Judgment Summary

FACV Nos 5, 6 & 7 of 2010

IN THE COURT OF FINAL APPEAL OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION

FINAL APPEAL NOS 5, 6 & 7 OF 2010 (CIVIL)

(ON APPEAL FROM CACV NOS 373 OF 2008 AND 43 OF 2009)

Between:

DEMOCRATIC REPUBLIC OF THE CONGO	1st Appellant
CHINA RAILWAY GROUP (HONG KONG) LIMITED	2nd Appellant
CHINA RAILWAY RESOURCES DEVELOPMENT LIMITED	3rd Appellant
CHINA RAILWAY SINO-CONGO MINING LIMITED	4th Appellant
CHINA RAILWAY GROUP LIMITED	5th Appellant
SECRETARY FOR JUSTICE	6th Appellant
- and -	
FG HEMISPHERE ASSOCIATES LLC	Respondent

Coram :	Mr Justice Bokhary PJ, Mr Justice Chan PJ Mr Justice Ribeiro PJ, Mr Justice Mortimer NPJ and Sir Anthony Mason NPJ
Dates of Hearing :	21-25, 28 & 29 March 2011
Date of Judgment :	8 June 2011

J U D G M E N T

Mr Justice Bokhary PJ :

1. It has always been known that the day would come when the Court has to give a decision on judicial independence. That day has come. Judicial independence is not to be found in what the courts merely say. It is to be found in what the courts actually do. In other words, it is to be found in what the courts decide. My judgment continues under the following sub-headings :-

(1) Core question of law : absolute or restrictive immunity?

2. The core question of law in this case is about the extent of the state immunity from suit and execution available in the courts of Hong Kong. Is it absolute immunity or is it restrictive immunity which does not extend to commercial transactions? I speak of "state immunity", but "sovereign

immunity" means the same thing. Latin appears to have maintained a firmer hold on international law than it has on our municipal law. Certainly the terms *acta jure imperii* (meaning sovereign activities) and *acta jure gestionis* (meaning commercial activities) are still very much in use. And the question of whether immunity is absolute or restrictive can be put like this. Is sovereign immunity confined to sovereign activities or does it extend to commercial activities?

3. As was said by an American court in the 1960s and repeated in the House of Lords by Lord Edmund-Davies in *I Congreso del Partido* [1983] 1 AC 244 at p.276D : "Sovereign immunity is a derogation from the normal exercise of jurisdiction by the courts and should be accorded only in clear cases". That is in harmony with the statement in *The Lotus* 1927 PCIJ Rep, Series A, No.10 at p.14 that "[r]estrictions upon the independence of States cannot be presumed". For the Permanent Court of International Justice made that statement after pointing out that it was "not a question of stating principles which would permit Turkey to take proceedings, but of formulating principles, if any, which might have been violated by such proceedings". The circumstances were these. A collision between a French steamer, the Lotus, and a Turkish collier on the high seas resulted in the sinking of the Turkish vessel and the loss of eight Turkish nationals on board. When the Lotus arrived in Constantinople, her French officer of the watch, Lieutenant Demons, and the master of the Turkish vessel were charged with manslaughter. In the result, Lieutenant Demons was sentenced to 80 days' imprisonment and the master of the Turkish vessel received a slightly heavier sentence. By the casting vote of the President, the Permanent Court held that Turkey had not acted in conflict with international law by instituting criminal proceedings against Lieutenant Demons.

4. While a good deal was said – and had inevitably to be said – about states in the course of the argument, there is another side to the coin which cannot be ignored or downgraded. It is the justice to individuals which Lord Wilberforce spoke of in *I Congreso del Partido* at p.262D. They are the individuals who have commercial transactions with states. And the justice due to them is being able to bring such transactions before the courts. Whether they will win or lose in court depends on the circumstances. That is how judicial justice is done. The judicial oath in Hong Kong is to uphold the constitution, safeguard the law and administer justice. It is to do all three of those things, omitting none of them.

5. A large body of cases and writings has been cited. Much of it is helpful. Some of it, once the statements therein are read in context, turns out not to bear upon anything with which the present case is concerned. Falling into this latter category is, for example, the advisory opinion of the International Court of Justice in *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights* 1999 ICJ Rep 62. As its name suggests and its contents confirm, that matter is not concerned with state immunity. It is concerned with the immunity that a special rapporteur needs in order to perform his or her task.

(2) Facts

6. When dealing with the facts, I will speak of the Democratic Republic of the Congo ("the Congo") even when referring to the time before it succeeded the former state of Zaire. As reduced to their essentials, the facts may be stated as follows.

7. The story of the case begins in the 1980s. That was when a company headquartered in Sarajevo, in what was then Yugoslavia, was engaged

in constructing a hydro-electric facility and high-tension electric transmission lines in the Congo. This company was Energoinvest DD ("Energoinvest"). The works executed by Energoinvest were eventually completed and accepted. So construction was not the problem. The problem was of a very different nature. Shortly stated, the problem was this. In order to finance the works, the Congo had entered into credit agreements with Energoinvest. Under these agreements, credit was extended by Energoinvest to the Congo and a Congolese state-owned electricity company, Société Nationale d' Electricité ("SNd'E"). Despite revision and rescheduling, the Congo and SNd'E defaulted on their repayment obligations.

8. Each credit agreement contained an International Chamber of Commerce ("ICC") arbitration clause. In 2001 Energoinvest referred its claims against the Congo and SNd'E to arbitration. Two arbitrations ensued. One took place in Paris and the other took place in Zurich. France and Switzerland are signatories to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 ("the New York Convention"). And the New York Convention applies to Hong Kong. The Congo and SNd'E had signed terms of reference by which they agreed to each arbitration being conducted in accordance with the 1998 version of the ICC's rules of arbitration, rule 28.6 of which provides :

> "Every Award shall be binding on the parties. By submitting the dispute to arbitration under these Rules, the parties undertake to carry out any Award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made."

9. I interrupt the narrative to mention certain provisions of the Arbitration Ordinance, Cap.341. It is provided in the interpretation clause, namely s.2(1) that "Convention award" means

> "an award to which Part IV applies, namely, an award made in pursuance of an arbitration agreement in a State or territory, other than China or any part thereof, which is a party to the New York Convention."

Section 2GG reads :

> "(1) An award, order or direction made or given in or in relation to arbitration proceedings by an arbitral tribunal is enforceable in the same way as a judgment, order or direction of the Court that has the same effect, but only with the leave of the Court or a judge of the Court. If that leave is given, the Court or judge may enter judgment in terms of the award, order or direction.
> (2) Notwithstanding anything in this Ordinance, this section applies to an award, order and direction made or given whether in or outside Hong Kong.

As to Convention awards in particular, s.42 (which is in Part IV) provides :

> "(1) A Convention award shall, subject to this Part, be enforceable either by action or in the same manner as the award of an arbitrator is enforceable by virtue of section 2GG.
> (2) Any Convention award which would be enforceable under this Part shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in Hong Kong and any reference in this Part to enforcing a Convention award shall be construed as including references to relying on such an award."

10. The limited circumstances in which enforcement of a Convention award may be refused is dealt with in s.44. That section (which is also in Part IV) reads :

> "(1) Enforcement of a Convention award shall not be refused except in the cases mentioned in this section.
> (2) Enforcement of a Convention award may be refused if the person against whom it is invoked proves –
>
> (a) that a party to the arbitration agreement was (under the law applicable to him) under some incapacity; or
> (b) that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made; or
> (c) that he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
> (d) subject to subsection (4), that the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or contains decisions on matters beyond the scope of the submission to arbitration; or
> (e) that the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the

> parties or, failing such agreement, with the law of the country where the arbitration took place; or
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> (f) that the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made.
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> (3) Enforcement of a Convention award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to enforce the award.
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> (4) A Convention award which contains decisions on matters not submitted to arbitration may be enforced to the extent that it contains decisions on matter submitted to arbitration which can be separated from those on matters not so submitted.
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> (5) Where an application for the setting aside or suspension of a Convention award has been made to such a competent authority as is mentioned in subsection (2)(f), the court before which enforcement of the award is sought may, if it thinks fit, adjourn the proceedings and may, on the application of the party seeking to enforce the award, order the other party to give security."

None of those exceptions apply in the present case.

11. Whether absolute or restrictive, there is state immunity from *suit* and state immunity from *execution*. So far the present case is about immunity from suit. This is on the basis that the "suit" is an application under s.2GG(1) as read with s.42(1) for leave to enforce Convention awards in the same way as a judgment of the High Court. In other words, the suit is an enforcement leave application.

