THE EMPEROR'S OLD BONDS

Mike Chen,* Charlie Fendrych,** and Andres Paciuc***

Recent news articles have suggested that Trump's trade war may finally provide relief to American holders of defaulted, pre-1950s Chinese bonds. Here, we examine the hurdles set before these bondholders, namely establishing jurisdiction over the People's Republic of China as a sovereign and the long-lapsed statute of limitations. We also evaluate the Chinese government's possible recourse.

Our investigation yielded key takeaways. First, to establish jurisdiction in the U.S., the bond must be denominated in U.S. Dollars or state a place of performance within the country. Second, to overcome the long-expired statute of limitations and win an equitable remedy, it must be shown that the PRC violated an absolute priority or pari passu clause and is a "uniquely recalcitrant" debtor. Finally, despite China's commitment to the odious debt doctrine, the doctrine is unlikely to provide meaningful legal protection in an otherwise successful suit. Overall, it is a difficult suit to bring. However, through our investigations, we have discovered one issue in particular which holds the greatest danger—or perhaps the greatest promise: the Chinese Government 2-Year 6% Treasury Notes of 1919.

* J.D. Candidate at Duke University School of Law, Class of 2021.
** J.D. Candidate at Duke University School of Law, Class of 2021.
*** J.D. Candidate at Duke University School of Law, Class of 2021.

I. INTRODUCTION

As recent business news articles have highlighted,[1] interest in pre-1950s Chinese bonds is currently experiencing a resurgence. Pre-1950s bonds, some of which include the Hukuang Railways Sinking Fund Gold Loan of 1911, the Chinese Government Treasury Notes of 1919, and the Liberty Bonds of 1937, predate the existence of the People's Republic of China ("PRC").[2] When the PRC was founded in 1949, the new regime refused to maintain the debt obligations of its predecessor, and the bonds have since been in default. These bonds are presently found in thousands of American homes, as antiques or collector's items, or on eBay and similar sites, for hundreds of dollars.[3] The ancient bonds, however, may be worth more than their value as antiques. Not only are American politicians floating the idea of using the defaulted bonds as leverage in light of the increasing economic and geopolitical tensions with the PRC, but bondholders are also interested in recovering on the defaulted bonds because of the potentially hefty award.[4] Some estimate that the PRC owes a total of more than one trillion dollars on its pre-1950s debt.[5]

This article examines the legal elements that need to be satisfied in order for holders of pre-1950s Chinese debt to bring suit against the PRC successfully. It will first examine if and how bondholders can establish jurisdiction over the PRC. The article will then analyze how bondholders can overcome the long-lapsed statute of limitations. Finally, the article will briefly examine whether the PRC can use the relatively obscure odious debt argument to protect itself from these suits. The article concludes that while it is a difficult suit for bondholders to bring, there is one bond issue that holds the greatest danger to the PRC and the greatest promise for bondholders: the Chinese Government 2-Year 6% Treasury Notes of 1919.

1. Tracy Alloway, *Trump's New Trade War Tool Might Just be Antique China Debt*, BLOOMBERG BUSINESSWEEK (Aug. 29, 2019, 8:37 AM), https://www.bloomberg.com/news/articles/2019-08-29/trump-s-new-trade-war-weapon-might-just-be-antique-china-debt [https://perma.cc/6VZF-FM6X]; Izabella Kaminska, *Antique Chinese Bonds are Now in Play*, FIN. TIMES (July 29, 2020), https://www.ft.com/content/7a65b99c-e419-49da-bf47-33acb91ed4a3?shareType=nongift [https://perma.cc/AL3D-TXSX]; Jonathan Garber, $*1.6T in Century-Old Chinese Bonds Offer Trump Unique Leverage Against Beijing*, FOX BUS. (May 14, 2020), https://www.foxbusiness.com/markets/historic-chinese-bonds-trump-leverage-beijing [https://perma.cc/ M6DD-SEUC].

2. Kaminska, *supra* note 1.

3. *Id.*

4. *Id.*; Alloway, *supra* note 1.

