

SUBMITTED

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MARVIN L. MORRIS, JR.,
Plaintiff,

v.

THE PEOPLE'S REPUBLIC OF CHINA,*et al.*,
Defendants.

No. 05 Civ. 4470 (RJH)

BRIEF OF AN AMICUS CURIAE
EVIDENTIARY SUPPLEMENT

September 21, 2006

Before the Honorable Richard J. Holwell, United States District Judge
for the Southern District of New York.

Prepared and submitted by

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INTRODUCTION

We speak as amici curiae in the matter of *Marvin L. Morris, Jr. v. The People's Republic of China* (05 CIV 4470) and do respectfully submit the information presented herein to the attention of the Court and request that the Court admit and review the information contained herein prior to rendering a decision in the above captioned civil action. As a matter of professional interest, we follow closely any developments affecting recovery of repayment of the defaulted sovereign debt of the Government of China. As a result of the research which we have conducted into this matter, we recently learned of the above captioned civil action which is presently pending in the United States District Court for the Southern District of New York. We believe the following information is highly relevant to this action. The information presented herein references the occurrence of specific activities which are known to have occurred within the United States as a result of the creation of the Chinese Government Five Per Cent Reorganization Gold Loan, issued in 1913 in the form of unrestricted bearer obligations comprising freely-tradable bonds (the "Bonds"), scheduled to mature in 1960 and which entered into default in 1939 and remain unpaid in a state of default today.¹

¹ We note that Defendant makes reference to a statement allegedly made by Geert Rowenhorst, a professor in Yale's International Center for Finance, whereby Mr. Rowenhorst is said to have stated that the Bonds are "...worthless." According to various authorities, Mr. Rowenhorst is alleged to have made similar statements on more than a single occasion. Interestingly, we discovered that Yale University was recently bestowed the privileged status of Qualified Foreign Institutional Investor ("QFII"), by the Chinese Government, enabling Yale University to become the first and only foreign university to be granted access to China's tightly restricted securities market. According to the Associated Press (*China Allows Yale to Invest in Domestic Markets*, April 19, 2006), the approval "...allows Yale's endowment investors to tap one of the world's fastest growing economies." The article further states that China's domestic market is restricted to "...Chinese investors and a select group of approved foreign institutions." Yale President Richard Levin is quoted as stating, "Its an opportunity to participate in the growth of the Chinese economy." The article describes Yale's relationship with China as dating to 1854, and states that Yale President Richard Levin has dramatically expanded that relationship in recent years, and that Yale maintains "...more than 80 academic collaborations with Chinese institutions." We are rather skeptical that the statements alleged to have been made by Mr. Rowenhorst, if actually spoken, represent a mere

SCOPE OF BRIEF

We restrict our comments to addressing the following two specific questions: (1) whether the creation and issuance of the Bonds constitutes a commercial activity within the United States or constitutes the performance of an act in connection with a commercial activity outside the United States and which act caused a direct effect within the United States, and (2) whether the Bonds were subject to the 1979 Treaty between the United States and the People's Republic of China which settled the expropriation claims of U.S. nationals.

STATEMENT OF FACTS

We observe that many of the relevant facts comprising the immediate instance have been comprehensively set forth in both parties' memoranda of law. We do not seek to reiterate herein factual information concerning circumstances as to which there exists no dispute. Rather, we respectfully seek to provide supplemental information which may assist the Court in evaluating the merits of the arguments already presented to the Court's attention.

ARGUMENT

The fact, and the manner, of the creation and issuance of the Bonds did constitute a commercial activity within the United States and may also be shown to constitute the performance of an act in connection with a commercial activity outside the United States which did cause and continues to cause a direct effect within the United States. Several of the Bonds were present in the United States prior to the event of default and the act of default did therefore have an effect within the United States.

coincidence. We further note that bearer obligations comprising this same debt are actively traded on the Euronext securities exchange and are assigned ISIN numbers.

The claims of United States citizens pertaining to the Bonds were neither settled nor addressed by the 1979 U.S. – China Agreement Concerning the Settlement of Claims. The Government of China continues to wrongfully ignore demands for repayment and continues its attempt to escape responsibility for the repayment of its defaulted full faith and credit sovereign debt.

I. THIS COURT HAS SUBJECT-MATTER JURISDICTION BECAUSE THE PRC IS NOT IMMUNE FROM SUIT UNDER THE FOREIGN SOVEREIGN IMMUNITIES ACT.

The actions of a foreign state may cause the foreign state to become subject to the jurisdiction of U.S. courts in instances in which the foreign state’s actions amount to either (1) the performance of a commercial activity within the United States or (2) the performance of an act in connection with a commercial activity outside the United States and which act causes a direct effect within the United States.² The United States Supreme Court has defined a commercial activity to include the issuance of sovereign debt obligations by a foreign state.³ The actions of the Government of China including the lawful and authorized actions of its appointed agents and representatives may be shown to constitute both a commercial activity within the United States and to have caused, and continue to cause, a direct effect in the United States.⁴ Plaintiff’s claim is actionable through this Court by virtue of the recent decision of the United States

² See the commercial activity exception, 28 U.S.C. § 1605(a)(2), of the U.S. Foreign Sovereign Immunities Act (“FSIA”), 28 § 1602 *et seq.*

³ See *Republic of Argentina v. Weltover*, 504 U.S. 607 (1992).

