ISSUES OF SOVEREIGN IMMUNITY IN THE AUSTRALIA-CHINA TRADE AND INVESTMENT

by

J.S. Mo*

Introduction

Although Australia and the People's Republic of China had no formal diplomatic relations until 1972, economic contacts between them have developed rather rapidly since then. In 1972 the two-way trade between the countries was $A84 million, but in the year 1986-87 the figure reached $A2.2 billion.[1] Chinese sources confirmed these figures and reported that in 1987 trade between Australia and China was US $1.61 billion, of which China's imports represented $US1.3 billion.[2] By February 1988 more than fifty Sino-Australian joint venture agreements had been signed, with two of them involving Chinese investment in Australia.[3] In the light of these developments, some Australian officials predicted that by the year 2000 China could become Australia's largest trade partner, although in 1988 China ranked only in third place in Australia's foreign trade.[4] However, in 1989 the trade relations between them were affected by the political events that had taken place in China that year.

Trade and mutual investment between Australia and China improved gradually in 1990. In that year, two-way trade between them recovered to about $2,425 million and two-way investment between them reached about $750 million, with Australian investment in China being $350 million and Chinese investment in Australia being $400 million.[5] Australian investment operates through about 80 joint ventures in China and Chinese investment in Australia involves mainly joint ventures at the Channar iron ore mine and in the Portland Aluminium Smelter. The trade and investment between these two countries is expected to increase significantly after February 1991 when the Australian Government decided to normalise its economic relationship with China.

The settlement of trade and investment disputes between Australia and China may affect the development of the economic contacts between them. Sovereign immunity is an issue which must be dealt with by both countries sooner or later. So far, no case involving sovereign immunity of the Australian or Chinese Government has received judicial consideration. However, a review of the positions of the two governments on this issue will provide some assistance should such issues arise in the future.

1. The Australian Position on State Immunity

Australia adopted the restrictive doctrine of state immunity in the *Foreign State Immunities Act* 1985 (Cth) (hereafter "the FSIA (Cth)"), which brought Australia to the

---

* LLB, (Jilin, China) LLM (Dalhousie)

1. Vol. 58, No. 10, *Australian Foreign Affairs Record* (1987) 594.
2. *China Daily* (*Renmin Ribao*, Overseas Edition, in Chinese) 15 February 1988.
3. These investments are the purchase of 10% interest in the Portland smelter in Victoria in 1983 and the purchase of 40% interests in a project of the iron ore mine in Western Australia's Pilbara region.
4. *China Daily* (*Renmin Ribao*, Overseas Edition, in Chinese) 15 February 1988.
5. New Release of the Minister for Trade Negotiation on 4 September 1990, Beijing.

same general stand in relation to state immunity as the United States, the United Kingdc Canada, and several other countries. In general, the FSIA (Cth) is influenced by both t *Sovereign Immunities Act* (U.K.) (hereafter "the SIA") of the United Kingdom and t *Foreign Sovereign Immunities Act* (U.S.) (hereafter "the FSIA (U.S.)") of the Unit States. For example, s.35, which treats the property of a separate entity in the same way the property of a state, bears the marks of the SIA of the United Kingdom; and s.22, whi extends s.17(3) to a separate entity of a foreign state is rather closer to FSIA of the Unit States than to SIA of the United Kingdom.[6] Under the FSIA (Cth), Australian courts not have jurisdiction over foreign states, except as provided by or under the Act itself.[7] T exceptions are submission by foreign states, commercial transactions of foreign stat contracts of employment concerning Australia, personal injury and damage to proper real estate, copyrights, patents, trade marks, where the foreign state is a member of a bo corporate, supervisory jurisdiction of courts with respect to arbitration which is enter into voluntarily by a foreign state, and actions *in rem* in relation to ships and cargc Obviously, the restrictive doctrine of state immunity, which was adopted as early as 1857 Belgian courts,[9] contradicts the absolute sovereignty immunity doctrine held by China.

Some features of the FSIA (Cth) that may raise potential conflicts with the prese position of China are reviewed below. First, the Australian legislation defines a separ entity as a foreign natural person or foreign corporation that is an agent or instrumental of a foreign state but is not a department or organ of the state.[10] The FSIA (Cth) apparen intends to restrict the immunity of a separate entity of a foreign state as a counter acti against the claim of immunity on state-owned enterprises engaging commercial activitie: But the provisions on separate entities may not suit the case of China, which, it will be see may not claim immunity with respect to its separate entities at all. A dispute may arise wi regard to what is property of a state-owned enterprise which is a legal person und Chinese law and what is property of a department of the Chinese Government which is n treated as a separate entity under the FSIA (Cth). Although the commercial activities both entities are subject to the FSIA (Cth), the status of the entities may result differences in enforcement of a judgment against the Chinese Government.