5. Alloway, *supra* note 1; Garber, *supra* note 1.

II. ESTABLISHING JURISDICTION

The majority of domestic holders of pre-1950s Chinese bonds will be barred from bringing suit against the PRC due to a lack of jurisdiction over the nation as sovereign. Under current U.S. law, however, some issuances are more susceptible to suit. Since 1952, the U.S. has subscribed to the restrictive theory of sovereign immunity, which excludes certain types of sovereign action from immunity.[6] In 1976, this policy was codified by the Foreign Sovereign Immunities Act ("FSIA").[7] Importantly, the U.S. Supreme Court affirmed that restrictive immunity of sovereign immunity can be retroactively applied to debt obligations issued before 1952.[8] When applying restrictive immunity, the relevant portion of the FSIA provides that a foreign state is not immune from U.S. jurisdiction when 1) "an act outside the territory of the United States" 2) occurs "in connection with a commercial activity of the foreign state elsewhere" and 3) "that act causes a direct effect in the United States."[9] Previous U.S. suits have shown that various issues of the pre-1950s Chinese bonds implicate the first two factors but failed to show direct effects in the U.S. for several reasons.[10] For example, the court in *Morris v. People's Republic of China*[11] held that the plaintiff's failed to show direct effects in the U.S. because there was no evidence "of prior ownership of plaintiff's bonds by U.S. citizens or corporations at the time of any default."[12] The court also rejected the argument that "a financial loss to a plaintiff (individual or corporate) by virtue of its residence or place of incorporation is itself sufficient to establish a direct effect 'in the United States' when all other facts point abroad."[13]

There are, however, many bonds that do not share these flaws. Holders of the 1911 Sinking Fund Gold Bonds[14] and the Chinese Government 2-Year

---

6. Letter from Jack B. Tate, Acting Legal Adviser, U.S. Dep't of State, to Philip B. Perlman, Acting Att'y Gen. (May 19, 1952), *reprinted in* 26 DEP'T ST. BULL. 984 (1952).

7. 28 U.S.C. §§ 1330, 1602–11.

8. Republic of Austria v. Altmann, 541 U.S. 677, 697–99 (2004).

9. 28 U.S.C. § 1605(a).

10. Morris v. China, 478 F. Supp. 2d 561, 567–68, 570 (S.D.N.Y 2007) ("[Prior case law supports that] a financial loss to a plaintiff (individual or corporate) [is not] by virtue of its residence or place of incorporation . . . itself sufficient to establish a direct effect 'in the United States' . . . ."); *see* Pons v. China, 666 F. Supp. 2d 406, 412–14 (S.D.N.Y. 2009) (holding that the financial injury in question failed to satisfy "direct effect" because it happened to an American secondary market purchaser from a default on bonds negotiated and consummated outside the United States by non-U.S. parties).

11. *Morris*, 478 F. Supp. 2d at 570.

12. *Id.*

13. *Id.*

14. *See* MOODY'S MANUAL OF RAILROADS AND CORPORATION SECURITIES 292 (1924) (describing the origin, basic terms and provisions of the Sinking Fund Gold Bonds issuance; as well as discussing

6% Treasury Notes of 1919[15], for example, would likely succeed in establishing direct effects. When evaluating direct effects, courts look to 1) whether there was a causal relationship between the act and the subsequent harm[16] and 2) whether the harm was felt directly within the U.S.[17] In evaluating causal effect, courts have found that contract breach can be sufficient harm[18] and that plaintiffs can arguably rely on the immediacy and directness of the effects felt by *former holders* of the bonds.[19] Regarding connectedness to the U.S., courts consider 1) the citizenship or place of incorporation of the bondholder at the time of default,[20] 2) where the instruments were purchased,[21] and 3) the contractually designated place of performance.[22] Unlike previously litigated Chinese bonds, the 1911 Sinking Gold Fund Bonds pass the direct effects test because they were sold in the U.S. by J.P. Morgan and Co., were listed on the New York Stock Exchange, and could be redeemed in New York.[23] Similarly, the 1919 6% 2-Year Bonds were issued in the U.S. to a Chicago bank, denominated in dollars, and payable in New York or Chicago.[24] However, these are not the only Chinese

---

how the funds were used for the construction of railways in China and stating what their listing was on the N.Y. Stock Exchange) [hereinafter MOODY'S MANUAL OF SECURITIES].

15. 3 FOREIGN RELATIONS OF THE UNITED STATES: DIPLOMATIC PAPERS 1935, at 652 (1953). Note that this should not be confused with the Pacific Development Company's loan to China of a similar amount. *See* JOHN MOODY, MOODY'S RATING BOOK SERVICE: GOVERNMENTS AND MUNICIPALS 292 (Maurice N. Blakemore et al. eds., 1922) (noting the potential for confusion between these two bonds).