⁴ See the recent activities of the U.S. Foreign Bondholders Protective Council and the American Bondholders Foundation, as well as the engagement of the United States Congress, in addressing the issue of the continuing evasion by the Government of the People’s Republic of China as respects the repayment of the defaulted full faith and credit sovereign debt of the Chinese Government:
<http://www.globalsecuritieswatch.org>

Supreme Court enabling the retroactive application of the U.S. Foreign Sovereign Immunities Act to pre-1952 takings by foreign states.⁵

A. The Commercial Activity Exception To The Foreign Sovereign Immunities Act

The commercial activity exception to the Foreign Sovereign Immunities Act provides as follows: “(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*” (*emphasis added*).⁶ The United States Supreme Court made clear in *Weltover* that the dispositive issue in determining whether an activity is commercial is whether private actors could undertake this type of activity in a market.⁷

⁵ See *Republic of Austria et al. v. Altmann*, U.S. (03-13) 541 U.S. 677 (2004). Prior to the Supreme Court’s decision in 2004, claims for recovery of repayment of the Chinese Government’s defaulted sovereign debt were not actionable though U.S. courts, due to the lack of a formal authority espousing a restricted doctrine of sovereign immunity, which was first officially espoused in the 1952 “Tate letter” and later codified as the FSIA in 1976, and then subsequently interpreted as intended to be retroactively applied as respects the pre-enactment actions of foreign states by the U.S. Supreme Court’s decision in *Altmann* in 2004, and which decision now enables the bringing of actions seeking judicial redress through U.S. courts for takings occurring prior to the 1952 “Tate letter”.

⁶ 28 U.S.C. § 1605(a)(2).

⁷ See *Weltover*, 504 U.S. at 614. The Court determined that Argentina’s issuance of bonds to finance a currency-exchange program was a commercial activity because private corporations could raise capital through the issuance of debt instruments in the same manner. *Id.* at 616. Contrast the facts comprising the immediate instance, i.e., an action involving a taking resulting from a foreign state’s issuance and subsequent default of debt, which meets the definition of a commercial activity, as distinct from a taking resulting from a foreign state’s expropriation of private land pursuant to the exercise of the power of eminent domain, which is considered a sovereign function and which does not therefore constitute a commercial activity. In regard to the latter situation, see *Mirza Shamim Ahmed Beg v. Islamic Republic of Pakistan et al.*, No. 03-10849, 11th Cir. (December 22, 2003).

The United States Supreme Court has determined that the issuance of sovereign debt by a foreign state constitutes a commercial activity by such foreign state.⁸

1. PRC's Actions Evidence Commercial Activity In The United States.

Defendant's actions, including the execution of an international debt contract and the appointment of agents authorized to act on Defendant's behalf in connection with the debt contract, abrogates the Defendant's claim of sovereign immunity.

Defendant's Actions Did Constitute a Commercial Activity Within the United States and Defendant's Actions Did Have an Effect Within the United States.

We pray the Court allow us to address the very pertinent question of whether the fact and manner of the creation of the debt (i.e., the issuance of the Bonds by the Government of China and the related activities of China's authorized agents acting lawfully within their role as authorized agents of the Government of China) constitutes a commercial activity occurring within the United States.⁹

As respects the initial offering and sale of the Bonds, please allow us to direct the Court's attention to the schedule prepared by the Foreign Bondholders Protective Council (included as Exhibit 1) which provides a comprehensive listing of the defaulted debt of

⁸ Id.

⁹ For a definition of the proper scope of analysis to be applied to deciding the merits of Plaintiff's claim, we note the precise wording of the United States Supreme Court's decision in *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), wherein the Court stated that the proper scope of analysis is to examine the specific claim which the plaintiff has asserted against the defendant, and the elements of that claim that, "if proven, would entitle [Plaintiff] to relief under [its] theory of the case." *Nelson*, 507 U.S. at 357; see also, *Weltover v. Republic of Argentina*, 941 F.2d 145, 150 (2d Cir. 1991), aff'd 504 U.S. 607 (1992) (noting that courts must "isolate the specific conduct that underlies the suit, rather than focusing on 'the broad program or policy of which the individual transaction is a part'" and warning that under an "overbroad" definition of relevant conduct, "the activity would almost inevitably be characterized as sovereign in nature"). We then note the following comparison of the Supreme Court's reasoning in *Nelson* to the district court's opinion in *Globe Nuclear Services and Supply GNSS, Limited v. AO Techsnabexport*, No. 04-1007, 4th Cir. (July 22, 2004), where the district court was found to have erred by the application of a capacious view of the conduct upon which GNSS's lawsuit was "based" including "the reality of the situation in light of the agreements and the overall context of the contract" (Redacted Mem. Op. at 31).

the Government of China which remains unpaid and in a state of default.¹⁰ It is significant that this schedule does not reference the Bonds, under the title of “Reorganization”, as having been “not publicly offered in U.S.” This fact would appear to indicate that the Bonds were publicly offered and sold within the United States. Such offers and sales may have occurred through the U.S. branches of the syndicate-member banks.¹¹

As respects activities involving international trading in the Bonds, we suggest that it is highly improbable to suppose that no commercial activity occurred within the United States, particularly during the initial 26 years of their existence as actively traded and fully-performing financial instruments evidencing full faith and credit sovereign debt of the Government of China (i.e., the period from 1913 until 1939).

The Bonds Were Authorized and Issued by the Government of China as Unregistered Bearer Obligations Without Any Restrictions Prohibiting Their Entry into the United States. The failure to actively undertake precautionary actions to restrict

¹⁰ The Foreign Bondholders Protective Council (the “FBPC”) was established as a non-profit corporation by the United States Department of State, Department of the Treasury, and the Federal Trade Commission for the purpose of assisting U.S. citizens holding defaulted obligations issued by foreign Governments in the recovery of repayment of such obligations. The FBPC has successfully negotiated in excess of 40 defaulted sovereign debt settlements and has attempted to collect repayment of the defaulted sovereign debt of the Government of China. These attempts have been met with the response that the Government of China recognizes no obligation to pay any debt incurred by the pre-communist Government of China. See *Aide Memoire* issued by the Ministry of Foreign Affairs of the People’s Republic of China dated February 2, 1983. The pattern of actions of the Government of China in this matter reveals the rather awkward sequence of the Chinese Government first attempting to repudiate the debt (as set forth in the 1983 *Aide Memoire*), then negotiating a settlement with defaulted bondholders in Great Britain in 1987 (see the 1987 Treaty between Great Britain and the People’s Republic of China which settled the claims of British bondholders), and then attempting yet again to repudiate the debt with respect to claims asserted by defaulted U.S. creditors (as respects Defendant’s attempt to construct an “odious debt” theory as a response to *Morris’* suit for recovery).