Secondly, commercial transactions are described as commercial, trading, busine: professional or industrial or like transactions into which the foreign state has entered, o like activity. In particular, commercial transactions include contracts for the supply goods or services; agreements for a loan or other transactions for or in respect of t provision of finance; or guarantees or indemnities in respect of financial obligation.[12] The transactions certainly cover most commercial activities a government may be involved i

6. T. Peele "The Law of Foreign Sovereign Immunity in Relation to the Trade with and Investment in China" in Moser (ed) *Foreign Trade, Investment and the Law in the People's Republic of China* Oxford University Press (2 edn) 1987 546 at 565.
7. See s.9 of the *Foreign State Immunities Act* 1985 (Cth), the "FSIA (Cth)".
8. See ss10-18.
9. *Supra*, n6 at 547.
10. S.3(1).
11. The intention of the Act was illustrated by Senator Walsh's Second Reading Speech on the *FSIA* (Cth) in the Sen on 8 October 1985. He pointed out that separate entities of a foreign State "are given, in most respect (sic), the sa immunity as the State. In practice, this means that entities with exclusively commercial functions, the majority of thc involved in dealings with Australia, will lack immunity". *Hansard* Vol.110 20 August-11 October 1985 at 796. See al the *Australian Law Reform Commission Report* ("the *ALRC*") No. 24 *Foreign State Immunity* AGPS Canberra 19 paras.72, 73 and 89.
12. S.11.

But the nature of the land-use leases made between the Chinese Government and foreign investors is arguable under the FSIA (Cth).[13]

2. The Chinese Position on State Immunity

Since 1949 the People's Republic of China has apparently adhered to the absolute immunity doctrine.[14] However, state immunity in relation to commercial and trade activities had not been a real issue in Chinese law until 1978 when China adopted an open-door trading policy.

Early studies of international law theory in China, which was deeply influenced by the Soviet Union, did not explain China's own understanding of absolute immunity. For example, while China was believed to uphold the "absolute" doctrine of sovereign immunity, at least one Chinese article criticised both the theory of absolute sovereignty,[15] and the doctrine of restrictive sovereignty allegedly held by Western countries.[16] This article then expressed its antagonism to the bourgeois theories of sovereignty, defining it as "mutual respect for sovereignty".[17] However, the article was not able to distinguish the essential differences between the principles of "mutual respect for sovereignty" and the doctrine of restrictive sovereign immunity. The arguments for "mutual respect for sovereignty" might stand if the arguments were made for clarifying what was deemed to be an acceptable relationship between sovereign States, but do not when being used to debate the substance of "sovereignty".[18] In fact, the article failed to address whether sovereignty is

13. The Chinese Government may probably argue that a land-use lease is not for commercial purposes but a measure for accommodating foreign investors. Often the land-use right is not transferred independently as a commodity but initially assigned as a right (or assurance) attached to the investment projects. Its existence is attributable to the peculiarity of the Chinese system of land ownership.

14. It must be pointed out that Chinese legal writings in the 1950's and 1960's often used the term "sovereignty" in a very broad sense, including "sovereign immunity". In fact, the term "sovereign immunity" was rarely used. Nor was the Chinese view of sovereign immunity expressly discussed. Even in articles dealing with issues of sovereign immunity, e.g. Keng-sheng Chou "Trends in the Thought of Modern English and American International Law" in J. Choen & H. Chiu (eds) *People's China and International Law* Princeton University Press Princeton 1974 at 891-3, "sovereign immunity" was broadly described but not discussed, at least not in a scholarly way. It is possible that, in that period of time, Chinese legal scholars treated "sovereign immunity" as an inherent part of sovereignty. For example, an article reviewing Western views of sovereign immunity states that sovereign immunity "is an old question in international law. Under the traditional theory of international law, the recognition of this principle of State judicial immunity, based upon State sovereignty, independence, equality, dignity, friendly relations and other reasons, is generally beyond question". (See Cohen and Chiu at 891). As we will see, some Chinese writers used terms "absolute sovereignty" and "restricted sovereignty" where they in fact dealt with issues of "sovereign immunity". Having regard to the usage of these terms in China, "sovercignty" in this article where Chinese translation or Chinese views are concerned refers to "sovereign immunity".