12. I now resume the narrative.

13. The Congo chose not to attend the arbitration hearings. But SNd'E participated in them, as did of course Energoinvest. In the result, each arbitral tribunal made a substantial award of principal and interest in favour of Energoinvest against the Congo and SNd'E jointly and severally. Each award is dated 30 April 2003. One is for US$11,725,844.96 with interest from the accrual of each instalment at the annual rate of 9% on US$11,179,266.36 and 5% on US$546,578.60. The other is for US$18,430,555.47 with interest from

the accrual of each instalment at the annual rate of 8.75% on US$18,073,746.94 and 5% on US$356,808.53. Neither the Congo nor SNd'E has challenged the validity of either award in any jurisdiction.

14. On 16 November 2004 the entire benefit of the principal and interest payable by the Congo and SNd'E under the two awards was assigned by Energoinvest to FG Hemisphere Associates LLC ("FG"). FG is an American company. It was formed under the laws of Delaware. And it is managed by a New York company which invests in emerging markets including by acquiring and recovering distressed debts, particularly those of defaulting states. The benefit of the awards constitute FG's sole asset of any substance. Due notice of the assignment was given to the Congo and SNd'E.

15. Neither the Congo nor SNd'E has made any payment of its own volition under either award. So far FG has managed to recover only US$3,336,757.75 under the awards. Such recovery was through enforcement proceedings in Belgium, Bermuda and South Africa. In FG's printed case dated 8 November 2010, it is said that as at the 1st of that month, the Congo was indebted to it in the sum of US$125,924,407.72 by way of principal and interest under the awards as unsatisfied. It is also there said that interest on that indebtedness is currently accruing at the rate of approximately US$30,000.00 per day.

16. Of the seven parties to these appeals, I have so far referred only to two, namely the Congo which is the 1st appellant and FG which is the respondent. It is now time to introduce the other five parties. Of these other five parties, one is the Secretary for Justice while the others are a company incorporated in the Mainland and three wholly-owned subsidiaries of its incorporated in Hong Kong. That parent is China Railway Group Ltd ("the

CR parent"), which is listed in Hong Kong as well as in Shanghai. Those three subsidiaries (to which I will refer collectively as "the CR subsidiaries") are China Railway Group (Hong Kong) Ltd, China Railway Resources Development Ltd and China Railway Sino-Congo Mining Ltd. The CR subsidiaries are the 2nd to 4th appellants, the CR parent is the 5th appellant and the Secretary for Justice is the 6th appellant having come into the proceedings as an intervener. From now on I will generally refer to the Secretary for Justice as "the Intervener".

17. On 22 April 2008, the CR parent issued an announcement to the Hong Kong Stock Exchange. This announcement was to the following effect. The CR parent and another Mainland company, Sinohydro Corporation Ltd, had entered into a cooperation agreement with the Congo. Pursuant to this cooperation agreement, a joint venture agreement was entered into between a Congolese state-owned mining company La Generale des Carriers et des Mines ("Gecamines"), a Mr G K Banika and a Chinese consortium. This Chinese consortium included the CR subsidiaries. Under the joint venture agreement which would come into effect upon the satisfaction of certain conditions precedent, the Congo would be paid US$221 million by the CR subsidiaries as part of the entry fees for a mining project in the Congo.

18. The Congo and the Intervener call FG a "vulture fund", and cite statements on the harm that such enterprises do to debt relief. FG points to Congolese default as the reason why Energoinvest, impoverished by the Seige of Sarajevo during Balkans War of the 1990s, had to discount the awards and has been benefited by being able to do so. And FG says that it is hard to imagine how the Congo's new US$6 billion debt created by its agreement with CR parent and subsidiaries can be equated with debt relief. However all of that may be, the Court's task is of course the impartial application of the law. The

Court will protect what in *The Amistad* 40 US 518 (1841) at p.596 Story J, speaking for the United States Supreme Court but appositely for all courts, called "the equal rights of all foreigners, who should contest their claims before any of our courts, to equal justice". That includes of course foreign states like the Congo and foreign companies like FG.

(3) Saw J's ex parte order : enforcement, service and injunctions

19. Having learned of the 22 April 2008 announcement to the Stock Exchange, FG made an *ex parte* application to the High Court. This application came before Saw J. On 15 May 2008 he made an order granting FG (i) leave to enforce the two awards against the Congo in the same manner as judgments; (ii) leave to serve an originating summons and the order on the Congo out of the jurisdiction; and (iii) interim injunctions restraining the CR subsidiaries from paying the Congo US$104 million by way of entry fees and restraining the Congo from receiving that sum from the CR subsidiaries. This order also notified the parties to attend an application by FG for the appointment of receivers by way of equitable execution to receive the entry fees towards satisfaction of sums due under the awards.

20. On the following day, 16 May 2008, FG issued an originating summons against the Congo and the CR subsidiaries as the 1st to 4th defendants. Then on 7 July that year the Congo took out a summons for the setting aside of Saw J's order. The hearing of this summons commenced before Reyes J on 18 November that year. Before that, there was an order made by Master Lung on 31 October that year for substituted service on the Congo. It is unnecessary to set out the whole of the history of the proceedings between the making of Saw J's order and the commencement of the hearing before Reyes J. As one would expect, it included matters such as notice, service, acknowledgments of service (that by the Congo being for the sole purpose of disputing jurisdiction),

the continuation of the injunctions, variation thereof, amendments and so on. It also included the adding of the CR parent as the 5th defendant and the Secretary for Justice coming into the proceedings as an intervener.

(4) Discharged inter partes by Reyes J

21. By a judgment given on 12 December 2008, following an *inter partes* hearing on 18 and 19 November and 2 December that year, Reyes J discharged Saw J's order, set aside the order for substituted service, dismissed the originating summons as against the Congo and ordered costs against FG. Later Reyes J also dismissed the originating summons as against the CR parent and subsidiaries, set aside the injunctions against them and ordered costs against FG. FG obtained from Reyes J a stay of his orders pending an appeal by it to the Court of Appeal.

(5) Restored by Court of Appeal subject to a remitter

22. On 10 February 2010, following a hearing in late July and early August the previous year, the Court of Appeal allowed FG's appeal with costs by a majority (consisting of Stock VP and Yuen JA, with Yeung JA dissenting). By that majority, the Court of Appeal restored Saw J's order subject to a remitter to the High Court for two purposes. As set out in the formal order, the first is "an inquiry to determine to what extent, if any, the entry fees payable by [the CR parent and subsidiaries] are intended by the Congo for payment to Gecamines and, further, whether the amount thus payable is amenable to or immune from execution". And the second, again as set out in the formal order, is "such further directions thereafter as may be necessary for the disposal of" certain summonses taken out by the Congo and the CR parent and subsidiaries. Although the remitter refers to the CR parent as well as the CR subsidiaries, Mr Gerard McCoy SC for the CR parent and subsidiaries has confirmed – and it

is common ground in these appeals – that the entry fees are payable by the CR subsidiaries but not the CR parent.

23. Nothing said here or below is to be taken as in any way deciding anything to be decided under the remitter.

(6) Reyes J's reasons

24. Now that I have stated the result reached by each of the two courts below, I proceed to outline their reasons.

25. As to state immunity, Reyes J began with the pre-handover position, that is to say the position prior to the resumption by the People's Republic of China ("China") of the exercise of Chinese sovereignty over Hong Kong with effect from 1 July 1997. He considered it "plain that immediately prior to [the handover] Hong Kong followed the restrictive approach". He then turned to the post-handover position, and identified what he called the four "competing theories" advanced by counsel. Having done so, he did not choose between them beyond saying that if he "had to express a provisional view", it would be that the first theory "seems the more correct and straightforward analysis". This theory is that as a result of the State Immunity Act 1978 ("the SIA") ceasing to have effect in Hong Kong upon the handover, the common law as it had developed prior to the extension of the SIA to Hong Kong (by the State Immunity (Overseas Territories) Order 1979) revived and continued to apply. So his provisional view inclined towards restrictive state immunity in post-handover Hong Kong.

26. The nub of the reason why Reyes J arrived at the result which he did appears from para.70 of his judgment where he said this :

> "… I do not believe that, on the facts, the relevant transaction here is of a commercial nature. Thus, even if it were supposed on the basis of one theory or other than Hong Kong law adopts a restrictive approach, I do not believe that the transaction here falls within the exception to sovereign immunity recognised by the restrictive approach."

As appears from paras 83 to 96 of his judgment, what Reyes J meant by "the relevant transaction" is the one constituted by the cooperation and joint venture agreements referred to in the 22 April 2008 announcement to the Stock Exchange and the agreements by which those agreements were later supplemented. He said (in para.88) that the transaction under which the entry fees were payable was "for no more nor less than the development of the whole of the Congo for the economic benefit and well-being of its citizens". And (in para.92) he expressed the view that this was not "a purely commercial transaction within the contemplation of the restrictive approach" and bore "the hallmarks of the exercise by states of sovereign authority in the interests of their citizens".