¹¹ In this regard, we note the following statement contained in the February 22, 2002 Memorandum to Officials of the United States Government prepared by the law firm of Stites & Harbison PLLC: “All the Chinese Government Bonds held by the ABF affiliated bondholders were issued as full faith and credit obligations of the established and recognized Government of China. They were sold in Europe *and the United States* (emphasis added) by the Hong Kong & Shanghai Banking Corporation, Deutsche Bank and other prominent international banks”.

the Bonds from entering the United States evidences an intentional action by China and its authorized agents to permit the Bonds to trade within the United States. In this regard, we are informed that there exists irrefutable evidence that several of the Bonds did in fact enter the United States during this period as full faith and credit Government bonds issued by the Government of China and upon which that Government made payments on the Bonds and such payments were made into the United States.¹² We are further informed by representatives of the American Bondholders Foundation (the “ABF”) that the ABF possesses specific knowledge of multiple instances involving investments made by U.S. persons, while such persons were resident within the United States, in several of the Bonds issued by the Government of China.¹³ We are further informed by representatives of the ABF that such investments made by U.S. persons were made at, or very near, the date of issuance of the Bonds and prior to the date of default by the Chinese Government, and that such investments comprised Bonds which were (a) physically present in the United States at the time such investments were made, and (b) that such investments also subsequently acted to cause the importation of several of the Bonds into the United States, and that payments on several of the Bonds were received into the United States by U.S. persons physically present in the United States at the time such payments were made.

¹² In this regard, we are informed by people knowledgeable concerning this situation that that the Bank of New York certified several of the Bonds as eligible to receive interest payments through the Bank of New York, and that the Bank of New York did in fact process such payments into the United States to the benefit of U.S. persons holding the Bonds. We are further informed that evidence of this fact does exist and that such evidence is presently in the possession of the American Bondholders Foundation.

¹³ The American Bondholders Foundation is the incorporated organization representing the interests of thousands of affiliated individuals, and which affiliated individuals comprise defaulted U.S. creditors of the Government of China. The Chinese Government continues to evade repayment of its defaulted sovereign debt and continues to engage in wrongful actions evidencing a pattern of selective default and discriminatory settlement.

The commercial activity exception codified pursuant to the Foreign Sovereign Immunities Act has been defined by the United States Supreme Court in *Weltover* to include the issuance and subsequent trading activities involving Government securities, including sovereign debt obligations, within the United States or activities having an effect within the United States. The facts comprising the immediate instance therefore appear to meet the test for a commercial activity within the United States.

The manner of importation of several of the Bonds into the United States during this 26 year period may have occurred as a result of any of the following activities:

1. Purchase in the U.S., through the U.S. branches of the selling banks, of several of the Bonds by persons resident in the U.S. at the time of offering;
2. Investment by U.S. persons in several of the Bonds through financial and investment transactions in the international debt capital markets;
3. Importation of several of the Bonds into the United States through the immigration into the U.S. of persons holding the Bonds including foreign nationals resident within the United States; and
4. Importation of several of the Bonds into the United States through the action of returning American citizens, including armed forces personnel, who may have purchased the Bonds outside the United States and returned home in possession of several of the Bonds, which Bonds having been acquired for an investment purpose.

We are aware of the existence of a specific document which evidences the presence of the Bonds within the United States at least as early as December 2, 1943. Such evidence comprises the United States Department of the Treasury "FORM TFEL-2"

(serial no. 816772) affixed to an original bond certificate held in trust by the American Bondholders Foundation on behalf of an affiliated bondholder.¹⁴

2. PRC's Actions Had And Continue To Have A Direct Effect In The United States.

As rights in contract, evidenced by the Bonds in the form of bearer obligations, were imported into the United States, then so too were China's actions in regard to the Bonds imported into the United States. Such actions continue in effect within the United States today. It is readily apparent that Defendant's conduct has "substantial contact with the United States and so fits comfortably under this definition and thus constitutes commercial activity carried on in the United States.

The creation of this debt did have and continues to have an effect within the United States. In light of the absence of any explicit restriction acting to prevent the entry of the Bonds into the United States, the Bonds were issued by the internationally recognized Government of China and provided unrestricted admission into the U.S. financial markets. The Bonds can be shown to have entered the U.S. subsequent to issuance, and that such entry in conjunction with China's act of default did constitute, and continues to constitute a commercial activity within the United States as defined by the commercial activity exemption of the Foreign Sovereign Immunities Act.

¹⁴ Please refer to photocopy of the bond certificate with Form TFEL-2 attached, included as Exhibit 2. The most probable explanation for the existence of this evidence is that the bond certificate was impounded by the United States Department of Justice Office of the Alien Property Custodian pursuant to the Trading with the Enemy Act during World War II. The financial instruments seized in this manner were subject to vestment with the Office of the Alien Property Custodian unless the U.S. Treasury Department issued a Form TFEL-2 certifying that the holder of the instrument was eligible to receive payment in the United States. The Treasury Department's certification (using Form TFEL-2) was affixed to financial instruments in instances in which the owner could prove that he was free from any blocked interest. Such instruments bearing Form TFEL-2 were then also eligible to be freely traded by friendly, non-hostile foreign nationals resident within the United States during World War II.

We note that despite its refusal to honor repayment of the Chinese Government's existing defaulted sovereign debt, the Government of China continues to engage in the periodic sale of sovereign bonds in the international financial markets including within the United States.¹⁵

II. PLAINTIFF'S CLAIMS ARE NOT BARRED BY THE INTERNATIONAL CLAIMS SETTLEMENT ACT AND THE 1979 U.S.-CHINA TREATY.

May it please the Court to allow us to now briefly reiterate the authority affirming the validity of the Bonds under accepted conventions of settled international law.

A. Continuity of Obligations Continues in Effect Under The Successor Government Doctrine of Settled International Law

A state's international obligations remain unchanged after a mere change of Government, even if such a change is a radical one, such as from a dictatorship to a democracy.¹⁶ Defendant's attempt to construct an "odious debt" argument thus fails.

