Sovereign Acts like a Private Party, Treat It like One" (2005) 5:2 Chi J Int'l L 675, 696-98 [Morrissey, Simplifying the FSIA].
[1274] *Jurisdiction of United States Courts in Suits Against Foreign States*, HR Rep No 94-1487, *ibid* at 16: "Certainly, if an activity is customarily carried on for profit, its commercial nature could readily be assumed"; Morrissey, "Simplifying the FSIA", *ibid*.

private person can sign a contract for the purpose of pursuing commercial profit in general, and the activities themselves may be characterized as commercial in nature.

- As a result, SASAC-owned commercial Chinese SOEs—like China Railway and Sinohydro—cannot attract jurisdictional immunity under Section 1605(a)(2)'s commercial exception of the US *FSIA* because they have engaged in commercial transactions.[1275]

Chapter 4 observed that China categorized Chinese SOEs into three groups: (1) "public welfare SOEs", "commercial SOEs that are in competitive businesses", and "commercial SOEs that are in industries and sectors that have an impact on national security and lifeline of national economy."[1276] Chapter 4 also showed that Chinese SOEs have a dual identity, particularly for "commercial SOEs that are in industries and sectors that have an impact on national security and lifeline of national economy" and "public welfare SOEs." In previous Chapters, we used three scenarios to illustrate Chinese SOEs' dual identity. First, SOEs like China Railway and Sinohydro, which engage in foreign investments with purposes of contributing to China's foreign policy. Secondly, Chinese SOEs like China Electronics, which imports military and civil dual-use technologies from abroad. Thirdly, public welfare SOEs that provide poverty relief and natural disasters relief. Because the US *FSIA*'s Section 1605(a)(2) does not consider the purpose behind a commercial transaction when characterizing that transaction, Chinese SOEs are unlikely

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[1275] See *Orient Mineral Co. v. Bank of China*, 506 F. 3d 980, 991 (10th Cir. 2007); *Rosner v. Bank of China*, 528 F. Supp. 2d 419 (S. D. N. Y. 2007). In both cases, Bank of China was found to be a state agency/instrumentality pursuant to the *FSIA* in the US courts. But Bank of China failed to attract jurisdiction immunity because its actions were commercial in nature. See also Liang, "Sovereign Immunity of State-owned Enterprises", *supra* note 1115 at 90.

[1276] Chapter 4, Section 3.2.

to attract jurisdictional immunity for these commercial activities regardless of their dual identity and sovereign purposes.

Compared to the *UNCSI* and the UK *SIA*, Chinese SOEs can easily acquire "state" status to invoke presumptive immunity in the US courts as a result of the Section 1603(b) of the US *FSIA*'s direct and majority ownership test. But Chinese SOEs—be they commercial SOEs or public welfare SOEs—are unlikely to attract jurisdictional immunity for their commercial transactions under the Section 1605(a)(2) as a result of the strictly applied nature test as laid down by the US *FSIA*'s text, and confirmed by its legislative history[1277] and the *Weltover* case decided by the US Supreme Court,[1278] even though they could have been exercising sovereign authority as demonstrated by their purposes. Whereas under the *UNCSI* and the UK *SIA*, commercial Chinese SOEs like China Electronics and public welfare SOEs can potentially attract jurisdictional immunity if their purposes in carrying out sovereign authority in their commercial transactions are taken into account by courts.[1279] Hence, Chinese SOEs' sovereign aspect of their dual identity does make a difference for SOEs' jurisdictional immunity under the *UNCSI* and the UK *SIA*, but not under the US *FSIA*.

The *Weltover* and the *Saudi Arabia v. Nelson* cases show that the nature only test applied by the US courts under the US *FSIA* is not easy to apply in all situations. In the example of China Electronics, the SOE imports and uses technologies in their production that can potentially be used by the military. Should we look at their trading in abstract as commercial transactions or should we look at their dealings closer by taking into account their purposes in contributing to

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[1277] *Jurisdiction of United States Courts in Suits Against Foreign States*, HR Rep No 94-1487, *supra* note 198 at 16.
[1278] *Weltover*, *supra* note 384, followed by US Federal Circuit Courts, for example, see *Embassy of the Arab Republic of Egypt v. Lasheen*, 603 F.3d 1166, 1171 (9th Cir. 2010), *Globe Nuclear Servs. & Supply GNSS, Ltd. v. AO Technsabexport*, 376 F.3d 282, 289 (4th Cir. 2004), *supra* note 1216.
[1279] See Chapter 5, Section 4.2.2; Chapter 6, Sections 5.2.1 and 5.2.2.

the state's military capabilities. Even commercial Chinese SOEs like China Railway and Sinohydro that engage in infrastructure-for-natural resources projects in the Congo carry certain sovereign elements in their commercial operations. Despite some uncertainty, the US *FSIA*'s sole nature test applied under the commercial exception ensures that no immunity can be granted to SOEs for their commercial activities, though arguably it fails to truly appreciate Chinese SOEs' dual identity and their potential to exercise sovereign authority in their commercial operations. The US approach is more friendly to parties contracting with SOEs when they seek to sue Chinese SOEs in US courts, compared to the *UNCSI* and the UK *SIA*.

The approaches taken by the *UNCSI* and the UK *SIA*, compared to the US *FSIA*, recognize Chinese SOEs' jurisdictional immunity in circumstances when they indeed have exercised sovereign authority as demonstrated by their purposes. Such an approach aligns with Article 5 of *ARSIWA*,[1280] and jurisprudence, in which courts have recognized that there are circumstances in which SOEs can act as arms of the state in carrying out the state's sovereign authority and functions.[1281] While this interpretative approach has the potential of granting jurisdictional immunity to Chinese SOEs in some circumstances, it still provides a framework for both courts and Chinese SOEs' business partners to determine under what circumstances Chinese SOEs would be treated as part of the state for immunity purposes and the scope of their immunity when they engage in commercial activities.

[1280] Binder & Wittich, "A Comparison of the Rules of Attribution in the Laws of State Responsibility, State Immunity and Custom", *supra* note 117 at 246-50; Schönsteiner, "Attribution of State Responsibility for Actions and Omissions of SOEs", *supra* note 6 at 906-11.
[1281] *Bancec*, *supra* note 1191; *Trendtex*, *supra* note 174; *KAC v. IAC*, *supra* note 92; *Gécamines v. FG Hemisphere*, *supra* note 957.

5.3 Chinese SOEs' execution immunity under the US *FSIA*

As noted above, Section 1610(b)(2) provides that a state agency/instrumentality's assets are subject to execution if its jurisdictional immunity was denied by the commercial exception of Section 1605(a)(2). Our analysis above shows that not only commercial Chinese SOEs, but also public welfare SOEs, cannot attract jurisdictional immunity, regardless of their sovereign purposes. Consequently, central SASAC-owned SOEs cannot attract execution immunity under the US *FSIA* as a result of their failure to attract jurisdictional immunity. In the *FG Hemisphere 1* case discussed in Chapter 3, a few subsidiaries of China Railway were identified in the *Collaboration Agreement*.[1282] The Congo and Gécamines could seek execution against China Railway's shares and interests in these subsidiaries if these companies and their assets are located in the US.