27. As to waiver, Reyes J held that the Congo's submission to arbitration did not constitute a waiver by it of state immunity.

(7) Court of Appeal divided 2:1

28. On the question of waiver, the Court of Appeal can be said to have been unanimous. The majority (Stock VP and Yuen JA) held that there was no immunity. But they said that there would have been no waiver if there had been immunity to waive. The minority (Yeung JA) held that there was immunity and that it had not been waived.

29. Beyond that measure of agreement on waiver, the Court of Appeal divided two to one.

(8) Reasons given in the Court of Appeal

30. At some risk of over-simplification perhaps, it can be said that the majority (Stock VP and Yuen JA) accepted what Reyes J had termed the "first theory" and which he provisionally favoured or at least leaned towards. In other words, the majority held that restrictive immunity had been part of the common law of Hong Kong prior to being given statutory effect by the extension to Hong Kong of the SIA and revived upon the SIA ceasing to apply to Hong Kong. Holding the foregoing to represent the law and considering it appropriate to restore Saw J's order subject to an investigation at trial of whether the entry fees payable by the CR subsidiaries are assets of the Congo and whether a substantial part of the entry fees has been allocated by the Congo to Gecamines to be used for commercial or private and not state purposes, the majority restored Saw J's order subject to the remitter which I have mentioned.

31. Dissenting, Yeung JA was of the view that restrictive immunity had not yet obtained the status of customary international law; that Hong Kong was bound to follow the Mainland approach to state immunity; and that the Congo was entitled to absolute immunity in Hong Kong.

(9) Present appeals brought

32. Brought with leave granted by the Court of Appeal and heard together pursuant to a direction made by the Registrar, there are now before this Court appeals brought by the Congo, the CR parents and subsidiaries and the Intervener. FACV No.5 of 2010 is the appeal initiated by the Intervener, FACV No.6 of 2010 is the appeal initiated by the Congo and FACV No.7 of 2010 is the appeal initiated by the CR parent and subsidiaries. The Congo, the CR parent and subsidiaries and the Intervener attack the Court of Appeal's decision save in so far as the Court of Appeal held that there had been no waiver. They seek a reversal of the result. FG supports the Court of Appeal's decision save in

so far as the Court of Appeal held that there had been no waiver. It defends the result, doing so (i) for essentially the reasons given by the majority and (ii) on the additional ground that there has been a waiver.

33. Citing the expert evidence on Congolese law which it has filed to such effect, FG says in para.14.1 of its printed case that the Congo "itself is a country where the doctrine of restrictive immunity has applied for over a century". As to that, nothing is said either in the Congo's printed case filed before FG's printed case or in the Congo's supplemental printed case filed after FG's printed case. But when the matter was raised with Mr Barrie Barlow SC for the Congo during the hearing of these appeals, he declined to admit on the Congo's behalf that the state immunity available in its courts is restrictive. There is no need to go further into this point. Nobody suggests that the extent of the state immunity to which the Congo is entitled depends on the extent of the state immunity available in its courts.

(10) Conditions precedent satisfied

34. It will be remembered that I have referred to FG's application for the appointment of receivers by way of equitable execution to receive the entry fees towards satisfaction of sums due under the awards. I should now mention that on the evidence filed by the Congo, the conditions precedent to the payment of the entry fees had been satisfied by the end of December 2008. That meant that it was no longer necessary to have receivers appointed by way of equitable execution. On 18 August 2010, FG obtained orders *nisi* against the CR parent and subsidiaries to garnishee a sum sufficient to satisfy the Congo's then indebtness to FG under the awards (which then stood at US$123,287,027.81). And on 26 October that year, further steps in relation to the CR parent and subsidiaries' challenge to the garnishee order *nisi*, and the outstanding inquiry, were stood over pending the outcome of these appeals.

(11) Article 158(3) interpretation/art.19(3) certificate?

35. I turn now to the question of seeking an interpretation from the Standing Committee of the National People's Congress. By art.1 of Hong Kong's constitution the Basic Law, it is declared that Hong Kong is "an inalienable part" of China. One country. By art.2 it is declared that the National People's Congress authorises Hong Kong to "exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication, in accordance with the provisions of this Law". Two systems. As to which, note the guarantee of *independent* judicial power and *final* adjudication. Throughout the Basic Law are to be seen provisions for the carrying into effect of the "one country, two systems" principle declared in the Preamble to the Basic Law. Prominent and crucial among such provisions are those pertaining to interpretation and adjudication.

36. Article 158(1) of the Basic Law vests the power of interpretation of the Basic Law in the Standing Committee. By art. 158(2) the Standing Committee authorises the Hong Kong courts to interpret on their own the provisions of the Basic Law which are within Hong Kong's autonomy. That means the whole of the Basic Law excluding only the provisions which concern affairs that are the responsibility of the Central People's Government ("the CPG") or which concern the relationship between the Central Authorities and Hong Kong. Article 158(3) says that the Hong Kong courts shall seek an interpretation from the Standing Committee if they need to interpret any excluded provision.

37. Together with the question of seeking an interpretation from the Standing Committee under art.158(3), there has been raised the question of

obtaining a certificate from the Chief Executive ("the CE") under art.19(3) of the Basic Law.

38. By art.19(1) Hong Kong is vested with independent judicial power, including the power of final adjudication. Article 19(2) provides that the courts of Hong Kong shall have jurisdiction over all cases in Hong Kong, except that the restrictions on their jurisdiction imposed by the legal system and principles previously in force in Hong Kong – in other words, in Hong Kong before the handover – shall be maintained. Then comes art.19(3). It provides as follows. The courts of Hong Kong shall have no jurisdiction over "acts of state such as defence and foreign affairs". And the courts of Hong Kong shall obtain a certificate from the Chief Executive on "questions of fact concerning acts of state such as defence and foreign affairs" whenever such questions arise in the adjudication of cases. This certificate from the CE shall be binding on the courts. And before issuing such a certificate, the CE shall obtain a certifying document from the CPG. All of this serves the "one country, two systems" principle. Since the handover, Hong Kong takes the facts from the CPG whereas it had taken them from the Foreign and Commonwealth Office prior to the handover. At that time, the practice of the Hong Kong courts was the same as that of the English courts described thus in *Oppenheim's International Law*, 9th ed. (1992), Vol.1 at pp 1046-1047 : "At common law it is the practice of English courts to accept as conclusive statements by or on behalf of the Secretary of State for Foreign and Commonwealth Affairs". What has changed in Hong Kong is the sovereign from whom the facts are taken.

39. FG has drawn attention to what Mr Ji Peng Fei, the Chairman of the Basic Law Drafting Committee, said about art.19(3) in the course of his speech addressed to the Third Session of the Seventh National People's Congress on 28 March 1990, which is this :

> "The draft vests the courts of the Special Administrative Region with independent judicial power, including that of final adjudication. This is certainly a very special situation wherein courts of a local administrative region enjoy the power of final adjudication. Nevertheless, in view of the fact that Hong Kong will practise social and legal systems different from the mainland's, this provision is necessary. Under the current judicial system and principles, the Hong Kong authorities have never exercised jurisdiction over acts of state such as defence and foreign affairs. While preserving the above principle, the draft stipulates that the courts of the Hong Kong SAR shall obtain a certificate from the Chief Executive on questions of fact concerning acts of state such as defence and foreign affairs whenever such questions arise in the adjudication of cases. This certificate shall be binding on the courts. However, before issuing such a certificate, the Chief Executive shall obtain a certifying document from the Central People's Government. This stipulation not only appropriately solves the question of jurisdiction over acts of state, but also guarantees that the courts of the Region can conduct their functions in the normal way."

From that, Lord Pannick QC for FG says, it can be seen that art.19(3) is (i) directed to "preserving" the pre-handover legal position as to the content of acts of state such as defence and foreign affairs and (ii) "guarantees" that the courts of Hong Kong "can conduct their functions in the normal way".

40. Before turning to the stances adopted by the parties on the question of seeking an interpretation from the Standing Committee, there are two more articles of the Basic Law to mention, namely arts 8 and 13.

41. Article 8 deals with the laws previously in force in Hong Kong. These are composed of Hong Kong's pre-handover common law, rules of equity, ordinances, subordinate legislation and customary law. (Here "customary law" obviously means the laws and customs of traditional China for the application of which some room still remains in Hong Kong.) It is provided that all previous laws shall be maintained, except for any that "contravene" the Basic Law, and subject to any amendment by the legislature of Hong Kong. In *One Country, Two International Legal Personalities : The Case of Hong Kong* (1997) at p.67, Professor Roda Mushkat predicted that "the constitutional doctrines

hitherto affecting the decision-making process by local judges" will be preserved.