¹⁵ We are aware of recent discussion among various U.S. Government officials to possibly barring the Chinese Government from issuing debt within the United States until such time as the Chinese Government acts to settle its existing defaulted sovereign debt. In this regard, see the following statement: "While there is certainly non-U.S. funding available to the Chinese Government and/or *some of its more odious companies (emphasis added)*, should they be barred from access to the American capital markets, they would likely have to pay a premium for funds attracted elsewhere." Source: Frank J. Gaffney, Jr., Executive Director of the Center for Security Policy and former Assistant Secretary of Defense for International Security Policy and Deputy Assistant Secretary of Defense for Nuclear Forces and Arms Control Policy.

¹⁶ See Pieter H. F. Bekker, *The Legal Status of Foreign Economic Interests in Occupied Iraq*, American Society of International Law (July 2003). International decisions have recognized that it does not matter that the former Government represented a dictatorship. See, e.g., Tinoco Case (Gr. Br. V. Costa Rica), *U.N. Reports of International Arbitral Awards*, Vol. I, 369, 375 (1923), reprinted in 18 AJIL 147 (1924). The decision held that the new Government of Costa Rica was bound by concessions and bank notes given by Tinoco, the former dictator of Costa Rica, to British companies, and dismissed as irrelevant that Tinoco's regime was unconstitutional under Costa Rican law and had not been recognized by several states. The United Nations Security Council has never declared null and void the contracts of a former Government of a U.N. member state and its authority to do so would be questionable. Article 46 of the Hague Regulations makes clear that "private property", which can be said to include proprietary rights granted in a state contract, "must be respected". See also, Paragraph 17 of the United Nations Security Council Resolution 687 (1991), whereby the Council decided that Iraqi statements repudiating its foreign debt were null and void. See also, United Nations General Assembly Resolution V (Dec. 2, 1950) acknowledging the status of contractual rights as property ("No one shall be deprived of property, including

Validity of American Claims and Chinese Discrimination Against American

Bondholders. The established and widely recognized government of a nation is liable under international law for the full faith and credit obligations of the established and widely recognized predecessor government of the same nation.¹⁷

China tacitly recognized its liability for the sovereign defaulted debt of predecessor Chinese Governments in 1987 when it entered into a treaty with Great Britain that recognized Chinese financial responsibility for Chinese Government bonds issued prior to the 1949 change of governments. This treaty provided compensation to British citizens and businesses who were holders of Chinese Government bonds issued prior to 1949, including the 5% Reorganization Gold Loan of 1913 Bearer Bonds still owned by a relatively large number of Americans. Unlike the 1979 U.S. - China Agreement, the 1987 China - Great Britain treaty specifically covered claims for bonds issued by the Chinese Government prior to October 1, 1949.

1. Pattern Of Actions By The PRC Has Invoked Established Conventions Of International Law

Our investigation into the matter of the defaulted full faith and credit sovereign debt of the Chinese Government which is the subject of Morris' action for recovery, and

contractual rights, without due process of law and without payment of just and effective compensation"). See also, *Restatement (Third) of the Foreign Relations Law of the United States* (1986), Section 712(2). See also, *Creditors' Claims in International Law*, 34 Int'l Law. 235 (2000). See also, the court's reasoning in *Pravin Banker Associates v. Banco Popular Del Peru*, 1997 WL 134390 (2nd Cir NY), as cited in "Collection of Sovereign Debt", Robert S. Rendell, International Financial Law Review, June 1997, which noted that courts will not extend comity to foreign proceedings when doing so would be contrary to the policies or prejudicial to the interests of the United States. The court further noted that the United States steadfastly maintains the policy of ensuring the enforceability of valid debts under principles of contract law. Accordingly, the Second Circuit affirmed the District Court's ruling that Pravin's claims should be recognized notwithstanding international comity considerations.

¹⁷ Id.

which remains unpaid as of the present date, has revealed the following sequence of actions undertaken by the Government of China:

(a) The Government of China serviced and paid currently on the debt for a period of approximately twenty-six (26) consecutive years (i.e., the period beginning in 1913 and running continuously until the event of default occurring in 1939).

(b) Subsequent to the event of default and following World War II, the Government of China affirms the validity of the debt and announces its intention to resume servicing the debt when it is able to do so.¹⁸

(c) The communist Chinese party accedes to the Government of China in 1949, and takes no action on the debt and simply ignores the existence of the debt.

(d) In an apparent response to various inquiries regarding resumption of repayment of the debt, the Chinese Government issues a proclamation in 1955 stating the inability of the Chinese Government to resume repayment of the debt as of the date of the proclamation. In this regard, please allow us to call to the attention of the Court the following observation pertaining to information referenced in Defendant's memorandum of law:

¹⁸ See letter dated December 11, 1979 prepared by J. Brian Atwood, Assistant Secretary for Congressional Relations, United States Department of State, addressed to the Honorable Charles A. Vanik, Chairman, Subcommittee on Trade, Committee on Ways and Means, U.S. House of Representatives. We note that this letter is dated subsequent to the date of the U.S.- China Treaty and contains the following statements: "The Government of China pledged its intention to resume service on the debts when economic conditions permitted...". "Because the PRC has not repudiated the bonds, however, a valid claim under the principles of international law has not arisen. In our view, the appropriate channel for seeking compensation remains the Foreign Bondholders Protective Council." We note that the language of the letter describes an effect within the United States occurring as a result of a commercial activity by Defendant. We also note that the preceding statement directly contradicts Defendant's position in the immediate instance (i.e., Defendant's assertion to the effect that the PRC engaged in a positive action in 1955 which acted to repudiate the debt).

Proclamation by the Chinese Government Regarding Repayment of the

Debt. We express specific concern as respects the following statement which appears on pages 7 and 8 of Defendant’s memorandum of law dated May 12, 2006, within the section entitled, “Repayment of the Bonds” under the heading, “Statement of Facts”:

“Morris has not alleged that payments resumed at any point subsequent to 1939. On the contrary, after the establishment of the People’s Republic of China in 1949, *id.*¶35, (footnote 7) the PRC repeatedly and expressly stated that it was not obligated (*emphasis added*) to pay on these Bonds. In 1955, the Fifth Office of State Council proclaimed ‘that the PRC Government will not (*emphasis added*) repay any of the public bonds issued by the Beiyang Government and the Nationalist Government.’ (footnote 8) *See* Notice of Ministry of Finance and Ministry of Foreign Affairs on resolving Problems of Public Bonds Issued by the Former Chinese Governments, (82) CAI WAIZI No. 21 (January 18, 1982), *available at* Link No. 7. This statement preceded the Bonds’ maturation in 1960.”