Regarding execution immunity, the effect of applying Section 1610(b)(2) of the US *FSIA* is similar to Section 14(3)—separate entities' execution immunity—of the UK *SIA*: SOEs cannot attract execution immunity for their assets if they have not acquired jurisdictional immunity even though they have "state" status under the US *FSIA*; whereas SOEs as separate entities—not part of the state—cannot attract execution immunity for their assets like states because they have not attracted jurisdictional immunity under the UK *SIA*.[1283] Chinese SOEs cannot attract execution immunity for their assets as a result of their commercial activities under the *UNCSI*, the US *FSIA* and the UK *SIA*.

[1282] Article 1.5, *Collaboration Agreement*, supra note 386, the five subsidiaries are China Railway Group (Hong Kong) Limited, China Railway Sino-Congo Mining Limited, China Railway Resources Development Limited, Sinohydro Corporation Limited, and Sinohydro Habour Co. Ltd.
[1283] Chapter 6, Section 4.2.1.

Like the *UNCSI*, the US *FSIA* also provides a military asset exception. Section 1611 (b)(2) provides that "the property is, or is intended to be, used in connection with a military activity and (A) is of a military character, or (B) is under the control of a military authority or defense agency."[1284] Because Chinese SOEs like China Electronics fail to attract jurisdictional immunity, it is unlikely that they can successfully claim execution immunity regarding its assets that will be used for a military purposes. In this regard, although Chinese SOEs like China Electronics have "state" status under the US *FSIA*, they have narrower protection regarding their assets for execution immunity purposes, compared to what they can potentially have under the *UNCSI* and the UK *SIA* if they have been given jurisdictional immunity for exercising sovereign authority and their assets have been determined to be used for a military purpose as discussed in previous Chapters.

6. Conclusion

This Chapter showed that the US *FSIA* takes a distinctive approach toward the definition of state agency/instrumentality for immunity purposes by including SOEs. The US Supreme Court's decision in *Dole Food* affirmed that a simple direct and majority ownership by a foreign state in an SOE is sufficient to establish that an SOE is a state agency/instrumentality for immunity purposes. The US Supreme Court in *Weltover* affirmed that the interpretation of what constitutes a commercial activity for jurisdictional immunity purposes is solely determined by the nature of the conduct and that the purpose is irrelevant.

Applying the above tests to the 97 central SASAC-owned SOEs, we found that they are state agencies/instrumentalities, *i.e.*, they have "state" status to claim immunity under Section 1603(b)(2). This is a significant difference from the *UNCSI* and the UK *SIA*. Under the *UNCSI*,

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[1284] Section 1611(b)(2), US *FSIA*.

to qualify as a state agency/instrumentality as part of the state to claim immunity, an entity has to be entitled to perform and has actually performed sovereign authority. The UK *SIA* does not have an equivalent notion of state agency/instrumentality. Corporations, including SOEs, are usually to be treated as separate entities outside the scope of the state for purposes of claiming immunity under Section 14(1) of the UK *SIA* unless they demonstrate they are state organs or departments of state. An SOE that is a separate entity could only attract jurisdictional immunity *ratione materiae* if it has exercised sovereign authority and a state would be immune in the same situation under Section 14(2) of the UK *SIA*. Although the US *FSIA* has a broader scope of the state that includes SOEs, it restricts SOEs' actual jurisdictional immunity through its strict nature of the conduct test that does not consider the conduct's purpose under the commercial exception. This is another difference between the US *FSIA* and the *UNCSI* and the UK *SIA*. As a consequence, Chinese SOEs' prospects for attracting jurisdictional immunity are likely lower under US *FSIA*, compared to what they can potentially acquire under the UK *SIA* and the *UNCSI*, where the purpose of the conduct can be taken into account.

Regarding execution immunity, in principle, Chinese SOEs cannot claim execution immunity when they fail to attract jurisdictional immunity under the US *FSIA*. This is in line with the *UNCSI* and the UK *SIA*. However, in previous Chapters, we noted that public welfare SOEs and commercial SOEs like China Electronics are likely to gain execution immunity under the *UNCSI* and the UK *SIA* if their sovereign purposes are taken into account as evidence of their exercise of sovereign or public authority. These SOEs have less privileges for execution immunity under the US *FSIA*, compared to what they can potentially have under the *UNCSI* and the UK *SIA*.

Chapter 8 Conclusion

1. The thesis's findings

While the principle of restrictive immunity has become customary international law, some of its technical details are unsettled. For example, no settled customary international law tests on the relationship between the state and SOEs and the commercial exception to jurisdictional immunity have emerged (see the various tests exhibited in Table-1 and Table-2 below).[1285] At the same time, China does not accept that customary international law affords only restrictive immunity. It claims an absolute immunity for itself and embraces a concept of state for immunity purposes that excludes SOEs.[1286] China's position has led to confusion and frustration in international litigation against China and Chinese SOEs. This is an important issue because Chinese SOEs stand at the forefront of Chinese foreign investments. This problem has become more acute because a substantial number of Chinese SOEs are key actors in China's BRI projects, which seek to revive China's old trade routes with infrastructure projects in dozens of countries that has both economic and political gravity.[1287]

Against this backdrop, this thesis examined Chinese SOEs' ability to claim sovereign immunity under the customary international law of restrictive immunity as expressed in and supplemented by the 2004 *UNCSI*, the 1976 US *FSIA* and the 1978 UK *SIA*. In investigating the immunity status of the 97 SOEs in which the Chinese central government has direct and full/majority ownership, this thesis answered two questions: (1) under what circumstances would these 97 Chinese SOEs be treated as part of the state for immunity purposes under the *UNCSI*,

[1285] Chapter 2, Sections 2.2, 3 and 4; Chapter 5, Sections 2 and 3.1.
[1286] Chapter 3, Sections 2 and 3.
[1287] Chapter 1, Section 2.2; Wang, "BRI Agreements", *supra* note 753; Wang, "China's Approach to the Belt and Road Initiative", *supra* note 69; Lew et al., "China's Belt and Road", *supra* note 69 at 12.

the US *FSIA* and the UK *SIA*; (2) under what circumstances would these 97 Chinese SOEs attract jurisdictional and execution immunities thereunder.

To execute this research endeavour, I employed a comparative methodology, conducted a political economy analysis, and analyzed cases in selected jurisdictions that have incorporated and supplemented the customary international law of restrictive immunity.