15. Yang Hsin & Ch'en Chien "Expose and Criticise the Imperialists' Fallacy concerning the Question of State Sovereignty" collected in Cohen and Chiu, supra n.14 at 111-2. The article argued that "the advocates of the theory of absolute sovereignty consider that in accordance with its sovereignty a State may, without being subject to any restriction, do anything it wishes to other States. That is to say, a State may impair the sovereignty of another State in order to exercise its own sovereignty. Obviously, this suits the policy of unrestrained aggression and expansion of imperialism".

16. *Ibid.* at 112. The article presented the following arguments:

> The advocates of the theory of denial of sovereignty or the theory of restrictive sovereignty mainly proclaim that States should abandon or restrict sovereignty for the sake of "the general interests of mankind" or "consolidating into legal order". They declare that sovereignty is relative, divisible, and subject to restriction and abandonment, and that as a matter of fact no State has complete sovereignty. The purpose of this theory is to prove that colonial rule and imperialist's infringement on the restriction and elimination of other States' sovereignty are all lawful.

17. *Ibid.*

18. *Ibid.* at 112. The article argued that "mutual respect for sovereignty absolutely does not mean that a State (regardless of how strong and large it is) may do whatever it wishes to other States on the pretext of exercising its sovereignty. Respect for sovereignty must be mutual: the principle that other States respect our sovereignty and we respect the sovereignty of other States. The exercise of sovereignty should be based upon the promise of not impairing the sovereignty of other States".

divisible or subject to restriction and abandonment.[19] Thus, the assumed antagonism to the restrictive sovereignty doctrine does not address the issues of restrictive immunity. Nor does it draw a line between restrictive and absolute immunity, as the article attempted to.

The vagueness of China's official position toward state immunity has not changed much since 1978,[20] but a trend to break away from the conventional and controversial doctrine of absolute immunity has been seen in Chinese practice. The *Huguang (Bukuang) Railway Bonds Case*[21] was perhaps the first major legal challenge to China's doctrine of absolute sovereign immunity since China opened its door to foreign investors. The case involved claims by a number of American citizens against the Chinese Government in relation to bonds issued by the Chinese Qing Imperial Government in 1911. After a lengthy court battle, in which the Chinese Government never formally appeared, the claims were denied by the Court.[22] It was settled on the bases of legal technicalities under the domestic law of the United States. The settlement of this case reveals China's present position with regard to state immunity, which has moved away from "absolute" doctrine of state immunity to a less "absolute" or less rigid position on sovereign immunity. Although China has not denounced the doctrine of absolute sovereign immunity,[23] it is not really adhered to absolute immunity doctrine either. Had it followed the absolute sovereign immunity

19. Mutual respect does not conflict with the notion of voluntarily abandonment of some traditional sovereign rights by States on a reciprocal basis. Mutual respect for sovereignty also warrants the notion of respecting the independent legislative power of other countries to restrict state immunity provided that restrictions so made are mutual.

20. If the article dealt with the divisibility of sovereignty, it would probably have addressed directly the issue of sovereign immunity.

21. *Jackson* v. *PRC* 550 F. Supp. 869 (ND Ala, 1982); 596 F. Supp. 381; 794 F.2d 1490 (11th Cir. 1986) and 801 F. 2d 404 (11th Cir. 1986).

22. The case involved several American citizens who held Huguang Railway Bonds, issued by the Qing Imperial Government of China in 1911 and sold by banks in France, Germany, England, and the United States. The Chinese Kuomingdao (Nationalist) Government stopped paying interest on the bonds in 1938. The Chinese Communist Government, which refused to acknowledge any external debt owed by the previous Governments, defaulted the principals of the bonds at their maturity in 1951. In 1979, the then bondholders sued the Government of the People's Republic of China for money owed to the defaulted interest and principals of the bonds in the United States District Court of Alabama Eastern District. The Court served a notice to the Chinese Government, which refused to respond to the Court on the ground of state immunity. The Court entered judgments by default against the People's Republic of China on 21 October 1981 and 21 September 1982 in the amount of US $41,313,038.00, which was further increased on 27 November 1982 to cover the claim of Jeff Saile, an unnamed member of the certified class. China protested the judgment through An Aide Memoire of the Ministry of Foreign Affairs on 2 February 1982, after receiving the default judgments. Subsequently, several meetings were held between the Chinese and the United States Governments. As a result, the Chinese Government agreed to appoint United States counsel to seek relief from the default judgments in the Court of Alabama Eastern District, without conceding the Court's jurisdiction under the FSIA (U.S.). The United States State Department submitted a "Statement of Interest" to the Court in support of China's motion. After reviewing the motion brought forward by counsel for China and the Statement from the State Department, the Court set aside the default judgments. The plaintiffs appealed against the Court decision setting aside the default judgments without success. See *Jackson* v. *People's Republic of China* 550 F.Supp. 869 (ND Ala, 1982), vacated and dismissed 596 F.Supp. 381, affirmed, 794 F.2d 1490 (11th Cir. 1986) rehearing denied, 801 F.2d 404 (11th, Cir. 1986).