42. As for art.13, it provides as follows. First, art.13(1) provides that the CPG shall be responsible for "foreign affairs relating to" Hong Kong. Secondly, art.13(2) provides that the Ministry of Foreign Affairs of China shall establish an office in Hong Kong "to deal with foreign affairs". Thirdly and finally, art.13(3) provides that the CPG authorises Hong Kong to "conduct relevant external affairs on its own in accordance with" the Basic Law.

43. By its notice of motion taken out on 30 June 2010, the Congo asks the Court to consider and decide (i) whether or not art.158 requires the seeking of an interpretation of arts 8, 13 and/or 19 from the Standing Committee and (ii) whether or not art.19 requires the CE to issue a certificate in respect of the contents of two letters from the Office of the Commissioner of the Ministry of Foreign Affairs of China in Hong Kong ("the OCMFA"). The first letter is dated 20 November 2008 and was meant for the High Court proceedings before Reyes J while the second letter is dated 21 May 2009 and was meant for the appeal to the Court of Appeal.

44. The OCMFA's first letter says this :

> "Regarding the issue of state immunity involved in the case *FG Hemisphere Associates LLC v. Democratic Republic of the Congo and Ors* (HCMP 928/2008) before the Court of First Instance of the High Court of the Hong Kong Special Administrative Region, the Office of the Commissioner of the Ministry of Foreign Affairs of the People's Republic of the China in the Hong Kong Special Administrative Region, having been duly authorized, makes the following statement as regards the principled position of the Central People's Government :
>
> The consistent and principled position of China is that a state and its property shall, in foreign courts, enjoy absolute immunity, including absolute immunity from jurisdiction and from execution, and has never applied the so-called principle or theory of 'restrictive immunity'. The courts in China have no

> jurisdiction over, nor in practice have they ever entertained, any case in which a foreign state or government is sued as a defendant or any claim involving the property of any foreign state or government, irrespective of the nature or purpose of the relevant act of the foreign state or government and also irrespective of the nature, purpose or use of the relevant property of the foreign state or government. At the same time, China has never accepted any foreign courts having jurisdiction over cases in which the State or Government of China is sued as a defendant, or over cases involving the property of the State or Government of China. This principled position held by the Government of China is unequivocal and consistent."

45. China is a signatory to the United Nations Convention on Jurisdictional Immunities of States and Their Property 2004 ("the UN Convention on Immunities"). And the UN Convention on Immunities acknowledges the restrictive doctrine of immunity. So Reyes J was not convinced that the OMCFA's first letter represented the position consistently adopted by the CPG.

46. When the case went to the Court of Appeal, the OCMFA wrote its second letter to explain the position in the light of China having signed the UN Convention on Immunities. The OCMFA's second letter says this :

> "1. China considers that the issue of state immunity is an important issue which affects relations between states. The long-term divergence of the international community on the issue of state immunity and the conflicting practices of states have had adverse impacts on international intercourse. The adoption of an international convention on this issue would assist in balancing and regulating the practices of states, and will have positive impacts on protecting the harmony and stability of international relations.
>
> 2. In the spirit of consultation, compromise and cooperation, China has participated in the negotiations on the adoption of the Convention. Although the final text of the Convention was not as satisfactory as China expected, but as a product of compromise by all sides, it is the result of the coordination efforts made by all sides. Therefore, China supported the adoption of the Convention by the United Nations General Assembly.
>
> 3. China signed the Convention on 14 September 2005, to express China's support of the above coordination efforts made by the international community. However, until now China has not yet ratified the Convention, and the Convention itself has not yet entered into force. Therefore, the Convention has no binding force on China, and moreover it cannot be the basis of assessing China's principled position on relevant issues.
>
> 4. After signature of the Convention, the position of China in maintaining absolute immunity has not been changed, and has never applied or recognized

> the so-called principle or theory of "restrictive immunity" (annexed are materials on China's handling of the Morris case)."

47. There is now a third letter from the OCMFA. It is dated 25 August 2010 and is meant for these appeals. The effect of this letter is summarised in para.148 of the Intervener's printed case where it is said that this letter "reiterates the position of the CPG on state immunity and further states that the principled position of the State applies to [Hong Kong]".

48. It is said in FG's printed case that the OCMFA's third letter contradicts the capitalist principle of *pacta sunt servanda* (meaning that agreements should be kept) upon which international trade and commerce is based. In response, the Intervener relies on immunity being procedural rather than substantive. For that, he cites statements in the House of Lords case of *Jones v. Ministry of Interior of Saudi Arabia* [2007] 1 AC 270 and the decision of the International Court of Justice in *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)* 2002 ICJ Rep 3. As to this contention of FG's and the Intervener's response to it, only two things need be said. First, it is not for the Court to comment one way or the other on China's policy. The Court is only concerned, vitally of course, with the legal system of Hong Kong. Secondly, procedure is a matter of law and can have an impact as heavy as that of a rule of substantive law. As to this, limitation is one example and immunity is another.

49. Having mentioned *Jones's* case in that connection, I should mention the other connection in which it was cited in these appeals. Lord Pannick drew the Court's attention to two statements in that case. One is Lord Bingham of Cornhill's statement at para.8 that prior to the move from absolute to restrictive immunity, "the British absolutist position had ceased to reflect the understanding of international law which prevailed in most of the rest

of the developed world". The other statement is that of Lord Hoffmann at para.47. Referring to the UN Convention on Immunities, Lord Hoffmann noted that it had been signed but not yet ratified by the United Kingdom and a number of other states. He then said that it is "the result of many years work by the International Law Commission ("the ILC") and codifies the law of state immunity".

50. Subject to his submissions as to their effect, Lord Pannick has no objection to the contents of the OCMFA's letters. He does not suggest that the Court may not look at those contents just because they are contained in letters rather in a s.19(3) certificate.

51. By its notice of motion taken out on 7 September 2010, the CR parent and subsidiaries ask the Court to consider and decide whether or not art.158 requires the seeking of an interpretation of art.13 from the Standing Committee. It is proposed in this notice of motion that if the Court takes the view that such an interpretation is required, then the following question be asked of the Standing Committee : "Is sovereign immunity, as a matter of principle, doctrine or rule of law, a matter of or a law relating to foreign affairs within the meaning of [art.13]?"

52. But in the written submissions dated 31 March 2011 provided by the CR parent and subsidiaries after the conclusion of the oral hearing, it is proposed that the following questions be asked in the event of an art.158(3) reference :-

(1) Is the adoption by the CPG of the principled position on state immunity within "foreign affairs relating to the Hong Kong Special Administrative Region" in art.13?

(2) If so, whether the courts of Hong Kong are obliged to give effect to the CPG's principled position on state immunity under art.13.

(3) Is the adoption by the CPG of the principled position on state immunity an "act of state" within art.19.

53. The Intervener says in the penultimate paragraph of his printed case that unless the Court accepts his argument that the doctrine of state immunity to be applied in the courts of Hong Kong is the absolute doctrine, an interpretation should be sought from the Standing Committee on "the relevant provision(s)" of the Basic Law, "in particular" art.13.

54. Then in para.30 (as amended) of the Intervener's supplemental printed case, the following questions for referral under art.158(3) are proposed :-

(1) Whether "foreign affairs relating to" Hong Kong under art.13(1) include the position, policy or measures relating to Hong Kong adopted by China in the realm of its relations with other states, and specifically those with respect to the grant of state immunity to those states before the courts of Hong Kong.

(2) Whether, by reference to the term "負責管理 " (*fuze guanli*) under art.13(1), the CPG has the power reasonably required to discharge its responsibility for the management or conduct of foreign affairs relating to Hong Kong, and if so, whether pursuant to that power, the CPG has the power (subject to any national law applicable to Hong Kong under art.18) to determine the position or policy regarding the grant of state immunity to a foreign state impleaded before the courts of Hong Kong.

(3) Whether the authorities of Hong Kong, including the judiciary, would have to defer to, follow and give effect to the position or policy of the CPG with respect to the grant of state immunity in Hong Kong by reason of art.13(1).

(4) Insofar as any laws previously in force in Hong Kong before 1 July 1997 may be inconsistent with the said position or policy of the CPG regarding state immunity, whether such laws must cease to have effect upon the establishment of Hong Kong Special Administrative Region or whether the application of such laws in Hong Kong must be subject to such modifications, adaptations, limitations or exceptions as are necessary so as to ensure that the laws previously in force in Hong Kong that are adopted as the laws of the Region are consistent with the said position or policy by virtue of art.13(1), and in view also of arts 8 and 160, the Decision of the Standing Committee dated 23 February 1997 under art.160 and s.2A of the Interpretation and General Clauses Ordinance, Cap.1.