My core argument was that Chinese SOEs have a dual identity as defined by the Chinese political economy and the understanding of it is critical to our full assessment of Chinese SOEs' "state" status and immunity under the law of sovereign immunity. Chinese SOEs' dual identity has two aspects. The first aspect is that, based on China's SOE categorization, there are commercial and public welfare SOEs in the current SOE regime. Commercial SOEs are further divided into two groups: "commercial SOEs in fully competitive industries and sectors" and "commercial SOEs in industries and sectors that have an impact on national security and lifeline of economy." However, China never finished the categorization work by telling us which SOEs are commercial ones and which are public welfare ones. China neither distinguished "commercial SOEs that are in competitive businesses" from "commercial SOEs that are in industries and sectors that have an impact on national security and lifeline of national economy."[1288] As a result of this lack of clarity for SOE categorization, the status and functions of 97 SOEs owned by central SASAC must be determined by their primary business and the purpose thereof, including whether they are in a national security sector identified by the CPC, and whether they have exercised sovereign authority on a case-by-case basis. In this thesis, an SOE was treated as a "commercial SOE that is in industries and sectors that have an impact on national security and lifeline of national economy" if its primary business falls into a national

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[1288] Chapter 4, Section 3.2.

security sector as identified by the CPC. Based on China's recent treaty practice with the European Union, if an SOE provides poverty relief or natural disasters relief, it could fall into the category of "public welfare SOE." In other situations, an SOE is likely to fall into the category of "commercial SOEs that are in competitive businesses." In principle, all central SASAC-owned Chinese SOEs have a dual identity and the degree to which SOEs are engaged in carrying out public function or exercising sovereign authority may vary from one SOE to another SOE (*e.g.*, one is a commercial SOE and one is a public welfare SOE) and from one transaction or activity to another (*e.g.*, one transaction is importing mineral resources for a general industrial usage purpose and one transaction is importing semi-conductors for a military usage purpose). The second aspect of Chinese SOEs' dual identity is that commercial Chinese SOEs, whether they are in competitive sectors or national security and economic lifeline sectors, all have a dual identity. The sovereign aspect is even stronger for "commercial SOEs in industries and sectors that have an impact on national security and lifeline of economy."[1289]

In exploring Chinese SOEs' "state" status and immunity under the *UNCSI*, the US *FSIA* and the UK *SIA*, I studied how each regime defines the state and applies the commercial exception to jurisdictional and execution immunities in Chapters 5, 6, and 7. Article 2(1)(b)(iii) of the *UNCSI*'s requires an entity to be "entitled to perform and [is] actually performing acts in the exercise of sovereign authority of the [s]tate" to qualify as a state agency/instrumentality for purposes of claiming immunity.[1290] This is a high threshold test for an SOE to meet when it is conducting commercial transactions. Compared to the *UNCSI*, the UK *SIA* takes a stricter approach toward the scope of the state regarding corporate entities. Unless a corporate entity,

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[1289] Chapter 4, Section 3.2.
[1290] Article 2(1)(b)(iii), *UNCSI*, see also Chapter 5, Section 2.1.

including an SOE, has demonstrated that it is a state organ or department of the state under Section 14(1) of the UK *SIA*, it should be treated as a separate entity thereunder—which is outside the scope of the state—if it is distinct from the executive organ, and can sue and be sued.[1291] It is thus difficult for an SOE to be considered part of the state for immunity purposes under the UK *SIA*. As a separate entity, an SOE can only attract immunity *ratione materiae* if it has exercised sovereign authority under Section 14(2) of the UK *SIA*, a test that is similar to that under Article 2(1)(b)(iii) of the *UNCSI*. In contrast to the *UNCSI* and the UK *SIA*, the definition of the state under the US *FSIA* includes an SOE if it is directly owned by the state with a majority shareholding right. Hence, SOEs have presumptive immunity under the US *FSIA* as they are state agencies/instrumentalities as defined by Section 1603(b) of the US *FSIA*.[1292] However, their immunity will be limited by an application of the exceptions stipulated in the US *FSIA*, particularly, Section 1605(a)(2)—commercial activity exception. Based on Section 1605(a)(2), SOEs cannot attract immunity for their commercial activities in the US courts regardless of whether these activities have a sovereign purpose.[1293]

Based on the different analytical frameworks applied under the *UNCSI*, the US *FSIA*, and the UK *SIA* toward the definition of the state and the commercial exception to jurisdictional immunity, we reached different conclusions on Chinese SOEs' jurisdictional immunity and execution immunity under each regime:

- Under the *UNCSI*, commercial SOEs in principle are unlikely to acquire state agency/instrumentality status under Article 2(1)(b)(iii) based on their commercial activities. Consequently, they are unlikely to attract jurisdictional and execution

[1291] Section 14(1), UK *SIA*, see also Chapter 6, Section 3.
[1292] Section 1603(b), US *FSIA*, see also Chapter 7, Section 3.1.2.
[1293] Section 1605(a)(2), US *FSIA*, see also Chapter 7, Section 5.

immunities under the treaty. In exceptional situations, commercial SOEs and public welfare SOEs can potentially gain state agency/instrumentality status under Article 2(1)(b)(iii) and attract jurisdictional immunity for engaging in commercial transactions that are closely related to their inherently sovereign functions—such as military and public welfare—as demonstrated by their purposes.

- Under the UK *SIA*, commercial SOEs in principle are treated as separate entities under Section 14(1). In most circumstances they are unlikely to attract either jurisdictional immunity or execution immunity for their commercial activities. However, they can potentially attract immunity *ratione materiae* if they have exercised inherently sovereign authority, such as military authority, in their commercial transactions as demonstrated by their purposes. To the contrary, public welfare SOEs can potentially be treated as state organs for exercising public functions. Otherwise, they will be treated as separate entities because of their separate corporate formality and their ability to make day-to-day business decisions. In both situations, whether public welfare SOEs can potentially acquire jurisdictional immunity *ratione materiae* for their commercial transactions depends on whether their purposes are evidence of their implementation of inherently public functions such as providing food or medications to the public.
- Compared to the *UNCSI* and the UK *SIA*, the US *FSIA* provides SOEs with an easy way to acquire "state" status through the state's direct and majority ownership. Thus, all SOEs—be they commercial ones or public welfare ones—enjoy presumptive immunity *ratione personae* under the US *FSIA*. But their presumptive immunity will be restricted for having engaged in commercial transactions under the broad commercial exception of Section 1605(a)(2) of the US *FSIA*.

I will elaborate upon my key findings in Sections 1.1-1.5 below.

1.1 Commercial Chinese SOEs' dual identity

My analysis of the commercial Chinese SOEs' dual identity in the Chinese political economy provides the following insights:

- The commercial identity of commercial Chinese SOEs, such as China Railway and Sinohydro, should be presumed in their domestic and overseas business ventures. This is because they have separate legal personality, independent corporate assets, independent business decision-making capacity in their day-to-day operations, even though the state and the CPC collectively or individually assert certain degrees of control and influence over these SOEs, such as through executive appointments and significant decision-making.
    - Commercial SOEs' primary pursuit of commercial interests in their business transactions, compared to their incidental sovereign purposes, will mean they are unlikely to acquire "state" status and to attract immunity.
- The sovereign identity of some commercial SOEs and public welfare SOEs should not be overlooked. Chinese SOEs are legally required to contribute to China's political and policy goals in their business operations. This is particularly shown in some Chinese SOEs' contribution to the state's inherently sovereign or public functions, such as the military, poverty relief, and natural disasters relief. Their purposes of carrying out these sovereign and public functions will be relevant to determining their "state" status and immunity.