16. Republic of Arg. v. Weltover, Inc., 504 U.S. 607, 618 (1992) ("[A]n effect is 'direct' if it follows 'as an immediate consequence of the defendant's . . . activity.'").

17. *See Morris*, 478 F. Supp. 2d at 569–71 (affirming that financial loss to a U.S corporation, alone, fails to constitute a "direct effect").

18. *Id.* at 568 ("Financial loss arising from a breach of contract can constitute an [direct] effect."); *see Weltover, Inc.*, 504 U.S. at 618–19 (holding that rescheduling maturity dates on debt instruments constituted a direct effect).

19. *Morris*, 478 F. Supp. 2d at 569.

20. *See id.* ("If plaintiff alleged that U.S. citizens held his bonds at the time of any default, the Court would then have to consider whether citizenship was sufficient to place the direct effect 'in the United States . . . .'").

21. Pons v. China, 666 F. Supp. 2d 406, 412 (S.D.N.Y. 2009) (noting that a financial injury resulting from a defaulted bond purchased on an American secondary market is insufficient for finding connectedness).

22. *See Weltover*, 504 U.S. at 619 (finding there were "necessarily" effects in the U.S. because the place of performance was New York).

23. MOODY'S MANUAL OF SECURITIES, *supra* note 14. Fortunately, these bonds are the first and only issue of Railway Bonds that involved U.S. banks, as the so called "American Group" of banks acting in China was terminated by President Wilson in 1913. LESLIE EATON CLARK, GEORGE BRONSON REA, PROPAGANDIST: THE LIFE AND TIMES OF A MERCENARY JOURNALIST 104 (Kalman Goldstein ed., 2018). Also, subsequent attempts to issue the contractually provided for second series failed. *See* Telegram from J.P. Morgan & Co., of N.Y., to Morgan Grenfell & Co., of London (Oct. 6, 1932) (on file with the U.S. Dep't of State: Office of the Historian) (noting that the economic conditions in China made further bond issuances "quite impossible").

24. MOODY, *supra* note 15.

bonds with major commercial effects in the U.S., nor is this an argument that the only way to attain direct effects is by contracting for performance within the U.S..

Recent Southern District of New York cases firmly assert that a U.S. citizen or corporation's financial loss is insufficient to establish direct effects[25] (and several circuits seem to agree).[26] However, the Southern District of New York is the only court that has heard the issue in this resurrected bond context. It is plausible that the U.S. government's views on this debt will evolve and that U.S. courts will become friendlier to creditors.[27] For instance, the renewed and increased political movement behind the bonds may cause courts to take creditors' claims more seriously.[28] It is also plausible that a different court might simply reach a different result.[29] The message is that there are probably more bonds capable of achieving jurisdiction over the PRC than current litigation suggests. Further, this increases the chance that one of the bonds contains a provision that will allow litigants to overcome the next hurdle: the statute of limitations.

III. TOLLING THE STATUTE OF LIMITATIONS & EQUITABLE RELIEF

Given the age of the pre-1950s Chinese bonds, the statute of limitations presents a significant barrier to collecting on the defaulted interest and principal payments. When a claim is brought under the FSIA, the state where the suit is brought determines whether the plaintiffs' claim is time-barred.[30] For example, barring certain exceptions, the statute of limitations for

25. *Pons*, 666 F. Supp. 2d at 413; *Morris*, 478 F. Supp. 2d at 567–70.

26. *See* Virtual Countries, Inc. v. Republic of S. Afr., 300 F.3d 230, 240 (2d Cir. 2002) ("[P]laintiff's more expansive theory, that *any* 'U.S. corporation's financial loss constitutes a direct effect in the United States . . . is plainly flawed.") (emphasis in original) (citations omitted).

> [A]n American corporation's failure to receive promised funds abroad will not qualify as a 'direct effect in the United States.' The 'direct effect' in such a case is the failure to receive the funds, which occurs abroad . . . and the financial injury, though ultimately felt in the United States, is too attenuated to qualify as direct . . . .

Big Sky Network Canada, Ltd. v. Sichuan Provincial Gov't, 533 F.3d 1183, 1191 (10th Cir. 2008). *But see* Weltover, Inc. v. Republic of Arg., 941 F.2d 145, 152 (2d Cir. 1991) ("[A] foreign sovereign's improper commercial acts cause an effect to the foreign corporate plaintiff in that plaintiff's place of incorporation or principal place of business.").