We note that Defendant did not provide a copy of the original document, nor did Defendant provide a copy of the translated version of the original document. When we attempted to view the source authority for this statement (provided as “Link No. 7” in Defendant’s memorandum of law), we observed that the web-page content is provided entirely in the Chinese Mandarin language and does not offer an English language option for viewing the site.¹⁹ We subsequently obtained an English language literal-translation of the web-page content, wherein we noted the following statement:

“The State Council fifth office on August 26, 1955 ... Agreed Ministry of Finance ‘all bonds which distributes about the Beiyang Government and the Kuomintang reactionary Government, the people's Government cannot repay’ (*emphasis added*).”

¹⁹ URL: http://www.chinalawedu.com/news/2003_10%5C5%5C1500489913.htm

We note that the literal-translation of the Chinese Government's 1955 proclamation (as reiterated by reference to, and quotation of same) in the Notice of Ministry of Finance and Ministry of Foreign Affairs communication dated January 18, 1982, states that the Government of China cannot repay the Bonds, and does not espouse any position as to the Chinese Government's obligation to repay the Bonds. We note that the term "cannot" (which evidences the inability to perform an act), contrasted with the phrase "will not" (which evidences the unwillingness to perform an act) constitute completely separate and distinct metrics evidencing very disparate meanings and therefore different intent. We harbor little doubt that the Chinese Government was in fact unable to pay its contracted foreign debt in 1955 and for that matter, even as recently as 1982. We cannot help but wonder as to whether this non-trivial departure from the actual facts comprising the immediate instance is suggestive of other instances of a similar nature contained in Defendant's memorandum.

(e) The Chinese Government negotiates a treaty with the United States providing compensation to U.S. nationals who have suffered a taking of property by the Government of the People's Republic of China.²⁰ Because no positive action was taken as of the date of the treaty by the Government of the People's Republic of China with respect to the debt, the Bonds were excluded from the scope of the treaty.²¹

²⁰ See Agreement Concerning the Settlement of Claims (the "1979 U.S.- China Agreement"), executed between the Government of China and the United States on May 11, 1979.

²¹ See letter dated November 27, 1979 prepared by Mr. John Petty, President, Foreign Bondholders Protective Council, addressed to the Honorable Abraham A. Ribicoff, Chairman, Subcommittee on International Trade, United States Senate, which states in part, "The Foreign Bondholders Protective Council, Inc. wishes to bring to the Subcommittee's attention and to express concern that the Claims Settlement Agreement between the United States and People's Republic of China dated May 11, 1979 fails to settle any of the claims by U.S. citizens with respect to the defaulted obligations of the Government of China with which the Council is concerned and that China is unwilling to negotiate separately on this particular class of claims."

(f) The Government of the People's Republic of China refuses to settle the claims of U.S. bondholders and continues to refuse to negotiate any settlement with the Foreign Bondholders Protective Council acting on behalf of U.S. citizens.²²

(g) Subsequent to execution of the treaty in 1979, the Government of the People's Republic of China issues an *Aide Memoire* in 1983 wherein the Government of the People's Republic of China formally declares the repudiation of the debt, thereby invoking accepted principles of international law.²³

(h) The Government of the People's Republic of China agrees to conclude a discriminatory settlement of the debt as respects British bondholders in 1987, and which excludes U.S. bondholders from participation.

(i) Subsequent to having settled the claims of British bondholders in 1987, and which settlement discriminated against the claims of U.S. bondholders which were ineligible for inclusion in the British settlement, the Government

²² We are informed by the president of the Foreign Bondholders Protective Council that the refusal by the Chinese Government to repay its defaulted sovereign debt represents the first and only instance encountered by the FBPC, in over 40 settlements involving defaulted sovereign debt, of a government which is unwilling to negotiate a settlement.

²³ See *Aide Memoire* of the Ministry of Foreign Affairs of the People's Republic of China dated February 2, 1983 (reproduced from the U.S. Foreign Broadcast Information Service, China Daily Report, Volume 1, Number 028, February 9, 1983, p. B-1). The People's Republic of China stated that, "...the Chinese Government recognizes no debts incurred by the past reactionary Governments of China and has no obligation to repay them." It is revealing to note that the *Aide Memoire* makes no reference whatsoever to any purported settlement of the Bonds by action of the 1979 U.S.-China Treaty. In fact, the U.S. Department of State continues to routinely refer inquires regarding repayment of the Bonds to the Foreign Bondholders Protective Council (e.g., see letter prepared by W. Michael Meserve, Acting Director, Office of Chinese and Mongolian Affairs, United States Department of State, dated August 13, 2003, addressed to Marvin L. Morris, Jr., in which the State Department refers Mr. Morris to the Foreign Bondholders Protective Council in response to Mr. Morris' inquiry regarding repayment of several of the Bonds).

of the People’s Republic of China again seeks to repudiate the debt in the immediate instance.²⁴

**2. The Foreign Claims Settlement Commission
And The 1979 U.S.-China Treaty Did Not
Resolve The Claims Of American Bondholders**

We now address the actions of the United States Foreign Claims Settlement Commission (the “FCSC”) and the subsequent 1979 Treaty between the United States and the People’s Republic of China which settled U.S. expropriation claims against the People’s Republic of China, and specifically whether the FCSC and the subsequent Treaty either settled the Bonds in the hands of U.S. citizens or denied admission of the Bonds held by U.S. citizens as a valid claim against the People’s Republic of China.²⁵

The U.S. Foreign Claims Settlement Commission and the 1979 U.S. – China Agreement Between the United States and the People’s Republic of China Settling the Claims of U.S. Nationals Involving Property Expropriated by the Government of China Did Not Address Any Claims Related to Settlement of the Bonds. On May 11, 1979, the United States and the People’s Republic of China entered into an Agreement Concerning the Settlement of Claims (the “1979 U.S. – China Agreement”). The 1979 U.S. – China Agreement, by its terms, settled the “claims of the United States and its nationals against the PRC arising from any nationalization, expropriation, intervention, and other taking of, or special measures directed against, property of

²⁴ See Defendant’s memorandum of law, wherein Defendant attempts to construct various theories in an attempt to escape liability for repayment of the Bonds.