1.2 Assessing Chinese SOEs' "state" status under the *UNCSI*, the US *FSIA* and the UK *SIA*

Chinese SOEs can claim "state" status and/or attract immunity *ratione personae* under the *UNCSI*, the UK *SIA*, and the US *FSIA* (with the UK *SIA*'s additional prescription of immunity *ratione materiae*) only if the relevant treaty or statutory criteria are met, as summarized in Table-1:

UNCSI	UK *SIA*		US *FSIA*
Immunity *ratione personae*	Immunity *ratione personae*	Immunity *ratione materiae*	Immunity *ratione personae*
Article 2(1)(b)(iii): an entity is a state agency/instrumentality if it is "entitled to perform and [is] actually performing acts in the exercise of sovereign authority of the [s]tate."	Section 14(1): whether an entity is a "state organ" or a "separate entity" depends on whether it meets the "control + function" test established in *Trendtex*.	Section 14(2): a "separate entity" can attract immunity if "the proceedings related to anything done by it in the exercise of sovereign authority" and "a state … would have been so immune" in the same circumstances.	Section 1603(b)(2): an entity is a state agency/instrumentality if the state has direct and majority ownership in it.
In principle, commercial SOEs are unlikely to attract *ratione personae* based on their commercial activities. In exceptional situations, public welfare SOEs and some commercial SOEs, however, can potentially acquire state agencies/instrumentalities	Satisfying the "control + function" test per *Trendtex*, a central SASAC-owned SOEs—even they are separate juridical entities—can become a state organ and have immunity *rationae personae*. Failing the *Trendtex* test or demonstrating that they are	As separate entities—if found exercising sovereign authority based on the nature and purpose of the conduct in the context—can potentially attract immunity *ratione materiae* under Section 14(2).	The 97 central SASAC-owned Chinese SOEs are state agencies/instrumentalities—be they commercial SOEs or public welfare SOEs—under Section 1603(b) with immunity *ratione personae* based on the state's direct and majority ownership.

status under Article 2(1)(b)(iii) for exercising inherently sovereign or public authority in their commercial transactions as evidenced by their purposes in a *UNCSI* jurisdiction where the court considers the purpose of the transaction as instructed by Article 2(2).	distinct from the state, and can sue and be sued, these Chinese SOEs are separate entities and are not immune, unless requirements provided in Section 14(2) are met.		

Table-1

As shown in the Table-1, to attract immunity *ratione personae* under the *UNCSI*, UK *SIA*, and the US *FSIA*, an SOE has to meet different tests. Under the *UNCSI*, the key is whether the SOE is "entitled to perform and [is] actually performing acts in the exercise of sovereign authority of the [s]tate."[1294] Under the US *FSIA*, it is whether the state has direct and majority ownership over the SOE.[1295] Under the UK *SIA*, it is whether the SOE is a state organ or department of the state under the *Trendtex*'s "control + function" test.[1296] Unlike the *UNCSI* and the US *FSIA*, the UK *SIA* grants separate entities—excluded from the scope of the state by Section 14(1)—immunity *ratione materiae* if they have exercised sovereign authority and a state would be immune in the same circumstance under Section 14(2).[1297] To qualify for separate entity under the UK *SIA*, an entity must be distinct from the state organs and departments of the state, and can sue and be

[1294] Article 2(1)(b)(iii) of the *UNCSI*, see Appendix.
[1295] Section 1603(b), US *FSIA*, see Appendix.
[1296] Section 14(1), UK *SIA*, see Appendix.
[1297] Section 14(2), UK *SIA*, see Appendix.

sued.[1298] For an SOE to attract immunity *ratione materiae* under the *UNCSI* and the *US FSIA*, the precondition is for that entity to attract immunity *ratione personae* in the first place. In contrast, for an SOE to attract immunity *ratione materiae* under the UK *SIA*, to acquire the "state" status and immunity *ratione personae* is not a precondition.

Under the *UNCSI* and the UK *SIA*, public welfare SOEs and some commercial SOEs are likely to acquire "state" status and immunity *ratione personae* to the extent that they have performed acts in the exercise of sovereign authority, such as they purchased food or medications for the population that suffered from poverty or natural disasters. However, this requires the court in a *UNCSI* jurisdiction or in the UK to consider the purposes of the transactions and how closely they are related to an exercise of sovereign authority. If they successfully do so under either regime based on their exercise of sovereign authority in connection with the transaction giving rise to the claim against them, they have a higher probability of succeeding in claiming immunity *ratione materiae* by arguing that the commercial exception does not apply. But in most situations, commercial SOEs should be treated as separate entities that have no immunity *ratione personae* under the UK *SIA*. They can claim immunity *ratione materiae*, however, if they demonstrate that they have exercised sovereign authority in connection with the transaction giving rise to the claim.

In contrast, the US *FSIA* imposes a direct and majority ownership threshold test that does not consider if any sovereign authority has been exercised by an SOE for it to become part of the state for immunity purposes. Thus, the 97 central SASAC-owned Chinese SOEs easily fall into the scope of state agencies/instrumentalities of the US *FSIA*. Their immunity *ratione materiae* is,

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[1298] Section 14(1), UK *SIA*, see Appendix.

however, limited by exceptions stipulated in Section 1605, including when they are engaged in commercial activity as stipulated by Section 1605(a)(2).[1299]

1.3 Assessing Chinese SOEs' jurisdictional immunity under the *UNCSI*, the US *FSIA* and the UK *SIA*

The three regimes studied in this thesis provide different tests to distinguish commercial conduct from sovereign conduct. The *UNCSI* permits the consideration of both the nature and the purpose of the conduct in some circumstances. The nature of the conduct will play a decisive role but the purpose of the conduct will play a complementary role if (1) the parties agree to it, or (2) the forum court permits the purpose to be considered under its domestic law. The UK judicial practice shows that UK courts look at both the nature and the purpose of the conduct in the overall context and frame the test as a "contextual" approach (like the Supreme Court of Canada). Under the contextual approach, the nature of the conduct plays a predominant role and the purpose of the conduct plays an incidental role. By contrast, the US *FSIA* applies a "nature-only" approach toward the determination of commercial conduct, *i.e.*, US courts do not consider the purpose of the conduct at center of the dispute. Their differences are summarized in Table-2.

Legal regime	*UNCSI*	UK *SIA*	US *FSIA*
Provision	Section 2(2)	Section 3(3)	Section 1605(a)(2)
Legal test prescribed	"Nature + purpose" (if the parties agree or the forum law considers purpose)	Unspecified	Nature only, no purpose
Judicial practice	No reported case yet	"Contextual" approach: nature (predominant) +	Nature only confirmed by the US Supreme Court

[1299] Chapter 7, Sections 3 and 4.

		purpose (incidental) in the overall context applied by the UK courts	
Assessing the 97 Chinese SOEs' jurisdictional immunity based on their dual identity	As noted in Table-1, public welfare SOEs and some commercial SOEs like China Electronics carrying on inherently sovereign activities can potentially acquire "state" status. In this event, they ***can potentially*** attract jurisdictional immunity for their commercial transactions that support their exercise of their sovereign/public functions. This conclusion is subject to the forum court's consideration of the purpose of the transaction and treatment of the purpose as a demonstration of an exercise of inherently sovereign authority or	Whether public welfare SOEs are categorized as state organs or separate entities, they ***are likely*** to attract jurisdictional immunity *ratione materiae* for their commercial activities that are related to their exercise of sovereign authorities. As noted in Table-1, commercial SOEs are most likely to be treated as separate entities. In principle, commercial SOEs as separate entities ***are unlikely*** to attract jurisdictional immunity for their commercial activities because UK courts gives the nature of the conduct the predominant role in their assessment. However, if an SOE's purpose in its business transaction illustrates its exercise of inherently sovereign authority such the	The 97 central SASAC-owned SOEs—be they public welfare SOEs or commercial SOEs—***are unlikely*** to attract jurisdictional immunity for their commercial ventures in US courts even though they have presumptive immunity *ratione personae*. This is because Section 1605(a)(2) provides that only the nature of the conduct is the benchmark for determining if an SOE' act can attract jurisdictional immunity.

	function. In most situations, commercial Chinese SOEs like China Railway and Sinohydro ***are unlikely*** to attract jurisdictional immunity for their commercial transactions because their sovereign purposes are often incidental compared to their predominantly commercial transactions.	military authority, the SOE ***can potentially*** acquire jurisdictional immunity for such commercial transactions.	