27. Alloway, *supra* note 1.

28. *See generally id.* (discussing bondholders' hopes that the Trump administration would seek payment of pre-Communist Chinese bonds); Kaminska, *supra* note 1 (discussing a growing political movement to pressure China into paying antique Chinese bonds); Garber, *supra* note 1 (discussing political proposals to enforce payment of the bonds).

29. *See Pons*, 666 F. Supp. 2d at 414 n.5 (demonstrating that judges are occasionally willing to reach potentially surprising results in strict accordance with the terms of a contract).

30. Dar El-Bina Eng'g & Contracting Co. v. Republic of Iraq, 79 F. Supp. 2d 374, 388 (S.D.N.Y. 2000).

bringing a contract claim in New York is six years.[31] The limitations period begins to run "on each [interest] installment from the date it becomes due" and on the principal amount the day after the bond matures.[32] Consequently, courts have held that claims for bonds issued by the PRC's predecessor governments are time-barred.[33] Even viewed in the light most favorable to a potential plaintiff, there is no readily apparent basis for tolling the statute of limitations for recovery on defaulted payments on these bonds before the 1980s, since the PRC was officially recognized by the United States in 1979.[34]

However, courts have not precluded the possibility that a pre-1950s bond containing a *pari passu* clause, or other related provision, that would make equitable relief appropriate could not toll or circumvent the statute of limitations.[35] Indeed, the PRC's predecessor states have defaulted on bonds with provisions that pose such a threat. The 4 ½% Gold Loan of 1898 contains an absolute priority provision promising "priority, both as regards principal and interest, over all subsequent loans . . .",[36] meaning these bond payments are to be paid before any other debt obligation. Fortunately, this loan was to be performed outside the U.S., so the PRC is likely protected against jurisdiction. Notwithstanding this, there is a possibility that a bond stipulating performance in the U.S. containing a similar provision exists, that equitable relief could be found appropriate, or that an even more remote argument could succeed.

A. Possible Tolling

Regarding known dollar-denominated bonds, the Sinking Fund Gold Bonds of 1911 and the Chinese Government 2-Year 6% Treasury Notes of 1919 contain similar language to the 1898 Gold Loan bonds, but with narrower provisions, promising priority only on enumerated revenues.[37] The *Pons* court has precluded any claims relating to priority on "Salt Administration Revenues" noting the Salt Administration has long been defunct.[38] Nevertheless, there remains a variety of priorities relating to more

31. N.Y. C.P.L.R. 213(2) (McKinney 2019).

32. Vigilant Ins. Co. v. Hous. Auth., 660 N.E.2d 1121, 1125–26 (N.Y. 1995).

33. *See* Morris v. China, 478 F. Supp. 2d 561, 573 (S.D.N.Y. 2007) (barring recovery on principal and interest payments on bonds issued by the Chinese government in 1913 on statute of limitations grounds).

34. *Id.* at 572.

35. *See* Pons v. China, 666 F. Supp. 2d 406, 414 n.5 (S.D.N.Y. 2009) (discussing the possibility of a valid *pari passu* clause that might circumvent statute of limitations issues).

36. MOODY, *supra* note 15, at 291.

37. *Id.* at 292–93.

38. *Pons*, 666 F. Supp. 2d at 414 n.5.

general "Provincial Revenues" that could fare better in court, such as the "Hupei General Lekin,"[39] which could be analogized to a present-day tax on or relating to the province of Hubei.[40] If that is accepted, then considering the fungibility of money, the proceeds of these taxes have funded some payment of debt obligations incurred after the default on the Imperial bonds and could contribute to the finding of a violation of the priority provisions.

A similar argument might work for the 2-Year 6% Treasury Notes of 1919, as they are secured by a "first charge"[41] on the "Goods Taxes" of four Chinese provinces.[42] In a supplementary agreement regarding the loan, this provision was clarified to mean "[t]he Goods tax receipts from the provinces of Honan, Anhui, Fukien, and Shensi, whether such receipts be in the nature of likin taxes, transportation taxes, or *other taxes or imposts of like natures*."[43] This distinguishes these bonds from those secured by specific taxes, like the Salt Administration Revenues, and clarifies that these "Goods Taxes" were to be construed liberally. Again, when considering the fungibility of money, it is very likely that relevant taxes have been paid out to other creditors, which would violate the first priority asserted by these bonds and toll the statute of limitations to the last instance of preferential payment.