55. But in the written submissions dated 31 March 2011 provided by the Intervener after the conclusion of the oral hearing, the following questions on art.13 are proposed for an art.158(3) reference :-

(1) Whether pursuant to the provision in art.13(l) that the CPG shall be responsible for the foreign affairs relating to Hong Kong, the CPG has the power (subject to any national law applicable to Hong Kong under art.18) to determine the position, policy or rule of state immunity vis-à-vis other states and their property applicable in Hong Kong as part of China.

(2) If so, whether it follows that:

(a) the authorities of Hong Kong, including the judiciary, shall defer to, follow or give effect to such position, policy or rule of state immunity as determined by the CPG by reason of art.13(l);

(b) the courts of Hong Kong shall not adopt any position different from such position, policy or rule of state immunity as determined by the CPG; and

(c) insofar as any laws previously in force in Hong Kong before 1997 may be inconsistent with such position, policy or rule of state immunity as determined by the CPG, such laws must cease to have effect upon the establishment of the Hong Kong Special Administrative Region, or the application of such laws in the Region must be subject to such modifications, adaptations, limitations or exceptions as are necessary so as to ensure that the laws previously in force in Hong Kong that are adopted as the laws of the Region are consistent with such position, policy or rule of state immunity as determined by the CPG by virtue of art.13(1), and in view also of arts 8 and 160, and the Decision of the Standing Committee dated 23 February 1997 under art.160.

56. And as for art.19, the questions proposed in the Intervener's written submissions dated 31 March 2011 are :-

(1) Whether the determination by the CPG as to the position, policy or rule of state immunity vis-à-vis other states and their property applicable for China, including Hong Kong, falls within "acts of state such as defence and foreign affairs" in the first sentence of art.19(3);

(2) If so, whether it follows that the courts of Hong Kong shall not adopt any position different from such position, policy or rule of state immunity as determined by the CPG.

57. In the written submissions dated 31 March 2011 provided by the Congo after the conclusion of the oral hearing, the Congo says that it adheres to its suggestion that Questions (1) and (3) of para.30 (as amended) of the Intervener's supplemental printed case sufficiently raise for interpretation the only matters that may necessitate referral.

58. So each appellant has felt the need to make changes to the questions which it says should be referred under art.158(3). And they are by no means agreed on what questions they say should be so referred.

59. FG says that there is no basis for seeking an interpretation from the Standing Committee or a certificate from the CE; that the question of what immunity is available in the courts of Hong Kong is a question of common law for the Court to answer; and that the correct answer is restrictive immunity.

60. As noted (at p.14) of the *Six-monthly Report on Hong Kong 1 July – 31 December 2010* dated March 2011, Cm 8052 presented to Parliament by the Secretary of State for Foreign and Commonwealth Affairs, if the Court decides in this case to seek an interpretation from the Standing Committee, it would be the first such referral by Hong Kong's judiciary.

61. Among the writings to which the Intervener has drawn the Court's attention is James Crawford : *The Creation of States in International Law*, 2nd ed. (2006). At pp 251-252 Professor Crawford says :

> "The courts of Hong Kong have the power of final judicial determination of all disputes falling within their jurisdiction, and there is no mechanism for making exceptions to their jurisdiction in cases with international implications. There is the possibility of the interpretation of their decisions by the Standing Committee of the National People's Congress and there have been several such interpretations. But the courts still have the power of final judicial determination, and any subsequent interpretation given by the Standing Committee cannot affect the actual outcome of those particular cases. It may be that for the most part the Hong Kong courts will be able to decide cases applying the common law, avoiding or ignoring any international implications. But this will not always be true. For example, the Court of Final Appeal has recognised decisions of Taiwanese bankruptcy courts, notwithstanding that the legal status of Taiwan in Hong Kong is that of a rebellious regime and not a foreign State. The Court of Final Appeal has also had to apply human rights treaties and has consistently given a progressive interpretation to them."

Professor Crawford continues (at p.252) by observing that "[t]he case of Hong Kong shows how territories which are part of a State can be given a distinct international voice with little or no apparatus of international control or even (on one view) of international obligation". He then goes on to contrast the position in Hong Kong with the then situation in Kosovo.

(12) State immunity before the handover

62. It is plain that the state immunity available in the courts of Hong Kong immediately prior to the handover was restrictive in that it did not extend to commercial transactions. And it does not take very many words to say why. *The Cristina* [1938] AC 845 concerned a vessel which, after being captured and requisitioned for public use by the *de facto* government of Spain, sailed into a British port. Laying claim to the vessel, her pre-requisition owners took out a writ *in rem*. The House of Lords was unanimous in holding that the writ should be set aside. Lords Atkin and Wright delivered speeches to the effect that as a rule of customary international law, which rule was a part of English common law, property owned and controlled by a foreign sovereign cannot be seized or detained by legal process. In the context of the vessel having been requisitioned for public use, what Lords Atkin and Wright said received the concurrence of

the other three Law Lords. But importantly they (Lords Thankerton, Macmillan and Maugham) reserved the question of whether immunity extended to the property of a foreign sovereign which was not destined for public use but was instead in commercial use. And that question was left open by the Privy Council in *The Sultan of Johore v. Abubakar Tunku Aris Bendahar* [1952] AC 318.

63. Noting without discussing the decision of the House of Lords in *United States of America v. Dollfus Mieg et Cie SA* [1952] AC 582 and that of the Privy Council in *Juan Ysmael & Co. Inc v. Government of the Republic of Indonesia* [1955] AC 72, I come to *Rahimtoola v. The Nizam of Hyderabad* [1958] AC 379. That case in the House of Lords is today perhaps most notable for Lord Denning's famous call for a reconsideration of state immunity, his view being that it should not extend to commercial transactions. He continued to champion the cause of restrictive immunity after becoming Master of the Rolls in 1962. In *Mellenger v. New Brunswick Corporation* [1971] 1 WLR 604 at p.610B he said that the defendant corporation, which was the *alter ego* of a Canadian province, was "entitled to plead sovereign immunity … *because it did not carry on any commercial transaction*". (Emphasis supplied.)

64. Then in 1975 came *The Philippine Admiral* [1977] AC 373, a decision of the Privy Council on appeal from Hong Kong. In her contribution "International Law" to *The Judicial House of Lords 1876-2009* (eds Louis Blom-Cooper, Brice Dickson and Gavin Drewry) (2009), Dame Rosalyn Higgins referred (at p.466) to that decision as "being clearly influenced by the changing international law perception of immunity for commercial acts". The Privy Council, which was then Hong Kong's court of last resort, held that the restrictive doctrine was more consonant with justice, and applied that doctrine. Because she was a trading vessel, the vessel in that case was held not to be

covered by state immunity even though she was government-owned. As one sees at p.403B, *The Porto Alexandre* [1920] P 30 was not followed.

65. Two years later the English Court of Appeal decided the case of *Trendtex Trading Corporation v. Central Bank of Nigeria* [1977] 1 QB 529. Sued in respect of a letter of credit which it had issued, the defendant bank invoked state immunity. It was unanimously held that the bank, which had been created as a separate legal entity with no clear expression of intent that it should have governmental status, was not an emanation, arm, *alter ego* or department of the State of Nigeria and was therefore in no position to rely on state immunity. By a majority (Lord Denning MR and Shaw LJ), it was also held that even if the bank were part of the Government of Nigeria, since customary international law no longer recognised state immunity in respect of ordinary commercial transactions, it would not be immune from the plaintiff's claim in respect of the letter of credit.

66. What Lord Denning MR said in the *Trendtex* case (at pp 555E-556C) under the sub-heading "The doctrine of restrictive immunity" should be set out in full :

> "In the last 50 years there has been a complete transformation in the functions of a sovereign state. Nearly every country now engages in commercial activities. It has its department of state – or creates its own legal entities – which go into the market places of the world. They charter ships. They buy commodities. The issue letters of credit. This transformation has changed the rules of international law relating to sovereign immunity. Many countries have now departed from the rule of absolute immunity. So many have departed from it that it can no longer be considered a rule of international law. It has been replaced by a doctrine of restrictive immunity. This doctrine gives immunity to acts of a governmental nature, described in Latin as *jure imperii,* but no immunity to acts of a commercial nature, *jure gestionis*. In 1951 Sir Hersch Lauterpacht showed that, even at that date, many European countries had abandoned the doctrine of absolute immunity and adopted that of restrictive immunity – see his important article, 'The Problem of Jurisdictional Immunities of Foreign States' in *The British Year Book of International Law, 1951,* vol.28, pp. 220-272. Since that date there have been important conversions to the same view. Great impetus was given to it in

> 1952 in the famous 'Tate letter' in the United States. Many countries have now adopted it. We have been given a valuable collection of recent decisions in which the courts of Belgium, Holland, the German Federal Republic, the United States of America and others have abandoned absolute immunity and granted only restrictive immunity. Most authoritative of all is the opinion of the Supreme Court of the United States in *Alfred Dunhill of London Inc. v. Republic of Cuba.* It was delivered on May 24, 1976, by White J with the concurrence of the Chief Justice, Powell J and Rehnquist J :
>
> > 'Although it had other views in years gone by, in 1952, as evidenced by … (the Tate letter) … the United States abandoned the absolute theory of sovereign immunity and embraced the restrictive view under which immunity in our courts should be granted only with respect to causes of action arising out of a foreign state's public or governmental actions and not with respect to those arising out of its commercial or proprietary actions. This has been the official policy of our government since that time, as the attached letter of November 25, 1975, confirms … "Such adjudications are consistent with international law on sovereign immunity".'
>
> To this I would add the European Convention on State Immunity (Basle, 1972), article 4, paragraph 1, which has been signed by most of the European countries."