Table-2

As shown in the Table-2, in principle, commercial Chinese SOEs are unlikely to attract jurisdictional immunity for their commercial conduct under the *UNCSI*, the UK *SIA*, and the US *FSIA*. However, public welfare SOEs and commercial SOEs like China Electronics can potentially attract jurisdictional immunity to the extent that they have exercised inherently sovereign authority or public functions (military, poverty relief, and natural disasters relief) in their business transactions as reflected by their sovereign purposes. This is because both the *UNCSI* (by way of the forum's law) and the UK *SIA*'s judicial practice allow the consideration of the purpose of the transaction in the characterization process. In contrast, under the US *FSIA*, Chinese SOEs—be they public welfare SOEs or commercial SOEs—are unlikely to attract jurisdictional immunity for their commercial transactions even if they have "state" status because

the US *FSIA* applies a strict commercial exception that excludes the consideration of the purpose of the conduct in the characterization process.

The *UNCSI*, the US *FSIA*, and the UK *SIA* all ensure that Chinese SOEs, in most circumstances, are unable to attract jurisdictional immunity for their commercial transactions, either because they do not have "state" status, or because they cannot enjoy immunity *ratione materiae* for their commercial transactions. Compared to the US *FSIA*, the *UNCSI* and the UK *SIA* provides some flexibility for courts in characterizing whether an SOE has exercised sovereign authority in its commercial transaction by considering the transaction's purposes. But such purposes have to be closely related to inherently sovereign authorities or public functions. Although the *UNCSI* and the UK *SIA* are more likely to afford jurisdictional immunity to some Chinese SOEs in some situations, their frameworks are more in tune with the reality that SOEs can exercise sovereign authority in their commercial capacity as authorized by the state depending on the circumstances.

1.4 Assessing Chinese SOEs' execution immunity under the *UNCSI*, the US *FSIA* and the UK *SIA*

Under the *UNCSI*, Chinese SOEs can attract execution immunity only if they are state agencies/instrumentalities and their assets are used for or are intended to be used for a sovereign purpose.[1300] Under the UK *SIA*, SOEs that are separate entities can attract execution immunity only if they have attracted jurisdictional immunity and their assets are used for or are intended to be used for a sovereign purpose.[1301] Under the US *FSIA*, if an SOE is found to be a state agency/instrumentality under Section 1603(b) and does not enjoy jurisdictional immunity under

[1300] Chapter 5, Section 3.2.
[1301] Chapter 6, Section 4.

Section 1605(a)(2), its assets, whether they are related to a claim or not in the dispute proceeding, do not enjoy execution immunity despite their usage purpose under Section 1610(b)(2).[1302] The execution immunity that can be enjoyed by Chinese SOEs' assets under the *UNCSI*, the UK *SIA*, and the US *FSIA* are summarized in Table-3 below.

Legal regime	*UNCSI*	UK *SIA*	US *FSIA*
Provision(s)	Article 19(c) and its Understanding	Sections 13(2), 13(4), and 14(3)	Section 1610(b)(2)
Test for the commercial exception to execution immunity	Article 19(c): Assets that are "specifically in use or intended for use by the [s]tate for other than government non-commercial purposes" are not immune from execution.	Section 14(3): In the event a separate entity attracts jurisdictional immunity per Section 14(2), paragraphs (1)-(4) of Section 13 on states' execution immunity apply to that separate entity. Section 13(4): state assets which are "for the time being in use or intended for use for commercial purposes" are not immune from execution.	Section 1610(b)(2): A state agency/instrumentality's assets are not immune from execution so long as it has engaged in a commercial activity without regard to purpose of the transaction.
The assets of the 97 Chinese SOEs' execution immunity	In most situations, commercial SOEs ***are unlikely*** to attract execution immunity for	In most situations, commercial SOEs as separate entities ***are unlikely*** to attract	In most situations, SOEs—be they commercial ones or public welfare ones—as agencies/instrumentalities

[1302] Chapter 7, Section 4.2.

	their assets if they fail to become agencies/instrumentalities. In exceptional situations, public welfare SOEs and commercial SOEs that are agencies/instrumentalities ***can potentially*** attract execution immunity for being state agencies/instrumentalities and their assets are used or intended to be used for a sovereign purpose, such as for military or public welfare use.	execution immunity for their assets if they fail to attract jurisdictional immunity for undertaking commercial activities. In exceptional situations, public welfare SOEs (either as state organs or separate entities) and commercial SOEs (as separate entities) ***can potentially*** attract execution immunity for their assets if they have exercised sovereign authority while they engage in commercial activities (thus, attracting jurisdictional immunity) and their assets are or intended to be used for a sovereign purpose as provided by Section 13(4).	***are unlikely*** to attract execution immunity for their assets if they have engaged in commercial activities as their jurisdictional immunity would have been denied by Section 1605(a)(2) in the first place.
Can China claim execution immunity for repatriated profits from	Yes, if the repatriated funds are state assets under the *UNCSI*, and they are	Yes, if the repatriated funds are state assets under the UK *SIA*, and they are or intended to be	Yes, if the repatriated funds are state assets under the US *FSIA*, and they are or

the 97 SOEs when it is sued?	used or intended to be used for a sovereign purpose.	used for a sovereign purpose. Notably, in light of the UK Supreme Court decision in *SerVaas v. Rafidian Bank*, China can succeed in claiming execution immunity for SOEs' repatriated profits as they have been earmarked to be paid to the public social insurance fund, which has a sovereign usage purpose.	were used for a sovereign purpose.

Table-3

1.5 Changing China's position on states' and SOEs' immunity

1.5.1 Changing China's absolute immunity position to restrictive immunity

China's contemporary rationale for its absolute immunity position includes—as crystalized in the *FG Hemisphere 1* case—avoiding diplomatic confrontation, protecting China's overseas interests and properties, reciprocity, economic cooperation, and China's foreign policies.[1303]

This thesis recommended China embrace restrictive immunity for a few reasons. First, it allows China to conform to, and participate in the practice of the development of the customary international law of restrictive immunity. Many rules in restrictive immunity, such as the tests to the definition of the state and the commercial exception to jurisdictional immunity as shown in this thesis, are unsettled. It is to China's long-term interests to shape their development by

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[1303] Chapter 3, Section 4.1.

participating in the resolution of these unsettled issues. For example, China has a key interest in shaping the rule of the SOE's immunity by way of defining what constitutes a state agency/instrumentality for immunity purposes in light of the fundamental role Chinese SOEs play in China's political economy, compared to other states. Ideally, that would include ratifying the *UNCSI* and enacting a domestic enabling statute to articulate the Chinese position on these issues. This is because the definition of state agency/instrumentality found in the *UNCSI* aligns with China's position regarding SOEs' immunity. On the one hand, Chinese SOEs are not part of the state for immunity purposes when they undertake commercial activities under Article 2(1)(b)(iii) of the *UNCSI*, which requires the entity to be "entitled to perform and [is] actually performing acts in the exercise of sovereign authority of the [s]tate" to become part of the state. On the other hand, if Chinese SOEs have actually performed acts in the exercise of sovereign authority in extraordinary situations, Article 2(1)(b)(iii) of the *UNCSI* allows them to become part of the state for immunity purposes, as China has indicated in its position in *China National Coal*.[1304] Also, the *UNCSI* permits the forum court to consider the purpose of the conduct in characterizing whether a transaction is commercial or not for jurisdictional immunity. As China takes the position that the purpose of the conduct should be considered by courts in this characterization process, this is another reason for China to adopt the *UNCSI*. In doing so, China will not only strengthen the state practice that takes into account the purpose of the conduct in determining whether a transaction is commercial, but also reflect China's political economy in which Chinese SOEs' sovereign aspect of their dual nature is often manifested in their purposes.