23. China's adherence to the absolute sovereign immunity was reiterated in the Aide Memoire sent by the Chinese Government to the U.S. Government in 1983. Paragraph 3 of the Memoire is as follows:

> Sovereign immunity is an important principle of international law. It is based on the principles of sovereign equality of all states as confirmed by the Charter of the United Nations. As a sovereign state, China incontestably enjoys judicial immunity. It is in utter violation of the principle of international law of sovereign equality of all states and the UN Charter that a district court of the United States should exercise jurisdiction over a suit against a sovereign state as a defendant, make a judgment by default and even threaten to execute the judgment. The Chinese Government firmly rejects this practice of imposing the United States domestic law on China to the detriment of China's sovereignty and national dignity. Should the U.S. side, in defiance of international law, execute the abovementioned judgment and attach China's property in the United States, the Chinese Government reserves the right to take measures accordingly.

People's Republic of China: An Aide Memoire of the Ministry of Foreign Affairs (1983) 22 ILM 81.

rigidly, it would not have appointed a United States lawyer to seek relief from the default judgment in the United States Court under the procedural rules of the United States courts.[24] Secondly, counsel on behalf of the Chinese Government sought relief from the default judgments on the ground of Federal Rules of Civil Procedure 60(b)(U.S.), which does not, however, provide state immunity as a basis for setting aside judgments.[25] Counsel in fact argued for the Chinese Government under the domestic rules of the United States and his arguments were accepted on China's merits under the law of the United States. The lawyer for the Chinese Government succeeded in defending China's position on the ground of the domestic law of the United States, rather than on the basis of absolute state immunity. Thus although the Chinese Government did not submit itself physically to the jurisdiction of US courts, its legal representative, who was authorised to act on China's behalf, submitted himself to the jurisdiction of the Court. Indeed, the Court dealt with the defences for China raised by the counsel as if the Chinese Government had been present in the court proceedings.[26] Seeking relief in that Court in that manner amounted to a vague, indirect, *de facto* abandonment (or, at least, a compromise) of the absolute sovereign immunity doctrine by the Chinese Government. Thirdly, the defences presented by counsel for China seem to have omitted absolute sovereign immunity as a ground for seeking relief from the default judgments.[27] The omission appears to suggest that the Chinese Government was prepared to resolve the controversy through a realistic approach, although the approach is not totally consistent with the doctrine theoretically upheld by China. This could be the case of either "the end justified the means" or "the end is more important than the means". These facts reveal that the Chinese Government has relaxed its adherence to the doctrine of absolute sovereign immunity in practice though not in theory.[28]

The trend to break away from the absolute sovereign immunity doctrine is also occasionally shown in Chinese studies of state immunity, which, however, have yielded only a small volume of academic writing. In an article written by the late Prof. Chen of Beijing University, the author, while insisting on absolute immunity in the *Huguang Railway Bonds Case*, raised several defences for the Chinese Government under the restrictive doctrine of state immunity. These included the definition of commercial activities, international practice of serving court documents, immunity of government bonds, "bad debts", the governing law for the Huguang Railway Bonds disputes under conflict of law rules, and time limitation under the law of Alabama.[29] Some of these defences apparently were adopted by counsel for China and were examined by the Court. The only defence

24. Under the FSIA (U.S.) a foreign state may appoint counsel to appear in the courts for the purpose of asserting immunity. Similar provisions are also found in the FSIA (Cth).
25. This rule gives six reasons under which a court may relieve a party from a final judgment, order or proceeding. The Court set aside the default judgments under Rule 60(b)(4). *Jackson* v. *the People's Republic of China*, reprinted in (1984) 23 ILM 402, at 408.
26. For example, the judgment said: "it was not until August 10, 1983, that China entered a special appearance and sought to have the default judgments set aside and the case dismissed". *Jackson* v. *the PRC* (1984) 23 ILM 402 at 404.
27. A copy of the motion filed by counsel for China is not available. But the absolute sovereign immunity principle is not discussed in the judgment setting aside the default judgments, although a number of other arguments supporting China's motion are examined by the Court. Thus it can be assumed that absolute sovereign immunity was omitted in the motion. The omission might not be an express consent from the Chinese Government, but was an acquiescence in the power of counsel who was authorised to act in the interest of the Chinese Government. Another possibility is that counsel raised it as a defence but that the Court ignored it.
28. This was also noted in the Statement of Interest submitted to the Court by the United States State Department. The documents states that the People's Republic of China: "despite its adherence to the absolute principles of immunity has appeared in this proceeding and put forth a number of legal and factual defences" (1983) 22 ILM 1096.
29. T.Q. Chen "Immunity of State Sovereignty and International Law" in *Selected Legal Essays of China* (*Zhong Guo Fa Lu Wen Xuan*) Law Publishing House Beijing 1984 at 427 (in Chinese).