67. "One country, alone may start the process. Others may follow". Having said that, Lord Denning rounded it off in his inimitably graphic way of putting things : "At first a trickle, then a stream, last a flood". One sees that at p.556D.

68. Whether the state immunity available in the courts of Hong Kong is absolute or restrictive is a question of common law. The correct answer does not depend on it being a rule of customary international law. And the same is true when it comes to whether a waiver of state immunity effective in the eyes of Hong Kong law can only be made before the court or can be made earlier. In *R v. Jones (Margaret)* [2007] 1 AC 136 at para.11 Lord Bingham leaned in favour of regarding international law as "one of the sources of" rather than "part of" English law, but acknowledged "old and high authority" for the proposition that "the law of nations is a part of" English law, citing cases going back to *Triquet v. Bath* (1764) 3 Burr. 1478. Indeed one can go back even further to *Barbuit's Case in Chancery* (1737) Cas. temp. Talb. 281 for the note in the

English Reports that the law of nations was in its fullest extent a part of English law. However that may be, a rule of domestic law in any given jurisdiction may happen to result from a rule of customary international law or it may happen to precede and contribute to the crystallisation of a custom into a rule of customary international law.

69. One of the points made in *R v. Jones (Margaret)* is that rules of customary international law cannot cause the common law to violate the constitution. I have no quarrel with that. In that case the constitutional principle which stood in the way of the assimilation contended for was the principle that the creation of crimes under domestic law is for the legislature.

70. The decision of the United States Supreme Court cited by Lord Denning in the *Trendtex* case is now reported as *Alfred Dunhill of London Inc. v. Republic of Cuba* 425 US 682 (1976). And the passage which he cited is to be found at p.698. What he called "the Tate letter" is a letter dated 19 May 1952 from the State Department to the Justice Department. It takes its name from Mr J B Tate, the acting Legal Adviser to the State Department who signed it.

71. Finally in 1981, the House of Lords held in *I Congreso del Partido* that the restrictive doctrine applied to actions *in personam* as well as to actions *in rem*. The majestic judgment given by Marshall CJ for the United States Supreme Court in *The Schooner Exchange* 11 US 116 (1812) was cited in the present case by Yeung JA in support of his view favouring absolute rather than restrictive immunity. So it is necessary to point out at once that the vessel concerned in that case was, as Marshall CJ noted in the opening paragraph of his judgment (at p.135), "an armed national vessel". In the third last paragraph of his judgment, Marshall CJ referred (at p.147) to the vessel, "being a public

armed ship, in the service of a foreign sovereign … having entered an American port open for her reception, on the terms on which ships of war are generally permitted to enter the ports of a friendly power". And it is to be observed that in *I Congreso del Partido* at p.266E-F, Lord Wilberforce cited the following statement by Marshall CJ for the United States Supreme Court in *Bank of the United States v. Planters' Bank of Georgia* 22 US 904 (1824) at p.907 :

> "It is, we think, a sound principle, that when a government becomes a partner in any trading company, it divests itself, so far as concerns the transactions of that company, of its sovereign character, and takes that of a private citizen."

72. After referring to the United States Supreme Court's statement in *Ohio v. Helvering* 292 US 360 (1934) at p.369 that "[w]hen a state enters the market place seeking customers it divests itself of its quasi sovereignty pro tanto, and takes on the character of a trader", Lord Wilberforce declared himself (at p.266G-H) impressed by the reasoning. It, "while denying immunity for breaches of commercial agreements, even though for governmental reasons, seems to recognise the legitimacy of inquiring whether the act in question is within the area of commercial activity into which the state has descended".

73. Moreover it is to be observed that, as the United States Supreme Court pointed out in *The Pesaro* 271 US 562 (1926) at p.573, when *The Schooner Exchange* was decided in 1812 "merchant ships were operated only by private owners, and there was little thought of governments engaging in such operations".

74. An important point to remember is the one which Lord Wilberforce made in *I Congreso del Partido* at p.262C. There he referred to "[t]he basis upon which one state is considered to be immune from the territorial jurisdiction of the courts of another state". This is, he pointed out, "that of 'par in parem' which effectively means that the *sovereign or governmental acts* of one state are

not matters upon which the courts of other states will adjudicate". (Emphasis supplied). So restrictive immunity is better understood not as a departure from absolute immunity but, instead, as something inherent in state immunity. The restriction to sovereign or governmental acts began to manifest itself once states began to engage in commercial activities.

75. In *Solicitor (24/07) v. Law Society of Hong Kong* (2008) 11 HKCFAR 117 at paras 6-15 the Court explained the effect in pre-handover Hong Kong of decisions of the Privy Council (on appeal from Hong Kong and from other jurisdictions) and of decisions of the House of Lords. The Privy Council spoke in *de Lasala v. de Lasala* [1980] AC 546 at p.558A-F and in *Tai Hing Cotton Mill v. Liu Chong Hing Bank* [1986] 1 AC 80 at p.108B-G about the effect on Hong Kong law of House of Lords decisions. On the basis of those statements, the decision of the House of Lords in *I Congreso del Partido* represented in reality the common law of Hong Kong as much as the decision of the Privy Council in *The Philippine Admiral* did. When the SIA was extended to Hong Kong, that was merely to put on a statutory basis what was already the common law of Hong Kong. It is, if I may say so, neatly put in Vaughan Lowe : *International Law* (2007) at p.185 where it is said that the doctrine of restrictive immunity given effect in English law by the *Trendtex* case was "codified and consolidated" by the SIA.

76. The Basic Law, as the Court underlined in *Stock Exchange of Hong Kong v. New World Development Co. Ltd* (2006) 9 HKCFAR 234 at para.43, aims to provide for continuity between the pre-handover and present judicial systems. That means what it says. And it comes in the wake of powerful and timely statements to like effect made in the very month of the handover itself by my brothers Chan and Mortimer (then Chan CJHC and Mortimer VP) in the famous case of *HKSAR v. Ma Wai Kwan* [1997] HKLRD 761. Following

argument on 22-24 July 1997 and in a judgment handed down on the 29th of that month, the then Chief Judge of the High Court said this at p.774D-E :

> "In my view, the intention of the Basic Law is clear. There is to be no change in our laws and legal system (except those which contravene the Basic Law). These are the very fabric of our society. Continuity is the key to stability. Any disruption will be disastrous".

Indeed. And at pp 804J-805A, Mortimer VP spoke of "the overwhelming intention of the Basic Law – and the Joint Declaration which was its genesis – to provide for the continuity of the legal system and the law". Those statements are accurate and important. As Marshall CJ said at p.386 when delivering the opinion of the United States Supreme Court in *United States v. Fisher* 6 US 358 (1805), "[w]here the intent is plain, nothing is left to construction".

77. It is clear that the state immunity available in the courts of Hong Kong *before* the handover did not extend to commercial transactions. Does the state immunity available in the courts of Hong Kong *since* the handover extend to commercial transactions?

(13) Court free to decide and decide independently

78. I have already referred to arts 8, 13, 19 and 158 of the Basic Law. In providing that no pre-handover rule of common law shall be maintained if it contravenes the Basic Law, art.8 is saying in terms what is in any event necessarily to be implied from the very nature of the Basic Law enacted by the National People's Congress and serving as Hong Kong's constitution. Of itself, art.8 sheds no light on what would contravene the Basic Law.

79. In providing that the CPG shall be responsible for foreign affairs relating to Hong Kong, art.13(1) is stating a position which is natural and, indeed, inevitable. That position is served, but not altered, by the setting up of the OCMFA in Hong Kong pursuant to art.13(2). And then comes, in art.13(3),

the CPG's authorisation under which Hong Kong can conduct relevant external affairs on its own in accordance with the Basic Law. That is the position in regard to foreign affairs and relevant external affairs.