This thesis also identified some obstacles for China to make this change, such as China's particular version of respecting sovereignty and sovereign equality, its preference for bilateral

[1304] Chapter 3, Section 3.1.1.

negotiations on rights and obligations in exchange for economic cooperation, and the academic narrative among some Chinese scholars that absolute immunity protects China's litigation interest in foreign domestic courts.[1305]

As noted in Chapter 1 and the Postscript, China's position on sovereign immunity is likely changing.[1306] China published the *Foreign State Immunity Law (Draft)* for public consultation on 30 December 2022.[1307] The key features of China's draft law include embracing restrictive immunity and incorporating commercial exceptions to both jurisdictional and execution immunity. Notably, regarding the definition of state agency/instrumentality, it adopts a definition that resembles the *UNCSI*, which requires the person or entity that claims "state" status to have authorized sovereign authority from the state and have actually performed that sovereign authority. Regarding the commercial exception to jurisdictional immunity, the law takes into account both the nature and the purpose of the conduct in the characterization process.[1308] These features in China's draft law align with my recommendations that China should adopt restrictive immunity,[1309] give attention to the definition of state regarding SOEs,[1310] and articulate the test that determines what constitutes a commercial transaction for jurisdictional immunity purposes.[1311]

1.5.2 Clarifying China's position on SOEs' categorization

China—in *China National Coal*—argued that Chinese SOEs were not part of the state for immunity purposes (as well as liability purposes) unless Chinese SOEs were given specific

[1305] Chapter 3, Section 4.2.
[1306] Chapter 1, Section 1.1; Postscript.
[1307] National People's Congress, *Foreign State Immunity Law* (Draft) Public Consultation, *supra* note 32.
[1308] Postscript.
[1309] Chapter 3, Section 4.2.
[1310] Chapter 3, Section 4.2.
[1311] Chapter 3, Section 4.2.

instructions to undertake actions in extraordinary circumstances.[1312] As China did not define the nature of the actions, the instructed actions could be either sovereign or commercial in nature.[1313] This position is different from China's statements made in the *UNCSI*'s drafting process—which suggested that Chinese SOEs were not part of the state for immunity purposes in all circumstances.[1314] The nuance of China's position as expressed in *China National Coal* is that Chinese SOEs can be part of the state when certain criteria are met. This means that China's absolute immunity position for states—which China argued that excluded SOEs—actually includes or could include SOEs, depending on the circumstances.

China's outright exclusion of Chinese SOEs from the scope of the state for immunity purposes on the international plane derives from its concern that its own sovereign immunity could be jeopardised, and its international state responsibility could be triggered by SOEs' actions, if SOEs are included as part of the state.[1315] But this thesis showed that in most situations, Chinese SOEs are unlikely to be considered part of the state for immunity purposes under the *UNCSI* and the UK *SIA* despite their domestic dual identity. But Chinese SOEs could potentially attract jurisdictional immunity under the *UNCSI* and the UK *SIA* in circumstances that they have exercised sovereign authority in their commercial transactions. Additionally, Chinese SOEs indeed have successfully characterized themselves as state agencies/instrumentalities for immunity purposes under the US *FSIA*.[1316] Chinese SOEs' success in claiming "state" status for immunity purposes under the US *FSIA* is contrary to China's wishes to portray Chinese SOEs as corporate commercial actors that are distinctive from the

[1312] Chapter 3, Section 3.1.1.
[1313] Chapter 3, Section 3.
[1314] Chapter 5, Section 4.2.3.
[1315] Chapter 3, Section 3.1.1.
[1316] See *Chinese Manufactured Drywall*, *supra* note 1204.

state.[1317] That partly owes to how the US *FSIA* defines the state agency/instrumentality by including SOEs with a state's direct and majority ownership. But as we saw in Chapter 7 and Section 1.3 above, Chinese SOEs are unlikely to attract jurisdictional immunity for their commercial activities in US courts under the strictly applied commercial exception of the US *FSIA*.

From a Chinese political economy perspective, China should recognize that it could use and has been using SOEs to achieve the state's and the CPC's social, economic and political goals and policies in the Chinese state-driven economy and abroad.[1318] China's position expressed in *China National Coal* that Chinese SOEs can be part of the state for immunity purposes in extraordinary situations reflect this Chinese domestic reality to some extent. When China frames its international positions on SOEs, such as under the law of sovereign immunity, it needs to take into account Chinese SOEs' domestic dual identity.

Additionally, China could clarify under what circumstances (1) a Chinese SOE is independent from the state as a commercial actor, *i.e.*, its only business is to pursue commercial interests; and (2) a Chinese SOE is a not a commercial actor but a state organ/agency/instrumentality as part of the state in the Chinese political economy, *i.e.*, its only or primary business is to pursue sovereign, non-profit interests under Chinese laws.[1319] This will provide Chinese SOEs' commercial counterparts not only with business certainty but also with a better understanding of when a Chinese SOE would be immune. In the event Chinese SOEs may

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[1317] For example, China argued that "[s]tate-owned-enterprises (SOEs) engaged in commercial competition are equal players in the market as other types of enterprises" in its proposal on WTO reform. See WTO, *China's Proposal on WTO Reform*, *supra* note 43 at para. 2.35.
[1318] Chapter 4, Section 2.
[1319] See Han Liyu (韩立余), "国际法视野下的中国国有企业改革" [Chinese State-Owned Enterprise Reform from the Perspective of International Law] (2019) 6 China Legal Science (中国法学) 161, 179. Han proposes that Chinese SOEs should be divided into three groups: commercial SOEs, public SOEs, national security SOEs. [Han, Chinese SOEs Reform from the Perspective of International Law]

be immune, parties contracting with Chinese SOEs can incorporate a waiver of immunity clause in their agreements. To achieve this goal, China needs to finish its proposed categorization of Chinese SOEs, *i.e.*, clarifying what SOEs are commercial SOEs and what are public welfare SOEs as it intended to do in 2015. Give the pervasive dual identity of Chinese SOEs, it will be difficult but necessary.[1320]

2. The thesis's contribution

As noted in the introductory Chapter, the SOE issue has been approached in different manners in different regimes (including subsidies, competition, investment treaties, state responsibility and sovereign immunity).[1321] My thesis investigated and contributed to the assessment of Chinese SOEs' "state" status and immunity under the customary international law of sovereign immunity based on Chinese SOEs' dual identity as defined by the Chinese political economy. This thesis's findings will enable parties and states that have commercial relationships with Chinese SOEs to better understand their dual identity, which includes a sovereign aspect. It will also help them to determine when Chinese SOEs will and will not attract immunity in international law. Moreover, my research will be informative for Chinese SOE reform—assisting China to further draw the line between the state and SOEs—which will support China's international stance on Chinese SOEs from an international law perspective.[1322] My work also provides China with reasons to embrace restrictive immunity and align its international position on SOEs with Chinese SOEs' domestic dual identity.