submitted to the Court, which is missing from Prof. Chen's arguments, is the issue o retroactivity of the FSIA (U.S.), that is, however, mentioned in the U.S. State Department's Statement.[30] The arguments in the article by Prof. Chen are unlikely to be mere coincidence. In a country like China, legal scholars may affect the policy of the Government,[31] or they may be affected by the policy of the Government.[32] One way or another, the position shown in the article is likely to indicate to some extent the trend in China.

In addition, the tendency to relax the absolute sovereign immunity doctrine can be seen in another article.[33] Although it still insists on absolute sovereign immunity, the article notes that "the Chinese Government has never entered into any economic contracts, which contain economic rights as well as obligations, with foreign investors". The fact noted by the article reflects the present practice of China in dealing with issues of state immunity.[34] This position of the Chinese Government on sovereign immunity is also seen in statements made by Mr Ni, the Chinese member of the International Law Commission. On numerous occasions, Mr Ni has insisted on absolute sovereign immunity doctrine,[35] but he has also accepted that state-owned enterprises do not have sovereign immunity.[36] In separating the government, which still has absolute sovereign immunity, from independent legal entities,[37] the Chinese Government hopes to limit its liability in case a dispute is brought to a foreign court.[38] Under the present practice, a foreign party is expected to sue its contracting partner

30. (1983) 22 ILM 1096.
31. Because the Government often cannot produce its own distinctive and independent theories of international law.
32. Because the legal scholars are expected to serve the needs of the Government.
33. J.L. Duan (ed) "A brief Review of the Scope of Investment Disputes and International Arbitration" Faculty of Graduate Studies, Chinese University of Politics and Law, *Essays on International Law (Guo Ji Fa Wen Xuan)* Chinese University of Politics and Law Press, Beijing 1986 at 4 (in Chinese).
34. This practice is also seen in the Australia-China Investment Protection Treaty, where China waives immunity over the investment of its "nationals" in Australia. For details of the Australia-China Investment Protection Treaty, see J.S. Mo "Some Aspects of the Australia-China Foreign Investment Protection Treaty" (1991) 25(3) Journal of World Trade 43.
35. For example, in 1982 Ni stated that although "the increasing participation of States in commercial and economic activities was leading towards a limitation of state immunity" . . . "a rule of international law could not be drafted on the basis of a single trend". (See Yearbook of the International Law Commission 1982 vol. 1 at 66). In 1983, he argued that the "affirmation that there appeared to be an emerging trend in favour of limitations on state immunity was even more difficult to accept in view of the scarcity of available evidence". (See Yearbook of the International Law Commission 1983 vol 1 at 70). In 1984, he stated that "state immunity was still firmly established on the basis of the sovereign equality of States as a general rule of international law, and that would continue to be the position so long as States remained sovereign and equal". (See Yearbook of the International Law Commission 1984 vol 1 at 122).
36. He stated that where "state-owned corporations or state enterprises with independent legal personalities had been set up by States that carried on business in other countries, such corporations or enterprises would have little difficulty in complying with the tax laws and regulations of the host States. State enterprises of his own country instituted proceedings and appeared as defendants in the court of foreign countries". See Yearbook of the International Law Commission 1984 vol. 1 at 124.
37. Legal entity, as defined in the Civil Code, is an organisation which is competent in exercising civil rights and in performing civil acts. Such organisation independently enjoys civil rights and assumes civil duties under law. Civil Code of the People's Republic of China (General Principles) Article 36, *Statutes and Regulations of PRC* University of East Asia Press and Institute of Chinese Law (Publishers) Ltd no. 860412.1. Under the Civil Code, a legal entity can be either a state-owned enterprise or a private enterprise. In the context of foreign investment, a legal entity refers to any organisation, body and enterprise which has power to sign economic contracts with foreign investors under Chinese law, regardless of whether it is directly controlled by a Department of the Government.
38. Such consideration can be seen in the article by Prof. Chen, where he argued that if the Chinese Government can be sued in the U.S. courts, it could then face endless lawsuits in the U.S. courts because there are hundreds of thousands of trade agreements between China and the United States. Chen, supra 29 at 449. Similar argument was also made by Mr. Ni, who observed that law should be phrased to the effect that would not "incline foreign plaintiffs to sue the State rather than a state enterprise, in order to force the State either to agree to an out-of-court settlement or to defend the suit in the foreign court, which might involve undesired waiver of its immunity". Yearbook of the International Law Commission 1984 vol. 1 at 124.