80. Then comes art.19, the terms of which I have already noted. Article 19(3) provides that the courts of Hong Kong shall have no jurisdiction over "acts of state such as defence and foreign affairs". And it continues by providing for the obtaining by the courts from the CE of a certificate, before the issuance of which the CE shall obtain a certifying document from the CPG, on questions of *fact* concerning acts of state such as defence and foreign affairs. All that that, too, is inevitable and to be expected. If there was in the present case some question of fact of that kind – for example, whether the Congo is recognised as a sovereign state or whether the Congolese government is recognised – then of course the courts of Hong Kong would go by what the CPG says as communicated to them by a certificate from the CE. But no question of fact of that kind arises in the present case.

81. In para.12.5 of its printed case, FG cites the statement in Hazel Fox : *The Law of State Immunity,* 2nd ed. (2008) at p.13 that "state immunity is a rule of law not one of executive discretion". The CR parent and subsidiaries say in para.4 of their printed case that they accept the "generality" of that statement by Lady Fox subject, they say, "to jurisdictional and legal context". And they say that such context involves : art.13; the question of seeking an interpretation from the Standing Committee; the handover's effect on the doctrine of state immunity under the common law of Hong Kong; and the proposition that the courts and the executive should "speak with one voice". Those matters have been pressed at length on behalf of all the appellants in writing and by way of oral presentation. It is not out of any or want of attention to those written and oral arguments that I refrain from reciting them. The

answer to all of them starts with the proposition vital to the rule of law – which it is convenient to take from *Marbury v. Madison* 5 US 137 (1803) at p.177 – that it is the "province and duty" of the judiciary to "say what the law is".

82. None of the arguments in these appeals have made me think it appropriate to depart from what was said in *Ng Ka Ling v. Director of Immigration* (1999) 2 HKCFAR 4 regarding the Court's duty to refer a Basic Law provision to the Standing Committee for an interpretation. That duty, it was said at pp 30I-31B, arises if two conditions are satisfied. These conditions are :

(i) that there is in question a Basic Law provision which is an "excluded provision" in that it concerns affairs which are the responsibility of the CPG or concerns the relationship between the Central Authorities and Hong Kong; and

(ii) that the Court needs to interpret that provision and the interpretation will affect its judgment.

The test as to whether the second condition is satisfied is, the Court said at p.33C-D, as follows. As a matter of substance, which predominantly is the provision that has to be interpreted in the adjudication of the case? If it is an excluded provision, the Court is obliged to refer. But if it is not an excluded provision, then no reference has to be made – not even if an excluded provision is arguably relevant to the construction of the non-excluded provision concerned even to the extent of qualifying it.

83. At p.31B-C the Court unanimously said then – and unanimously reaffirms now – that it is for it and it alone to decide, in adjudicating cases, whether both conditions are satisfied. It is the Court's duty to decide that, and the Court always does its duty. The rule of law depends on that, and fidelity to the judicial oath demands it. Without fear or favour.

84. Even – and perhaps especially – in the face of a threatened constitutional crisis, it is essential to the survival of the rule of law in general and judicial independence in particular that when the Court decides whether or not to seek an interpretation under art.158(3), its decision is reached by a faithful application of the law. It is not a matter of discretion, whether for the purpose of avoiding controversy, however fierce, or for any other purpose. The question of whether the state immunity available in the courts of Hong Kong today extends to commercial transactions is a question of common law which the Court can and must decide. Deciding it does not involve any Basic Law interpretation at all let alone any interpretation to be sought from the Standing Committee. That the common law system continues in Hong Kong is not in question. Nor is it in question that foreign affairs are for the CPG alone and not for even Hong Kong's executive let alone Hong Kong's judiciary. The present case does not – and no case ever does – involve any exercise of jurisdiction over acts of state, defence or foreign affairs. No fact in relation to any of those matters is in question in the present case. If the Basic Law is engaged at all in this case, it is not its interpretation but merely its application that is involved. The intention is clear, and nothing is left to interpretation.

85. As long ago as 1975, it had become clear on the authority of Hong Kong's then court of last resort that when deciding whether the state immunity available in the courts of Hong Kong is absolute or restrictive, a court administering Hong Kong law is to decide that issue independently on its own and without consulting the executive. That was made clear by the Privy Council in *The Philippine Admiral* at p.399C-H. It is to be noted that their Lordships did so after having been shown the decision of the United States District Court in *Rich v. Naviera Vacuba SA* (1961) F. Supp. 710 and the

decision of the United States Court of Appeals in *Isbrandtsen Tankers Inc. v. President of India* (1971) 446 F. (2d) 1119.

86. Having regard to what was said in those two decisions, it is not surprising that the Privy Council saw fit to warn (at p.399D-E) that "if the courts consult the executive on such questions what may begin by guidance as to the principles to be applied may end in cases being decided irrespective of any principle in accordance with the view of the executive as to what is politically expedient". The jeopardy in which such consultation would put the rule of law in general and judicial independence in particular is obvious. It is of course to be observed that *Rich's* case and the *Isbrandtsen* case are now to be read subject to the decision of the United States Supreme Court in the *Alfred Dunhill* case in 1976. And in all fairness to the executive branch of government in the United States, the following passage in Louis Henkin : *Foreign Affairs and the United States Constitution*, 2nd ed. (1996) at p.60 should be cited :

> "In general, the Executive preferred to leave issues of immunity in particular cases to the courts, guided by the general policy established through Congressional legislation; indeed, the Executive branch encouraged Congress to enact the Foreign Sovereign Immunities Act so as to be relieved of that responsibility."

87. In *Samantar v. Yousuf* 130 S Ct 2278, which was decided on 1 June 2010, the United States Supreme Court had to answer the question of whether an individual foreign official sued in respect of conduct undertaken in his official capacity is a "foreign state" entitled to immunity from suit within the Foreign Sovereign Immunities Act ("the FSIA") enacted in 1976. And their Honours answered it "No".

88. For present purposes, the interest in *Samantar's* case lies in the account which Stevens J, delivering their Honours' opinion, gave of the American position in regard to state immunity from the time of the decision in

The Schooner Exchange in 1812 to the enacting of the FSIA in 1976. That account is to be found at pp 2284-2285, and reads :

> "The Court's specific holding in *Schooner Exchange* was that a federal court lacked jurisdiction over 'a national armed vessel … of the emperor of France,' *id.*, at 146, but the opinion was interpreted as extending virtually absolute immunity to foreign sovereigns as 'a matter of grace and comity,' *Verlinden*, 461 U.S., 486.
>
> Following *Schooner Exchange*, a two-step procedure developed for resolving a foreign state's claim of sovereign immunity, typically asserted on behalf of seized vessels. See, eg., *Republic of Mexico v. Hoffman,* 324 U.S. 30, 34-36 (1945); *Ex parte Peru,* 318 U.S. 578, 587-589 (1943); *Compania Espanola de Navegacion Maritima, S.A. v. The Navemar*, 303 U.S. 68, 74-75 (1938). Under that procedure, the diplomatic representative of the sovereign could request a 'suggestion of immunity' from the State Department. *Ex parte Peru*, 318 U.S., at 581. If the request was granted, the district court surrendered its jurisdiction. *Id.*, at 588; see also Hoffman, 324 U.S., at 34. But 'in the absence of recognition of the immunity by Department of State,' a district court 'had authority to decide for itself whether all the requisites for such immunity existed'. *Ex parte Peru,* 318 U.S., at 587; see also *Compania Espanola,* 303 U.S., at 75 (approving judicial inquiry into sovereign immunity when the 'Department of State … declined to act'); *Heaney v. Government of Spain,* 445 F. 2d 501, 503, and n.2 (CA2 1971) (evaluating sovereign immunity when the State Department had not responded to a request for its views). In making that decision, a district court inquired 'whether the ground of immunity is one which it is the established policy of the [State Department] to recognize.' *Hoffman*, 324 U.S., at 36. Although cases involving individual foreign officials as defendants were rare, the same two-step procedure was typically followed when a foreign official asserted immunity. See, eg., *Heaney*, 445 F. 2d, at 504-505; *Waltier v. Thomson,* 189 F. Supp. 319 (SDNY 1960).
>
> Prior to 1952, the State Department followed a general practice of requesting immunity in all actions against friendly sovereigns, but in that year the Department announced its adoption of the "restrictive" theory of sovereign immunity. *Verlinden*, 461 U.S., at 486-487; see also Letter from Jack B. Tate, Acting Legal Adviser, Department of State, to Acting Attorney General Philip B. Perlman (May 19, 1952), reprinted in 26 Dept. State Bull. 984-985 (1952). Under this theory, 'immunity is confined to suits involving the foreign sovereign's public acts, and does not extend to cases arising out of a foreign state's strictly commercial acts.' *Verlinden*, 461 U.S., at 487. This change threw 'immunity determinations into some disarray,' because 'political considerations sometimes led the Department to file "suggestions of immunity in cases where immunity would not have been available under the restrictive theory."' *Republic of Austria v. Altmann*, 541 U.S. 677, 690 (2004) (quoting *Verlinden*, 461 U.S., at 487).
>
> Congress responded to the inconsistent application of sovereign immunity by enacting the FSIA in 1976. *Altmann,* 541 U.S., at 690-691; see also *Verlinden,* 461 U.S., at 487-488. Section 1602 describes the Act's two primary purposes : (1) to endorse and codify the restrictive theory of sovereign immunity, and (2) to transfer primary responsibility for deciding

> 'claims of foreign states to immunity' from the State Department to the courts. After the enactment of the FSIA, the Act – and not the pre-existing common law – indisputably governs the determination of whether a foreign state is entitled to sovereign immunity."