²⁵ The Foreign Claims Settlement Commission of the United States (FCSC) is a quasi-judicial, independent agency within the United States Department of Justice. The FCSC was established in 1954 pursuant to Reorganization Plan No. 1 (5 U.S.C. App.).

nationals of the United States on or after October 1, 1949 and prior to the date of this Agreement”.

We note that a memorandum to the United States Congress prepared by the law firm of Stites & Harbison PLLC dated May 30, 2003 provided legal confirmation of the continued existence of U.S. bondholders’ claims.²⁶ We have previously described the fact that the Foreign Bondholders Protective Council also recognized that claims pertaining to the defaulted sovereign debt of the Chinese Government were outside the scope of the 1979 Agreement and were thus not addressed.²⁷ In this regard, it is again worthwhile to note that the 1983 *Aide Memoire* issued by the Ministry of Foreign Affairs of the People’s Republic of China, in which the Government of China attempted to repudiate its pre-communist Government debt payable to U.S. persons, occurred four years subsequent to the 1979 Treaty.²⁸

²⁶ See Memorandum to the United States Congress re: Legal Confirmation of China’s Financial Obligations to U.S. Bondholders. Prepared by the law firm of Stites & Harbison PLLC (May 30, 2003). This memorandum may be viewed on the world wide web at the following URL:

http://www.globalsecuritieswatch.org/may30_2003_memo.pdf

²⁷ Please refer to letter dated July 11, 1979 prepared by the Foreign Bondholders Protective Council and addressed to the United States Ambassador of the People’s Republic of China (copy included as Exhibit 3) which contains the following statements referencing the 1979 Treaty: “During our discussion, I mentioned that the claims arising from the defaulted Government bonds were specifically excluded from the Claim Settlement. In particular, the Council understands that the claims of holders of the publicly issued defaulted obligations of the Government of China with which the counsel (*sic*) is concerned and which are described in the attached Aide Memoire are not claims settled pursuant to Article I(a) of the Agreement because all such obligations were in default prior to October 1, 1949 and the subsequent failure on the part of the People’s Republic of China to reaffirm such obligations does not constitute any ‘nationalization, expropriation, intervention and other taking of, or special measures directed against, property of nationals of the USA on or after October 1, 1949 ...’ within the meaning of Article I(a).”

²⁸ See Aide Memoire dated February 2, 1983 issued by the Chinese Ministry of Foreign Affairs, included as pages 81-82 of the American Society of International Law, International Legal Materials, 221.L.M75 (1983), wherein the People’s Republic of China explicitly repudiated the Bonds and declared “The Chinese Government recognizes no external debts incurred by the defunct Chinese Governments and has no obligation to repay them ...”. For the matter of discrimination against the claims of United States citizens, please refer to the provisions of the 1987 treaty between China and Great Britain which provides for settlement and payment of bondholder claims of British nationals and which does not provide for any payment of the claims of American bondholders.

Determination and Significance of Positive Action by the Government of China as Regards the Status of the Debt. The United States Foreign Claims Settlement Commission had already ruled in 1970 and 1971 that the date of a “taking” of a defaulted Chinese Government bond was the date the bond first went into default.²⁹ The U. S. Foreign Claims Settlement Commission reaffirmed this ruling in October 1979². *In the Matter of the Claim of Welthy Kiang Chen*, Claim No. CN-2-015, Decision No. CN-2-066, entered as a Proposed Decision on October 17, 1979 and reaffirmed as the Final Decision of the Commission, April 1, 1981, the U.S. Foreign Claims Settlement Commission stated, “The Commission has consistently held that in the absence of a positive action by the foreign Government affecting the right to payment, a bondholder’s right is “taken” by the debtor foreign Government on the day when it refuses to pay the obligation for the first time, in other words, when the foreign Government first defaults upon its obligations.”

Finding by the FCSC Regarding the Absence of Positive Action by the Government of China Prior to the 1979 Agreement as Regards the Status of the Debt. The U.S. Foreign Claims Settlement Commission, when reaffirming in April 1981 its 1979 decision in the *Chen* matter, determined that there was no record that “the Government of the PRC has affirmatively repudiated the [defaulted bonds]. The setting up of a takeover committee does not do so;nor does the freezing of U.S. assets in China affect or imply a repudiation of such bonds and notes.”

As we described previously, the United States Department of State in a letter dated December 11, 1979 addressed to the Chairman of the U. S. House of

²⁹ Carl Marks & Co., Inc., Foreign Claims Settlement Commission, Claim No. CN-0420; Decision No. CN-472, March 11, 1971.

Representatives Subcommittee on Trade of the Committee on Ways and Means acknowledged that defaulted Chinese bonds owned by Americans were outside the scope of the 1979 U.S. - China Agreement between the United States and China and referred United States claimants to the Foreign Bondholders Protective Council. In a similar regard, we are also aware that inquiries to the U.S. Department of State concerning the issue of repayment of the Bonds have been met with a referral to the Foreign Bondholders Protective Council, as opposed to any statement alleging settlement of the Bonds through the action of the 1979 Treaty.

Positive Action by the Government of China to Change the Status of the Debt and to Repudiate the Debt Subsequent to the 1979 Agreement. It was not until after the United States and the Peoples' Republic of China entered into the 1979 U.S. – China Agreement that China officially sought to repudiate its obligation for pre-1949 Chinese Government bonds. For more information about China's February 2, 1983 *Aide Memoire* of the Ministry of Foreign Affairs of the People's Republic of China setting forth China's renunciation of pre-1949 Chinese Government foreign debt, see the August 18, 1983 United States "Statement of Interest to Set Aside Default Judgment against China" filed in the Jackson v. People's Republic of China case, United States District Court for the Northern District of Alabama. Accordingly, the claims of American owners of Chinese Government full faith and credit bonds which went into default prior to the assumption of control of the Chinese Government by the communist party in October 1949 were excluded from the scope and benefits of the 1979 U.S.– China Agreement and still remain unresolved nineteen years after executing a settlement with British holders of similar defaulted pre-1949 bonds.