[1320] Naughton, "The Current Wave of State Enterprise Reform in China", *supra* note 655; Han, Chinese SOEs Reform from the Perspective of International Law, *ibid.*
[1321] Chapter 1, Section 1.1.
[1322] See Han, "Chinese SOEs Reform from the Perspective of International Law", *supra* note 1314.

While I argue this thesis has made the above contributions, it should only be seen as a starting point for engaging in further research for both myself and other scholars who are interested in issues relating to China and international law, Chinese SOEs' corporate governance, China and Chinese SOEs in the global political economy, and the Chinese foreign relations law, as I will highlight a few points for future research in Section 3 below.

3. The subsequent research agenda

3.1 Comparative studies

I examined two domestic jurisdictions—the US and the UK—in this thesis. An examination of other jurisdictions that have embraced restrictive immunity or maintained absolute immunity would further contribute to our understanding of where the law of sovereign immunity is. It would also provide interesting grounds to test Chinese SOEs' "state" status and immunity. I intend to incorporate some other jurisdictions in converting this thesis to a book for publishing purposes as part of my subsequent research agenda.

3.2 The relationship between China (central, provincial and local SASACs) and their "tiered" subsidiary SOEs under the law of sovereign immunity

The issue of "tiering" involving the 97 Chinese SOEs studied in this thesis and their subsidiaries under the law of sovereign immunity requires further assessment. The immunity of SOEs' subsidiaries was not clearly articulated either in domestic laws like the US *FSIA*, the UK *SIA*, or the *UNCSI*. An exploration of this issue is necessary since it is often these subsidiaries that carry out more detailed functions of their parent SOEs, such as making and carrying out foreign investments.

3.3 Chinese SOEs' "state" status and their attribution of liability to China under the law of international state responsibility

Chinese SOEs' "state" status and the attribution of liability to China for SOEs' actions under the law of international state responsibility is another understudied issue. The important issue of "piercing the corporate veil" between a state and its SOEs (including subsidiaries) for responsibility purposes was mentioned but not addressed in the *UNCSI*. As shown in this thesis, this issue often appears in litigation against states and SOEs while they claim immunity, thus, research on this liability issue in light of Chinese SOEs' dual identity will not only have an independent academic value, but complement our understanding of Chinese SOEs' relationship to China under the law of sovereign immunity.

4. Final words

In this thesis, I examined 97 SASAC-owned SOEs' "state" status and immunity under the customary international law of restrictive immunity as expressed in different ways in the *UNCSI*, the US *FSIA*, and the UK *SIA*. In this research process, I realized the importance of the understanding of Chinese SOEs' status and functions in the Chinese political economy for the resolution of my thesis questions posed under international law.

In this thesis, I focused my research on selected jurisdictions, excluded "tiered" subsidiaries of SOEs, and treated the issue of state responsibility and liability as peripheral. These choices allowed me to go deeper on the complex issue of sovereign immunity that I have examined in this thesis. By injecting a Chinese political economy analysis in my international law assessment and make certain choices on exclusions, I believe that I have achieved my goal of assessing Chinese SOEs' "state" status and immunity under the customary international law of sovereign immunity as expressed in and supplemented by the *UNCSI*, the US *FSIA* and the UK *SIA*. As I have mentioned, some issues require further investigations. I hope this research will

ignite more meaningful conversations on China and Chinese SOEs not only under the law of sovereign immunity but also the other substantive areas of law of international state responsibility and domestic liability.

Postscript

As noted in Chapter 1, China published a *Foreign State Immunity Law (Draft)* on 30 December 2022 for public consultation.[1323] The public consultation will end on 28 January 2023.

If this law is passed, China will abandon its decades-long adherence to an absolute immunity position and embrace restrictive immunity. The underlying rationale—according to the *Explanation Note Regarding Foreign State Immunity Law (Draft)*—is:

> Within the context of economic globalization, a majority of states have turned from "absolute immunity" to "restrictive immunity", *i.e.*, [they] do not extend immunity to foreign states' non-sovereign activities such as commercial activities, and allow their domestic courts to exercise jurisdiction [over such activities of foreign states]. Currently, our external exchanges are expanding, the impact of the Belt and Road Initiative is increasing, economic cooperation between Chinese corporations and citizens and foreign states are increasing. To adapt to this new situation, support high-level opening-up, and promote the high-quality development of the Belt and Road Initiative, it is necessary to enact a law on foreign state immunity [as] based on international custom, so as to clarify that Chinese courts can exercise jurisdiction over foreign states' non-sovereign activities such as commercial activities."[1324]

The *Explanation Note Regarding Foreign State Immunity Law (Draft)* indicates that the draft law has been influenced by the *UNCSI*, the US *FSIA*, and the UK *SIA* on key provisions that we have examined in this thesis to different extents.[1325] The definition of the "sovereign state" provided in draft Article 2 consists of three subparagraphs:

> Article 2 The foreign state used in this law includes:
>
> (1) sovereign states other than the People's Republic of China;
>
> (2) agencies or constituent parts of the sovereign states as indicated in Section (1);

[1323] National People's Congress, *Foreign State Immunity Law* (Draft) Public Consultation, *supra* note 32.
[1324] Standing Committee of the National People's Congress, *Explanation Note Regarding Foreign State Immunity Law (Draft)*, *supra* note 31 [author's translation].
[1325] *Ibid*, it noted that the *Foreign State Immunity Law (Draft)* was drafted with reference to international conventions and major state practice.

> (3) natural persons, legal persons, organizations that are not legal persons that have been authorized by sovereign states as indicated in Section (1) and have actually exercised such sovereign authority.[1326]

Notably, draft Article 2(3) finds its inspiration in *UNCSI*'s definition of state agency/instrumentality and imposes the requirements that a person or an entity must have been authorized and have actually exercised sovereign authority to acquire "state" status for immunity purposes under this law. Unlike the US *FSIA*, draft Article 2(3) does not include an SOE as part of the state simply by an existence of direct and majority state ownership.

Like the *UNCSI*, the US *FSIA*, and the UK *SIA*, China's *Foreign State Immunity Law (Draft)* includes a commercial exception to both jurisdictional and execution immunity. Paragraph 1 of draft Article 7 provides the commercial exception to jurisdictional immunity:

> Article 7 The commercial activity engaged by a foreign state with natural persons, legal persons, organizations that are not legal persons from other states (including China), that occurred in China, or has direct effect with the territory of China even if the commercial activity occurred outside of China, for litigation arising from such commercial activity, the foreign state does not have jurisdictional immunity in Chinese courts.[1327]

Paragraph 2 of draft Article 7 provides what constitutes a commercial activity and how it should be interpreted by courts:

> The commercial activity as used in this law, means any transactions in goods, services, investments, or other activities that are commercial in nature that are not an exercise of sovereign authority. For a Chinese court to determine if an activity is a commercial activity, the nature and purpose [of the activity] shall be considered altogether.[1328]

Paragraph 2 of draft Article 7 explicitly instructs courts to consider both the nature and the purpose of the conduct in determining whether a transaction is a commercial one. This is close to the *UNCSI* and the UK judicial practice and in contrast with the US *FSIA*'s exclusive nature test.