rather than the Chinese Government. Moreover, the Chinese Government expects foreign courts not to execute judgments against the property of the Chinese Government or against legal entities other than the one involved in the lawsuit. This is a result of the adoption of a realistic policy toward the restrictive doctrine accepted by several major trading partners of China, and is also an indication of China's *de facto* retreat from the absolute sovereign immunity doctrine.

The Chinese framework for foreign investment and trade suggests a possibility of Chinese legal entities, which include organs and organisations of government, being sued or suing in foreign courts. Chinese Joint Venture Law, Cooperative Joint Enterprise Law, and Foreign Economic Contract Law all allow disputants to submit their disputes to foreign arbitrators. China should surely have realised that arbitration held within foreign countries might be subject to the supervisory power of foreign courts in some cases. Accordingly, the provisions on international arbitration in Chinese law can be an indication of China's willingness to be subject to the supervisory power of foreign courts,[39] although a submission to foreign arbitration does not necessarily mean a submission to foreign adjudication.

In sum, the Chinese Government still upholds the absolute sovereign immunity doctrine, but seems to have limited its application. This can be seen in the Australia-China's Investment Protection Treaty, entered into force on 11 July 1988. The Treaty has a limitation on immunity clause. Under this clause, the Australian and Chinese Governments agree that the issues of immunity involving investment of "nationals" of the two countries will be dealt with according to the law of the country where the litigation takes place. This suggests that the Chinese Government will not claim immunity over the investment of Chinese "nationals" in Australia. Thus direct conflict with sovereign immunity doctrine can be avoided by suing relevant legal entities of China rather than the Government. The Chinese Government may not claim absolute immunity over activities of a state-owned enterprise because of practical difficulties and considerations, such as the economic interests of China. The settlement of the Huguang Railway Bonds controversy suggests a new and practical approach to resolving disagreement between the absolute sovereign immunity doctrine held by the Chinese Government and the restrictive sovereign immunity doctrine held by several countries, including Australia. To prevent potential conflicts, Australian foreign business people should avoid signing contracts with the Chinese Government unless absolutely necessary or if the Chinese Government waives immunity; alternatively, they should sue the Chinese government in the Chinese courts.[40]

---

39. This is also noted by Peele who regards this as an implicit waiver of sovereign immunity. See Peele, *supra* n.6 at 551-2.
40. The Civil Code and Civil Procedure Law do not apply to the relationship between government as political entity and persons. But under the Civil Code, if a government body acts as a legal entity, it is liable for its activities. Difficulties in sueing the Government arise when the cause of action is not regulated in the Civil Code, such as torts, or contracts signed by government administration which is not a legal person (e.g. land-use lease). It is not clear if the disputing parties to such disputes can still sue the Government in the courts. The basis for disputants' rights to sue can be found in Article 41 of the Chinese Constitution, which allows Chinese citizens to criticise and make charges against any State organ or functionary for violation of law or dereliction of duty. This right seems not to be fully enforceable for lack of any appropriate law. However, as far as commercial activities are concerned, the foreign parties can always sue the Chinese Government, which acts as a legal entity, in Chinese courts. At least two cases involving local governments have been reported. One involved a Hong Kong company and a local government in an area designated as a "Special Economic Zone"; see *Hong Kong XXX Ltd* v. *SEZ ESC* (1988) 2, 1 *China Law and Practice* 22; the other involved a Chinese party and the Municipal Government of Yinchuan; see T.X. Zhuen, the President of the National Supreme Court "Annual Working Report of the National Supreme Court" (1987) 2 *Gazette of the National Supreme Court of the PRC* (in Chinese) 3 at 11.