The 1919 bonds are also secured by revenues from the "Tobacco and Wine Public Sales Tax,"[44] which was imposed in 1915.[45] The alcohol monopoly instituted by the PRC in 1951 replaced earlier tax policies,[46] so those revenues could likely only be attached by construing the provision as a general security in China's sin taxes. If they could be attached, however, the 1919 bonds provide that the Chinese government is to make available a lump sum in gold from those revenues during each year that the debt goes

39. *Imperial Chinese Government Loan*, COM. & FIN. CHRON., June 17, 1911, at XIX; *see also* MOODY'S MANUAL OF SECURITIES, *supra* note 14, at 292.

40. *See infra* note 43 and accompanying text (supporting the notion that these taxes were meant to be construed generally).

41. A "first charge" is "something akin to a security interest" and "impl[ies] that bondholders will have priority over other creditors." Mark C. Weidemaier et al., *Origin Myths, Contracts, and the Hunt for* Pari Passu, 38 L. & SOC. INQUIRY 72, 89–90 (2013).

42. MOODY, *supra* note 15, at 292.

43. Supplementary Agreement Regarding Securities Under Continental and Commercial Bank Loan of 1916, China-Cont'l & Commercial Tr. & Sav. Bank Chi., art.1, May 14, 1917, *reprinted in* 2 TREATIES AND AGREEMENTS WITH AND CONCERNING CHINA 1894-1919, at 1343 (John V.A. MacMurray ed., 1921) (emphasis added).

44. *Id.* pmbl.

45. *See* Xu Guo & Yong-guang Huang, *The Development of Alcohol Policy in Contemporary China*, 23 J. FOOD & DRUG ANALYSIS 19, 20 (2015).

46. *Id.* at 21.

unpaid.[47] This arguably constitutes a breach in each year that the debt remains unpaid and the gold unfurnished, which would toll the statute of limitations to the current day. Ultimately, of the bonds surveyed, the 1919 bonds seem to be the most plausible to bring suit on. This may be reflected by higher trading valuations in online marketplaces.[48] If so, this could refute the recent S.D.N.Y. assertion that these bonds are priced and sold as collectibles and strengthen the case against China.[49]

B. Equitable Relief and the "Uniquely Recalcitrant" Debtor

An equally serious cause for concern is the possibility of equitable relief. In 2012, the Second Circuit granted holders of an Argentinian bond, which had defaulted in 2001, an injunction enforcing the bond's *pari passu* clause.[50] In violation of the clause, which contained an "Equal Treatment Provision," the Argentine government had made payments on new issues of bonds without paying holders of the defaulted bonds.[51] The Second Circuit affirmed an injunction requiring specific performance of Argentina's obligations under this provision.[52] Later holdings have, however, narrowed the grant of equitable relief to situations where the debtor is "uniquely recalcitrant."[53] The Second Circuit thereby heightened the requirement that must be met in order for a sovereign debtor to be considered in breach of a

47. Agreement for a Loan of U.S. Gold $5,000,000, China-Cont'l & Commercial Tr. & Sav. Bank Chi., art. 3, Nov. 16, 1916, *reprinted in* 2 TREATIES AND AGREEMENTS WITH AND CONCERNING CHINA 1894-1919, at 1337 ("[T]he receipts from said Tobacco and Wine Public Sales Tax will net the Chinese Government during each of the years that all or any part of said Five Million Dollar ($5,000,000) loan, both principal and interest, is unpaid, a sum equivalent to at least Five Million Dollars ($5,000,000) in gold coin of the United States of America . . . . [which t]he Chinese Government will promptly apply towards the payment of said Treasury Notes . . . ."); MOODY, *supra* note 15, at 292 ("During each of the years that all or any part of this loan remains unpaid, a net sum equal at least to $5,500,000 in gold shall be received upon such revenues . . . and shall be available for the service of this loan.").

48. At the time of writing, the only bonds readily available from this issuance were two $1,000 denominations selling for $1,500.00 and $4,500.00, respectively. *1919 Republic of China—6% Gold Loan Treasury Notes—$1000*, TOKENS-GIRL NUMISMATIC, https://www.tokens-girl.ca/product/1919-republic-of-china-gold-loan-6-1000-treasury-notes/ [https://perma.cc/XS2A-SY5C] (last visited Mar. 6, 2021); *Republic of China $1000 Dollar Bond Gold Loan 1919 PASS-CO Authentication*, EBAY, https://www.ebay.com/ (input "Republic of China $1000 Dollar Bond Gold Loan 1919 PASS-CO Authentication" into the search bar and click on the first result) [https://perma.cc/4CWF-C2SL] (last visited Mar. 6, 2021). This is a very small sample but represents an apparent premium (and a large one at that) over other old Chinese bonds issued in similar quantities.