[1326] Article 2, *Foreign State Immunity Law* (Draft) [author's translation].
[1327] Article 7, paragraph 1, *Foreign State Immunity Law* (Draft) [author's translation].
[1328] Article 7, paragraph 2, *Foreign State Immunity Law* (Draft) [author's translation].

Draft Article 13(3) provides the commercial exception to execution immunity:

> Article 13 The property of foreign state enjoys immunity from judicial measures of constraint, except in the following situations:
>
> […]
>
> (3) for purposes of executing a binding judgment of China, and the property of the foreign state is used for commercial activity, has a connection with the litigation, and is located in China.[1329]

Draft Article 13(3) resembles Article 19 of the *UNCSI* in most part but imposes a connection requirement between the targeted assets and the underlying litigation. Under the *UNCSI*, the connection requirement is made to "the entity against which the proceeding was against."

Overall, China's *Foreign State Immunity Law (Draft)* embraces restrictive immunity and adopts a definition of state agency/instrumentality that is close to the *UNCSI*'s approach, which aligns with China's position on SOEs' Crown and sovereign immunity as it has expressed in *China National Coal*. It also explicitly includes the purpose element in determining whether a transaction can be characterized as a commercial one for jurisdictional immunity purposes. It also includes a commercial exception to execution immunity. These key provisions of the draft law reflect what I have argued China should adopt in this thesis.

The next National People's Congress is scheduled to open in March 2023. It is to be seen if this law will be passed and if so, to what extent it will be changed from this version for public consultation.

[1329] Article 13(3), *Foreign State Immunity Law* (Draft) [author's translation].

Appendix: Key provisions from the *UNCSI*, the UK *SIA*, the US *FSIA* that are cited in the thesis

1. The *UNCSI*

Article 2 Use of Terms

Article 2(1)(b) “State” means:

(iii) agencies or instrumentalities of the State or other entities, to the extent that they are entitled to perform and are actually performing acts in the exercise of sovereign authority of the State.

Article 2(1)(c) “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 of indemnity in respect of any such loan or transaction;

(iii) any other contract or transaction of a commercial, industrial, trading or professional nature, but not including a contract of employment of persons.

Article 2(2). In determining whether a contract or transaction is a “commercial transaction” under paragraph 1 (*c*), reference should be made primarily to the nature of the contract or transaction, but its purpose should also be taken into account if the parties to the contract or transaction have so agreed, or if, in the practice of the State of the forum, that purpose is relevant to determining the non-commercial character of the contract or transaction.

Article 10 Commercial Transactions

1. If a State engages in a commercial transaction with a foreign natural or juridical person and, by virtue of the applicable rules of private international law, differences relating to the commercial transaction fall within the jurisdiction of a court of another State, the State cannot invoke immunity from that jurisdiction in a proceeding arising out of that commercial transaction.
2. […]
3. Where a State enterprise or other entity established by a State which has an independent legal personality and is capable of:

(a) suing or being sued; and

(b) acquiring, owning or possessing and disposing of property, including property which that State has authorized it to operate or manage,

is involved in a proceeding which relates to a commercial transaction in which that entity is engaged, the immunity from jurisdiction enjoyed by that State shall not be affected.

Article 19 State immunity from post-judgment measures of constraint

No post-judgment measures of constraint, such as attachment, arrest or execution, against property of a State may be taken in connection with a proceeding before a court of another State unless and except to the extent that:

(a) the State has expressly consented to the taking of such measures as indicated:

(i) by international agreement;

(ii) by an arbitration agreement or in a written contract; or

(iii) by a declaration before the court or by a written communication after a dispute between the parties has arisen; or

(b) the State has allocated or earmarked property for the satisfaction of the claim which is the object of that proceeding; or

(c) it has been established that the property is specifically in use or intended for use by the State for other than government non-commercial purposes and is in the territory of the State of the forum, provided that post-judgment measures of constraint may only be taken against property that has a connection with the entity against which the proceeding was directed.

Annex to the Convention

With respect to article 10

The term “immunity” in article 10 is to be understood in the context of the present Convention as a whole.

Article 10, paragraph 3, does not prejudge the question of “piercing the corporate veil”, questions relating to a situation where a State entity has deliberately misrepresented its financial position or subsequently reduced its assets to avoid satisfying a claim, or other related issues.

With respect to article 19

The expression “entity” in subparagraph (c) means the State as an independent legal personality, a constituent unit of a federal State, a subdivision of a State, an agency or instrumentality of a State or other entity, which enjoys independent legal personality.

The words “property that has a connection with the entity” in subparagraph (c) are to be understood as broader than ownership or possession.

Article 19 does not prejudge the question of “piercing the corporate veil”, questions relating to a situation where a State entity has deliberately misrepresented its financial position or subsequently reduced its assets to avoid satisfying a claim, or other related issues.

2. The US *FSIA*

Section 1603 Definitions

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity—

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

[…]

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

Section 1605 General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

[…]

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States[.]

Section 1610 Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

[…]

(2) the property is or was used for the commercial activity upon which the claim is based[.]

[…]

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

[…]

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a) (2), (3), (5), 1605(b), or 1605A of this chapter, regardless of whether the property is or was involved in the act upon which the claim is based.

3. The UK *SIA*

Section 3.—(1) A state is not immune as respects proceedings relating to—

(a) a commercial transaction entered into by the State; or

(b) an obligation of the State which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in the United Kingdom.

[…]

(3) In this section "commercial transaction" means—

(a) any contract for the supply of goods or services;

(b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and

(c) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority;

but neither paragraph of subsection (1) above applies to a con- tract of employment between a State and an individual.

Section 13.—(1) No penalty by way of committal or fine shall be imposed in respect of any failure or refusal by or on behalf of a State to disclose or produce any document or other information. for the purposes of proceedings to which it is a party.

(2) Subject to subsections (3) and (4) below—

[…]

(b) the property of a State shall not be subject to any process for the enforcement of a judgment or arbitration award or, in an action in rem, for its arrest, detention or sale.

[…]

(4) Subsection (2)(b) above does not prevent the issue of any process in respect of property which is for the time being in use or intended for use for commercial purposes[.]

Section 14.—(1) The immunities and privileges conferred by this Part of this Act apply to any foreign or commonwealth State other than the United Kingdom; and references to a State include references to—

(a) the sovereign or other head of that State in his public capacity;

(b) the government of that State; and

(c) any department of that government,

but not to any entity (hereafter referred to as a "separate entity ") which is distinct from the executive organs of the government of the State and capable of suing or being sued.

(2) A separate entity is immune from the jurisdiction of the courts of the United Kingdom if, and only if—

(a) the proceedings relate to anything done by it in the exercise of sovereign authority; and

(b) the circumstances are such that a State (or, in the case of proceedings to which section 10 above applies, a State which is not a party to the Brussels Convention) would have been so immune.

(3) If a separate entity (not being a State's central bank or other monetary authority) submits to the jurisdiction in respect of proceedings in the case of which it is entitled to immunity by virtue of subsection (2) above, subsections (1) to (4) of section 13 above shall apply to it in respect of those proceedings as if references to a State were references to that entity.

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