To confirm the accuracy of the information presented in this section and at the Court's discretion, the Court may wish to contact the individual who served as the senior legal adviser to the Foreign Claims Settlement Commission during the period the matter in controversy was adjudicated. We believe this person is willing to affirm the fact that the FCSC did not make any determination as to the validity of the Bonds or the continuing payment obligation of the People's Republic of China for this debt, and that settlement of the Bonds was not a condition of, nor addressed by, the 1979 Treaty between the United States and the People's Republic of China settling expropriated property claims of U.S. citizens. If the Court should wish to avail itself of this opportunity, please be in contact with Ms. Jonna Bianco, President of the American Bondholders Foundation.

CONCLUSION

For the foregoing reasons and owing to the product of our research into this matter, we pray the Court to deny the Defendant's motion for dismissal of the Complaint.

Respectfully submitted,

Dated: Tucson, Arizona
September 14, 2006

SOVEREIGN ADVISERS

By: _____

Kevin O'Brien, President (520) 971-9735
James H. Kay, C.P.A., Vice President
Dr. Tulsi Uprety, Ph.D., Vice President
Wynne Hall, M.B.A., Vice President
4901 E. Sunrise Drive, Suite 711
Tucson, Arizona 85718

Friend of the Court

For further expert information, please contact the following persons:

Mr. John Petty, President
Foreign Bondholders Protective Council

Ms. Jonna Bianco, President
American Bondholders Foundation

Exhibit 1

National	Issued	Maturities	Interest	Issued	Outstanding 1967
War Indemnity	1898	1943	4 1/4 %	£ 16,000,000	£ 2,095,425
Anglo French	1908	1938	4 1/2 %	£ 5,000,000	£ 250,000
Crisp Loan	1912	1952	5 %	£ 5,000,000	£ 885,760
Reorganization	1913	1960	5 %	£ 25,000,000	£ 12,428,380
Pukow	1914	1964	5 %	Fcs. 100,000,000	Fcs. 100,000,000
Marconi ^a	1918	1924-8	8 %	£ 600,000	£ 600,000
Vickers ^a	1919	1925-0	8 %	£ 1,803,200	£ 1,803,200
Boxer Indemnity ^b	1925	1948	5 %	\$43,893,900	\$22,136,200
Skoda	1925	1935	8 %	£ 6,866,046	£ 6,866,046
Belgian Govt. ^b	1928	1941	6 %	\$5,000,000	\$528,900
Chinese Govt. (U. S. Cotton and Wheat Loans) ^b	1933	....	5 %	\$17,105,388	\$10,000,000
Sassoon Loan	1934	1947	6 %	£ 238,000	£ 190,264
Canton-Hankow (Indem.)	1934	1947	6 %	£ 1,500,000	£ 972,000
U. S. Loan (Kwantung) ^b	1937	1953	6 %	\$2,000,000	\$1,840,000
Gold Bonds ^c	1938	1953	5 %	C.G.U. 100,000,000 \$50,000,000 £ 10,000,000	C.G.U. 100,000,000 \$50,000,000 £ 10,000,000
Railway Loans					
Imperial Ry.	1899	1944	5 %	£ 2,300,000	£ 172,500
Chengtingfu-Taiyuanfu	1902	....	5 %	Fcs. 8,737,500 ^d	Fcs. 8,737,500
Honan ^a	1905	1963	5 %	£ 800,000	£ 475,700
Honan (From Scrip) ..	1936	Begin 1963	None	£ 49,570	£ 49,570
Kaifengfu-Honanfu ..	1903-07	1934	5 %	Fcs. 41,000,000	Fcs. 23,500,000
Shanghai-Nanking ...	1904-07	1953	5 %	£ 2,900,000	£ 484,000
Shanghai-Nanking ...	1920	....	8 %	£ 156,000	£ 156,000
Canton-Kowloon ^a ..	1907	1957	5 %	£ 1,500,000	£ 1,101,500
Canton-Kowloon	1936	Begin 1955	None	£ 127,822	£ 127,822
Tientsin-Pukow ^a	1908-09	1950	5 %	£ 5,000,000	£ 2,047,500
Tientsin-Pukow (Sup.) ^a	1910	1940	5 %	£ 3,000,000	£ 1,512,000
Tientsin-Pukow ^a	1910	....	5 %	£ 1,134,000	£ 678,800
Tientsin-Pukow Fund A	1938	....	None	£ 732,422	£ 732,422
Tientsin-Pukow Fund B	1938	....	None	£ 111,256	£ 111,256
Hukuang	1911	1975	5 %	£ 6,000,000	£ 5,656,000
Hukuang	1937	1961	None	£ 441,876	£ 441,876
Chinese Govt. Ry. Loan	1911	1936	5 %	Yen 10,000,000	Yen 9,340,000
Lungtsing-U-Hai ^a ..	1913	1952	5 %	£ 4,000,000	£ 4,000,000
Shanghai Fengching ..	1913	1934	6 %	£ 375,000	£ 225,000
Pukow-Sinyang	1913	....	6 %	£ 198,792	£ 198,792
Pukow-Sinyang	1916	....	7 %	£ 8,404	£ 8,404
Tatungfu-Chengtu ...	1913	1960	6 %	£ 770,217	£ 577,176
Chuchow-Chingchow ^b ..	1916	....	8 %	Fcs. 5,798,518	Fcs. 4,251,580
Kaomi-Hsuechow	1918	....	8 %	\$1,150,000	\$1,150,000
Taoching Equipment ^a ..	1919	1929	7 1/2 %	Yen 20,000,000	Yen 20,000,000
Ching-Meng ^a	1920	1948	5 %	£ 125,839	£ 43,683
Lungtsing-U-Hai ^a ..	1922	1930-1982	8 %	£ 120,742	£ 90,553
Lungtsing-U-Hai ^a ..	1922	1933-1982	8 %	Fl. 31,483,000	Fl. 30,750,000
Lungtsing-U-Hai ^a ..	1925	1935-1982	8 %	B.Fcs. 137,743,000	B.Fcs. 137,743,000
Railway Equipment ..	1922-23	1932	8 %	Fcs. 21,250,000	Fcs. 21,250,000
Hsingtao-Tainanfu ...	1923	1938	8 %	B.Fcs. 48,000,000	B.Fcs. 48,000,000
Redemption Bonds ^b ..	1930	1954	2 %	Yen 40,000,000	Yen 13,000,000
Kiu-Kiang-Nachung ..	1935	....	6 %	\$20,000,000	\$20,000,000
Shanghai-Hangchow Ningpo Ry.	1936	1961	6 %	Yen 18,000,000	Yen 18,000,000
Nanking-Hunan Ry. (Adj.) ^b	1937	....	None	£ 1,100,000	£1,100,000
				\$2,500,000	\$2,350,000