49. *See* Morris v. China, 478 F. Supp. 2d 561, 567–68 (S.D.N.Y. 2007).

50. NML Capital, Ltd. v. Republic of Arg., 699 F.3d 246, 250–51 (2d Cir. 2012).

51. *Id.* at 259–60.

52. *Id.* at 250.

53. White Hawthorne, L.L.C. v. Republic of Arg., No. 16-CV-1042, 2016 WL 7441699, at *2 (S.D.N.Y. 2016) (quoting NML Capital, Ltd. v. Republic of Arg., 727 F.3d 230, 247 (2d Cir. 2013)); *see also* Aurelius Capital Master, Ltd. v. Republic of Arg., 644 F. App'x 98, 107 (2d Cir. 2016) (quoting *NML Capital, Ltd.*, 727 F.3d at 247).

pari passu clause. To now be "uniquely recalcitrant," a pattern of payments prioritizing one group of creditors over another alone is insufficient.[54] Furthermore, neither public and official disavowals of the debt nor enacting legislation that affects one class of creditors disparately are alone sufficient to be considered "uniquely recalcitrant."[55] In order for a sovereign to be considered a "uniquely recalcitrant" debtor, courts require a confluence of the aforementioned factors, in conjunction with the sovereign's "course of conduct."[56]

Although the PRC is unlikely to be characterized as a "uniquely recalcitrant" debtor because of the high threshold, there are certain arguments that a bold bondholder could make. A plaintiff could persuasively argue that the PRC has established a much longer pattern of uncooperative behavior than Argentina. Having resumed issuing bonds since 1981, and having faithfully paid those bondholders over defaulted bondholders, the PRC has engaged in preferential creditor treatment for nearly half a century. The PRC has publicly maintained its disavowal of these debts for even longer, having held fast to this position since its rise to power in 1949.[57]

Although *Black's Law Dictionary* does not define "recalcitrant", *Merriam-Webster* defines the term as "obstinately defiant of authority,"[58] and *Oxford English Dictionary* adds "uncooperative, refractory; objecting to constraint or restriction."[59] The PRC's aforementioned pattern of behavior could be characterized as "uncooperative", and indeed, "obstinate" in its defiance. Further, the PRC's longstanding refusal to appear in U.S. court[60] could likewise be framed as "recalcitrant," although the PRC has since revised this policy.[61] This limits the effect of this argument, particularly given the court's apparent willingness to look past the PRC's past misconduct if it has been corrected.

If these arguments are used in conjunction with an absolute priority provision, or even a violated *pari passu* clause, and the suit is brought in

54. *White Hawthorne, L.L.C.*, 2016 WL 7441699, at *2–3; *see* Exp.-Imp. Bank of the Republic of China v. Gren., No. 13 Civ. 1450(HB), 2013 WL 4414875, at *4 (S.D.N.Y. 2013) (stating that payment of other creditors over Taiwan was not enough to establish Grenada's breach of *pari passu*).

55. *Id.*

56. *Id.*

57. See discussion of odious debts *infra* Part IV.

58. *Recalcitrant*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2003).

59. *Recalcitrant*, OXFORD ENGLISH DICTIONARY (3d ed. 2010).

60. *See* Jackson v. China, 550 F. Supp. 869, 874 (N.D. Ala. 1982) ("Not only has the People's Republic of China refused to avail itself of the legal procedures available to set aside entry of default, it has returned all documents sent to it and has indicated that it will not be a party to this suit.").