3. Sovereign Immunity and Potential Disputes Between Australia and China

Actions *in rem* under the FSIA (Cth) may be a potential source of conflict betwee Australia and China if the Act is to be construed broadly. The conflict arises from s.18(2 which allows a legal action to be taken against a ship concerning a claim against anoth ship of the same State in the action *in rem*. This rule, in conjunction with s.32,[41] ma subjugate all commercial ships and cargos belonging to China to the jurisdiction of th Australian courts. This is just what the Chinese Government is trying to avoid by applyin the concept of legal entity to international trade. The application of the provisions o actions *in rem* is very much dependent on the interpretation of the concept of Stat property under the Act. At present, there are no commercial ships in China which ar directly under the control of the Government. Rather, shipping companies act a independent legal persons under Chinese law. Thus, when actions *in rem* arise, Australia courts should, and probably would in light of English court practice,[42] only treat a ship a the property of a separate entity, although the Act may be interpreted broadly to includ properties of other state enterprises in such situations. If so, the Act will not lead to dire conflict between Australia and China.

Another possible cause of confusion which may not be easily resolved in the context o the present legal framework for state immunity in Australia and China, is the land-use rigl in China. The FSIA (Cth) does not exclude the jurisdiction of Australian courts by th mere reason that the commercial activity is performed in China, although it does nc extend to a proceeding which involves a State having interest in, or possessing or usin immovable property outside Australia.[43] Accordingly, if the land-use lease between Chinese local government[44] and an Australian investor is regarded as a commerci transaction,[45] the Australian courts will probably have jurisdiction over any disputes arisin therefrom. But if it is regarded as a proceeding involving ownership, possession and use o property, the lease will not be subject to the FSIA (Cth). The determination of the natu of the lease may involve issues of conflict of laws. Under Australian law, a land-use right a proprietary right. But under Chinese law, a land-use right is not expressly recognised as proprietary right, because Chinese law neither treats land as a kind of real estate nor allow a land-use right to be transferred indefinitely. It is a very restricted right to use land for limited period of time. Whether this right is a "proprietary right" is open to debate, eve under Chinese law. Two conflicting situations may arise in the application of the Act. If th land-use right is regarded as a proprietary right under either Chinese law (although th Chinese law itself does not provide a clear answer in this respect) or Australian law, a action involving land-use rights is not regarded as a proprietary right (i.e. if it is treated as commercial transaction), the Chinese Government could not claim sovereign immunit under the Act. In the second situation, if the Chinese government does not act through

41. It allows a judgment to be executed against ships and cargos of the same State.
42. For example, see *Czarnikow* v. *Rolimpex* [1979] AC 351 and *Playa Larga (Owners of Cargo Lately Laden on Boar* v. *I Congreso Del Partido (Owners); Marbale Island (Owners of Cargo Lately Laden on Board)* v. *I Congreso D Partido ("I Congreso")*.
43. S.14 (1) states that a "foreign State is not immune in a proceeding in so far as the proceeding concerns:
    (a) an interest of the State in, or the possession or use by the State of, immovable property in Australia; or
    (b) an obligation of the State that arises out of its interest in, or it's possession or use of, property of that kind."
44. The lease concerning the initial land-use right must be made between a local Chinese government and a foreig investor (natural or legal person).
45. S.11(3) states generally that a commercial transaction refers to "a commercial, trading, business, professional o industrial or like transaction into which the foreign State has entered or a like activity in which the State has engaged The section further specifies that "a contract for the supply of goods or services; and agreement for a loan or son other transaction for or in respect of the provision of finance; and a guarantee or indemnity in respect of a financi obligation" are regarded as commercial transactions, excluding "a contract of employment or a bill of exchange".

separate legal person it would have to face the issues of sovereign immunity.[46] If the Chinese Government chooses to claim absolute sovereign immunity, conflicts will arise from the application of the Act.

Conclusion

In conclusion, the differences between the absolute sovereign immunity and restrictive sovereign immunity doctrines are evident, but not irreconcilable. While maintaining their sovereignties (both legislative and judicial), Australia and China should be able to reach a compromise as to their immunities, such as in the *Huguang Railway Bonds Case* between the Chinese and U.S. Governments, to avoid and to resolve their differences if they hope to increase their trade contact. The best China could do under its present legal and economic systems is to renounce state immunity over commercial activities and specified transactions carried out by state-owned legal entities under the FSIA (Cth) provisions. This is justified under the Chinese Civil Code and Civil Procedure Law. Meanwhile, the effective means for Australia to avoid direct conflicts with China is to accept the differences between the Chinese Government and state-owned enterprises or organisations which are legal persons under Chinese law. In fact, common law courts have accepted the independent status of state agencies engaging in commercial activities.[47] In 1979, the House of Lords in England recognised that *Centrala Handlu Zagranicznego Rolimpex*, a Polish State enterprise was a separate legal entity in Polish law.[48] Thus, *Rolimpex*, like any private-owned enterprise in the same situation, is exempt from performing its contractual obligation under the *force majeure* rule 18(a) of the Rules of the Refined Sugar Association.[49] Similarly, in 1982 the House of Lords allowed an appeal by the Republic of Cuba with respect to the application of state immunity doctrine.[50] The majority of the House regarded the independent state organisations