^a Readjusted in 1936.

^c Issued internally.

^b Not publicly offered in U. S.

^d Outstanding amount used here as issued amount not known.

Exhibit 2



BOND FOR
£ 20.

SCHULDVERSCHREI
ÜBER M. 40

The Government of the Republic of China

Die Regierung der Chinesischen

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er Schuldversch
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el oder 1/2 % bei
f Prozent Zins
lung halbjährli
le sind fällig
den Zinsberech
allverschreiben
darauf getusch
rend der Dauer
v Klammern auf
e jährliche
der Zinsen an
beruhen und
vstehenden An
Schuldbersch
en werden die
ummen der An
freilang des
arminster an
nung sein das
des Chinesischen
das die Chinesis
Schuldverschre
Geldes verpfl
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8

FORM TFEL-2

DATE **DEC. 2, 1943**



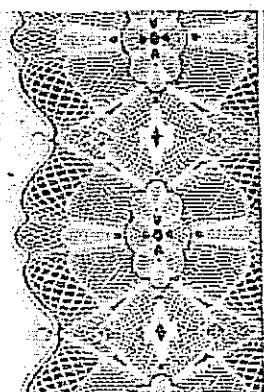
ISSUER: **THE CHINESE GOVERNMENT**

ISSUE: **5% REORGANISATION GOLD**

LOAN OF 1943 **PAID JULY 1, 1960**

CERTIFICATE No. **-371237-**

DENOMINATION: **20 POUNDS**



FAC-SIMILE OF THE SIGNATURE
OF THE MINISTER OF FINANCE
AND OF THE SEAL OF THE
CHINESE GOVERNMENT.

FACSIMILE DER UNTERSCHRIFT
DES FINANZMINISTERS UND DES
SIEGELS DER REGIERUNG DER
CHINESISCHEN REPUBLIK.

FAC-SIMILÉ DE LA SIGNATURE
DU MINISTRE DES FINANCES ET
DU SCAU DU GOUVERNEMENT
DE LA RÉPUBLIQUE CHINOISE.

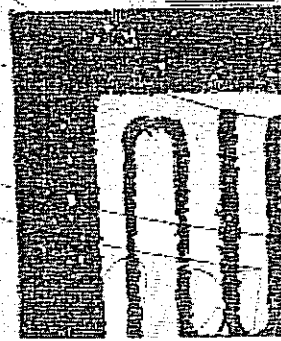


Exhibit 3

FOREIGN BONDHOLDERS PROTECTIVE COUNCIL, Inc.
1775 Broadway, New York, N. Y. 10019

July 11, 1979

His Excellency Chai-Zemin
Ambassador of the People's Republic
of China
2300 Connecticut Avenue
Washington, D.C.

Dear Mr. Ambassador:

You will recall my visit with you on Friday, April 13. At the time, the Senate Foreign Relations Committee delegation, under the chairmanship of Senator Church, was leaving for Beijing and I was to depart the following day to meet them. During my visit with you I was speaking in my capacity as President of the Foreign Bondholders Protective Council and not in my corporate responsibility.

The background to my visit was set during the course of the various senior visits by U.S. Government officials which a few years ago commenced our normalization of relations. In those visits and most recently, the Chairman of the U.S. delegation visiting Beijing in February, cited the issue of defaulted bonds and identified the Foreign Bondholders Protective Council, Inc. as the body with which the matter should be resolved.

During our discussion, I mentioned that the claims arising from the defaulted government bonds were specifically excluded from the Claim Settlement. In particular, the Council understands that the claims of holders of the publicly issued defaulted obligations of the Government of China with which the counsel is concerned and which are described in the attached aide memoire are not claims settled pursuant to Article I(a) of the Agreement because all such obligations were in default prior to October 1, 1949 and the subsequent failure on the part of the People's Republic of China to reaffirm such obligations does not constitute any "nationalization, expropriation, intervention and other taking of, or special measures directed against, property of nationals of the USA on or after October 1, 1949..." within the meaning of Article I(a).

At our April meeting I believe you indicated your Embassy would be taking this matter up with the U.S. Treasury and that this course of action was preferable to my pursuit of the matter in Beijing the following week. I am now writing to advance our discussions of this subject.

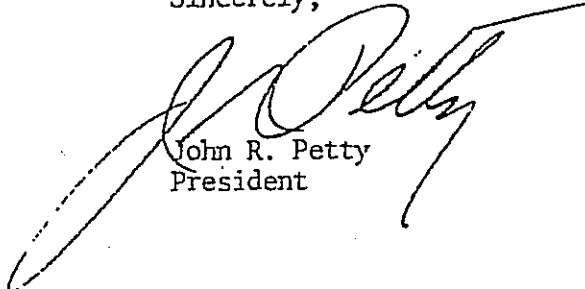
.s Excellency Chai-Zemin

- 2 -

July 11, 1979

The aide memoire attached provides information additional to that which we discussed in April. Toward the end of this month I would like to call your office for another meeting on this subject.

Sincerely,

A large, stylized handwritten signature in black ink, appearing to read "John R. Petty". The signature is written over the typed name and title.

John R. Petty
President

JRP:cm
Attachment