61. *See* Jackson v. China, 794 F.2d 1490, 1492–94 (11th Cir. 1986) (noting China's first qualified appearance before a U.S. court; and that prior to this appearance, China was seemingly oblivious to the change in federal law from a policy of absolute sovereign immunity to restrictive sovereign immunity).

front of a court that abides by the sanctity of contracts (like in *Jamaica Avenue*[62]), there is a chance that an equitable remedy could be won. What is clear is that plaintiffs would need to prove that China has been "bad, very bad to come close" to being considered "uniquely recalcitrant."[63]

C. Remote Alternatives

There are other, more remote means of getting around the statute of limitations that are still worth mentioning: set-off by the U.S. government and official Chinese recognition of the debt. A significant number of these debts being assigned to the U.S. government pose a problem for the PRC. If the U.S. government is sued, the U.S. can reduce the debt owed to the plaintiff by asserting a time-barred "claim of the United States," even if the claim does not arise out of the same transaction. Because China holds over $1 trillion in U.S. debt,[64] the U.S. government would have little trouble identifying debt to offset outstanding Imperial Chinese Bonds. Granted, the threat is mitigated by the implausibility that the "U.S. can identify which bonds are held by China, that it can selectively reduce the amount it pays on those bonds . . . and that the Chinese government doesn't sell the bonds to someone else."[65] Not to mention that Treasury regulations on bond issuance and payment likely preclude any attempt to pursue this.[66]

IV. ODIOUS DEBT AND OTHER ARGUMENTS

In the unlikely chance that the PRC encounters an adverse ruling, it can argue that its pre-1950s debt is odious and therefore it is not legally or morally obliged to repay it. While there are many definitions of the odious debt doctrine,[67] the term generally refers to "debts incurred in opposition to

62. *See* 216 Jamaica Ave., L.L.C. v. S & R Playhouse Realty, 540 F.3d 433, 441 (6th Cir. 2008) (holding that a gold clause, from a nearly one-hundred-year-old contract, was enforceable).

63. Joseph Cotterill, *Sovereign* Pari Passu *and the Litigators of the Lost Cause*, 9 CAP. MKTS. L.J. 18, 21 (2013).

64. Bryan Borzykowski, *China's $1.2 Trillion Weapon that Could be Used in a Trade War with the US*, CNBC (Apr. 5, 2018, 11:06 AM), https://www.cnbc.com/2018/04/05/chinas-1-point-2-trillion-weapon-that-could-be-used-in-a-us-trade-war.html [https://perma.cc/8EHY-H86V].

65. Mark Weidemaier & Mitu Gulati, *Enough with the Old Chinese Debt Already*, CREDIT SLIPS (Sept. 10, 2019, 8:31 PM), https://www.creditslips.org/creditslips/2019/09/enough-with-the-old-chinese-debt-already.html/ [https://perma.cc/SUW8-2DQN].

66. *Id.*

67. *See, e.g.*, JEFF KING, THE DOCTRINE OF ODIOUS DEBT IN INTERNATIONAL LAW: A RESTATEMENT 51–56 (2016). Noting that there are a number of definitions of odious debt: Sack defined "debts odious for the population of an entire state" as a despotic regime contracting a debt to strengthen itself, while Bedjoui defined "odious debts" as "all debts contracted by the predecessor State with a view to attaining the objectives contrary to the major interests of the successor State or of the transferred territory," and "for a purpose not in conformity with international law and, in particular, the principles of international law embodied in the Charter of the United Nations." *Id.*

a revolution or for other oppressive purposes."[68] Because odious debts are incurred against the population's best interest, it follows that a successor regime is not responsible for the odious debts of its predecessors.[69]

As it has done in prior litigation on the railway bonds, the PRC can argue that its pre-1950s debt is odious because "the Chinese view the bonds as an improper part of the Western powers' domination of China at the beginning of [the 20th] century and as a direct cause of the Revolution of 1911."[70] Ample historical evidence demonstrates that a substantial portion of the Chinese population opposed the issuance and terms of those bonds.[71] Accordingly, it is no surprise that "[t]he loan has been condemned by Chinese historians, nationalist and communist alike, as one of the ugliest crimes committed by the imperialist powers in China."[72]

Establishing the PRC's pre-1950s debt as odious, however, would not be a sufficiently adequate defense in United States courts. To avoid paying the debts, the PRC would also have to prove that the nonpayment of odious debts was "a long-established principle of international law"[73] in order for the defense to be accepted by United States courts. The PRC could highlight the historical instances in which other nations' odious and oppressive debts were repudiated in order to establish that the doctrine that "odious debts are not to be succeeded to"[74] is part of international customary law.[75] However, this is a difficult proposition.

For a U.S. court to consider that the odious debt doctrine is a part of international customary law, the doctrine must be part of the "general and consistent practice of states followed by them from a sense of legal obligation."[76] The PRC would be extremely unlikely to prove this because the doctrine of odious debt is far from "general and consistent practice."[77]

---

68. James V. Feinerman, *Odious Debt, Old and New: The Legal Intellectual History of an Idea*, 70 LAW & CONTEMP. PROBS. 193, 195 (2007).