46. In China, all land is owned by the State. A legal entity can only obtain land-use right initially from the Government although its rights can be transferred later. In addition, land-use right is often assigned by the government administration which does not satisfy the tests for a legal person under Chinese law. To avoid such legal technicalities the Chinese Government may establish special land management corporations as legal persons under Chinese law which should obtain initial land-use right from a local government and then lease the right to others. Thus, China can argue that any dispute arising from land-use lease is between two legal entities, but not between the Government and person. But the rarity of lawsuits against the Chinese Government in relation to land-use right does not create a need at least presently in the view of the Chinese Government, to take these measures.

47. J. Crawford (ed), "Foreign State Immunity" *Asian Pacific Regional Trade Law Seminar: Papers and Summary of Discussion* Attorney-General's Department Canberra AGPS 1985 at 563. Prof. Crawford points out that "common law courts have been strict in their adherence to the principles of the corporate separateness of state agencies for these and related purpose".

48. *Czarnikow* v. *Rolimpex* [1979] AC 351. The case is an appeal by an English sugar importer from the decision of the Court of Appeal ([1978] QB 176), which confirmed the award of a penalty of the Refined Sugar Association in London

49. *Ibid* at 367. Lord Viscount Dilhorne observed that:

> The respondents are an organisation of the State. Under Polish law they have a legal personality. Though subject to direction by the appropriate minister who can tell them "what to do and how to do it", as a State enterprise the make their own decisions about their commercial activities . . . They are managed on the basis of economi accountability and are expected to make a profit. The arbitration in my opinion rightly found as a fact that th respondents were not so closely connected with the Government of Poland as to be precluded from relying on th ban imposed by the decree as government intervention.

50. *I Congreso* [1983] AC 244. The dispute involved a claim by a Chilean company for compensation against the Cuba Government. In September 1973 after the Chilean revolution, two Cuban cargo vessels owned by Mambisa, a Cuba State enterprise, left Chile for their safety because the Cuban Government decided to discontinue commercial an diplomatic relations with Chile. The *Playa Larga* had discharged part of her cargo and returned to Cuba. *The Marb Islands* discharged her cargo in Vietnam, a sale which was consistent with the terms of the bills of landing an approved under Cuban law. The Chilean company brought an action in 1975 *in rem* against Mambisa which was th owner of a vessel (*The Congreso*) that was delivered in Sunderland. The Cuban Government claimed sovereig immunity. The Court of Appeal dismissed the appeal by the Cuban Government to set aside the writs and subsequer proceedings in three legal actions brought by the Chilean company. But The House of Lords reversed the decision the Court of Appeal.

as legal entities. Lord Wilberforce's comments perhaps suggest the general position common law courts in relation to corporate separateness of state agencies. He observed th the sale of cargo in Vietnam by the ship master was a commercial transaction which:

> "was not that of the Cuban State, but of an independent state organisation. Tl status of these organisations is familiar in our courts, and it has never been held th the relevant State is in law answerable for their actions".[51]

Although there may be pragmatic difficulties for the Australian courts to determi whether a state enterprise is a Chinese legal entity,[52] in the light of common law court practice, the legal status of Chinese enterprises under Chinese law would probably b recognised in Australian courts.

51. *I Congreso* [1983] AC 244 at 271.

52. The FSIA (Cth) does not set forth criteria for determining a separate entity of a foreign State. The Australian La Reform Commission commented in 1984 that "agency of a foreign State" ought comprise:

> all agencies of the foreign State which are not departments or organs of the State because the degree government control is insufficiently close. There will be no formal requirements that the agency show that it exercising 'sovereignty', although it should clearly be relevant that the entity is exercising what are on any vie governmental functions (e.g. immigration control). It is not intended that 'agency' be interpreted as requiring precise relationship of principal and agent in the technical common law sense. Rather it is expected that a cou would consider whether the entity is exercising governmental functions on behalf of the foreign State.

ALRC Report, *supra* 11 para 72. The ALRC suggests that the exercise of governmental functions is the criterion determine whether an entity is an agency of a foreign State. Because of the Chinese Government's extensi involvement in economic activities, Australian courts may sometimes have difficulties in determining whether Chinese state-owned enterprise is exercising governmental functions. Disagreement may arise if the Chine Government intends to claim immunity for one of its separate entities.