69. *Id.*

70. Jackson v. China, 794 F.2d 1490, 1495 (11th Cir. 1986).

71. United States' Statement of Interest to Set Aside Default Judgment Against China, Jackson v. China, No. 79-C-1272-E, at 1082–108 (N.D. Ala. Aug. 18, 1983); *see* JOHN K. FAIRBANK ET AL., EAST ASIA: THE MODERN TRANSFORMATION 629–31 (1965); O. EDMUND CLUBB, TWENTIETH CENTURY CHINA 39 (3d ed. 1978).

72. K.C. Chan, *British Policy in the Reorganization Loan to China 1912-13*, 5 MOD. ASIAN STUD. 355, 355 (1971).

73. Morris v. China, 478 F. Supp. 2d 561, 565 n.6 (S.D.N.Y 2007).

74. *Id.*

75. *See* KING, *supra* note 67, at 73–77, 102, 116–19 (discussing a comprehensive list of historical cases where sovereigns' repudiated debt, including the instances in Cuba, Yugoslavia, Costa Rica, and the Soviet repudiation of Tsarist debt).

76. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 102(2) (AM. LAW INST. 1987).

77. *Id.*

The odious debt doctrine is "perhaps the most debated legal doctrine in international finance"[78] and some scholars point out that "no court, international or municipal, has ever explicitly recognized the existence of such a doctrine, and argue that there is little historical evidence that any of the payments or non-payments of despotic debts were driven by beliefs about [the] legal doctrine."[79]

Even if the odious debt doctrine were a part of international customary law, the PRC would still face many hurdles using the doctrine as the basis for their repudiation of the pre-1950s debt. The fact that the Republic of China[80] continued to make interest payments on railway bonds until the mid-1930s, when it encountered financial difficulties, evinces that the railway bonds may not have been odious. Modern plaintiffs could easily argue that the Republican government "recognized the usefulness of the railway and its benefits to national development, notwithstanding the controversy its financing engendered."[81] Thus, if the railway bonds benefited the Chinese population at the time, then they can no longer be deemed odious.[82] Further, foreign governments' involvement in the bonds does not mean that the debts are inherently odious.[83] Debts can be incurred under situations of unequal bargaining power and still benefit the debtor nation's population.[84]

While the PRC released a statement in 1955 saying that it didn't acknowledge any debts by its predecessor governments,[85] it appears, however, that the PRC's "English version of the document containing this quotation [was] incorrectly translated, and that it actually states that the PRC was 'unable to repay' the obligations, not that it was unwilling to."[86] Stating that one is unable to repay a debt obligation strongly suggests that the sovereign acknowledges the validity of the debt. This suggests that the PRC

78. Joseph Blocher et al., *King Leopold's Bonds and the Odious Debt Mystery*, 60 VA. J. INT'L L. 487, 528 (2020).

79. *Id.* at 492.

80. The Republic of China succeeded the Qing Dynasty after the Chinese Revolution of 1911. Aris Teon, *The Chinese Revolution of 1911—The Founding of the Republic of China*, GREATER CHINA J. (Mar. 18, 2016), https://china-journal.org/2016/03/18/chinese-revolution-1911-founding-republic-of-china/ [https://perma.cc/YWX9-JS47].

81. Feinerman, *supra* note 68, at 201.

82. *See id.* at 200.

83. *See id.* at 199 ("[T]he high degree of foreign involvement in the railway construction and lending during the late Qing period does not, in itself, prove the PRC's contention that the Huguang bonds were not just debts.").

84. *Id.* at 201 n.33 ("Despite Sun Yatsen's announced opposition to the railway loans from foreign powers at the time they were made, before the 1911 revolution, the necessity of using foreign capital for expansion of China's railways after the establishment of the Republic of China became obvious.").

85. *See* Morris v. China, 478 F. Supp. 2d 561, 564 n.5 (S.D.N.Y 2007).

86. *Id.*

regarded the debts as valid, instead of odious. Further, if the PRC considered the debts to be odious, it would have deemed them as such in 1955. In short, the PRC can fall back on arguments regarding its sovereignty. Despite this, the PRC may be better served by focusing on the aforementioned failings of the defaulted bonds and using the American legal system to its advantage.