89. The decision in the *Alfred Dunhill* case, in which the United States Supreme Court declared for deciding by itself, preceded the enactment of the FSIA. As can be seen from the report of the decision of the United States Court of Appeals in *Ungar v. PLO* 402 F 3d 274 (2005) the committee report which accompanied the Bill which became the FSIA referred to the practice under which federal courts had come to rely less on international law and more on the actions of the State Department in determining whether to grant immunity in individual cases. That practice, the report said, was generally at odds with the views of the international community. The report went on to note that in "virtually every country … sovereign immunity is a question of international law to be determined by the courts".

90. Two things said in *Samantar's* case are of particular interest. First, the State Department's general practice in the days of absolute immunity was to request immunity in all actions against friendly sovereigns. So in acceding to a suggestion of immunity by the State Department, the district court would be doing no more than discovering from the executive whether a foreign state was a friendly one. Secondly, political considerations had sometimes led the State Department to file suggestions of immunity in cases where immunity would not have been available under the restrictive theory. That bears out the Privy Council's warning in *The Philippine Admiral* at p.399D-E that consulting the executive might end in cases being decided irrespective of principle and in accordance with political expediency. While on the American position, I note this statement in 44B *American Jurisprudence* 2d (2007) at p.435: "Enforcement of arbitral agreements, confirmation of arbitral awards, and

execution upon judgments based on orders confirming such awards will not be refused on the basis of the Act of State doctrine."

91. In para.87 of his judgment, Stock VP said :

> "The communication now before us is directed at the applicable theory rather than at a specific claim for immunity but it seems to me nonetheless that in the present setting this Court must have close regard to the PRC's attitude to the doctrines of absolute and restrictive immunity, a duty emphasized further by the fact represented by art.13 of the Basic Law that '[t]he Central People's Government shall be responsible for the foreign affairs relating to the Hong Kong Special Administrative Region'. That said, the executive does not in this case seek to dictate a result but rather to draw the Court's attention to its policy, for the Court to take into account."

Having regard to some of the submissions made before Mr Benjamin Yu SC for the Intervener rose to address the Court, it was necessary to ask Mr Yu about that paragraph. Through his counsel Mr Yu, the Secretary for Justice informed the Court that what the learned Vice President said in para.87 of his judgment is an accurate understanding of the executive's stance. This response by the Secretary for Justice is as unsurprising as it is proper.

92. That the question in *The Schooner Exchange* was approached – and approached independently – as a question of law is evident from the opening paragraph of the judgment where it is said that :

> "The question has been considered with an earnest solicitude, that the decision may conform to those principles of national and municipal law by which it ought to be regulated. In exploring an unbeaten path, with few, if any, aids from precedents or written law, the court has found it necessary to rely much on general principles, and on a train of reasoning, founded on cases in some degree analogous to this."

93. Lest it be thought that the decision of the Privy Council in *The Philippine Admiral* was a source of surprise in Hong Kong, it should be mentioned that it affirmed the result (restrictive immunity) and the approach (independent judicial decision-making) of the Full Court in Hong Kong. That is

the approach which Professor Mushkat – and not only her – obviously hoped would survive. The Full Court's decision is reported in [1974] HKLR 111.

94. As long ago as 1956 a Hong Kong court had held in favour of restrictive immunity. That was in *Midland Investment Co. Ltd v. The Bank of Communications* (1956) 40 HKLR 42 which concerned a claim for the delivery up of a number of share scrips. At p.48 Gregg J said that "it is necessary for the foreign sovereign, if he wishes to discharge the onus of satisfying the court that he is entitled to sovereign immunity, in a case like the present, to produce satisfactory evidence that the property seized is dedicated or destined for public use". He so held without consulting the executive. His decision was reached judicially in reliance on the reservations expressed by Lords Thankerton, Macmillan and Maugham in *The Cristina*.

95. In para.28 of the Congo's printed case it is said – rightly but irrelevantly to the present case – that the common law judicial policy or rule of practice is that the judiciary and the executive should "speak with one voice" in regard to acts of state or foreign affairs. That has nothing to do with whether the state immunity available in the courts is absolute or restrictive. In the paragraph of the Congo's printed case to which I have just referred, nine cases and para.5-041 of *Dicey, Morris & Collins on the Conflict of Laws,* 14th ed. (2006), Vol. 1 are cited.

96. Para.5-041 of *Dicey, Morris & Collins* reads :

> "It has been held that the courts will not investigate the propriety of an act of the Crown performed in the course of its relations with a foreign State, or enforce any right alleged to have been created by such an act unless that right has been incorporated into English domestic law. Such acts are 'acts of state', which, it has been said, 'cannot be challenged, controlled or interfered with by municipal courts'. This proposition does not mean that an act of state is not recognised by the courts or that it cannot affect private rights existing prior to its commission. Nor does it mean that areas which were once thought to be

> exclusively within the prerogative power of the Crown in the exercise of foreign relations, such as the exercise of diplomatic protection, cannot be the subject of judicial review."

That, as one sees, has nothing to do with whether state immunity extends to commercial transactions. Nor do any of the nine cases, except one, and that one is directly *against* the proposition that the judiciary should consult the executive on such a question. I will now demonstrate that by a brief reference to each of those nine cases. It will not take long.

97. In *Mighell v. Sultan of Johore* [1894] 1 QB 149 the "one voice" question was whether the Sultan of Johore was the ruler of an independent sovereign power. It was a "recognition" case.

98. The "one voice" question in *Duff Development Co. Ltd v. Government of Kelantan* [1924] AC 797 was of the same kind, being whether the Sultan of Kelantan was the ruler of an independent state. It, too, was a "recognition" case.

99. In *The Fagernes* [1927] P 311 the question was whether or not the spot in the Bristol Channel where the collision at sea concerned took place was within the territorial sovereignty of Britain. The court sought, received and proceeded on the executive's answer. As it happens, the executive's answer was that the spot concerned was not within British territorial waters. The extent of a nation's territorial sovereignty is of course something on which its judiciary and its executive should speak with one voice. But that has nothing to do with the present case.

100. The passage in Lord Maugham's speech in *The Cristina* cited by the Congo in the present connection has to do with Britain's recognition of the Spanish Government.

101. In *Kahan v. Pakistan Federation* [1951] 2 KB 1003 the "one voice" question was whether a sovereign state within the British Commonwealth, in that case Pakistan, was an *independent* state in British eyes notwithstanding its Commonwealth membership.

102. Contrary to the position for which the Congo contends, the passage cited on its behalf from the advice of the Privy Council in *the Philippine Admiral* shows that the question of whether or not state immunity extends to commercial transactions is one which the courts of our system answer on their own without consulting the executive.

103. When Mr Yu for the Intervener was asked which of these "one voice" matters bore, in his submission, the greatest resemblance to the question of whether the state immunity available in the courts is absolute or restrictive, he said that it was the matter in *Re Westinghouse Uranium Contract* [1978] AC 547. The declared view of Her Majesty's Government which the House of Lords took into account in that case was that the wide investigatory procedures under United States anti-trust legislation against persons outside the United States who are not United States citizens constitute an infringement of the sovereignty of the United Kingdom when those procedures were directed against United Kingdom companies or nationals. Such a matter was seen as one of territoriality. That is attested by what (at p.617B-C) Lord Wilberforce said both immediately before and immediately after his statement : "The courts should in such matters speak with the same voice as the executive". Immediately before, he identified the government policy concerned as a policy

"against recognition of United States investigatory jurisdiction extra-territorially against United Kingdom companies". And immediately after, he cited *The Fagernes*. It is plain that the *Westinghouse* case does not assist the appellants.

104. There is another point to mention. Since it was not raised at the hearing, I mention it only after having concluded, without taking it into account, that the *Westinghouse* case does not assist the appellants. Quite simply, the point is that the executive view which the House of Lords took into account was in line with English judicial thinking anyway. That thinking was expressed thus by Hoffmann J (as he then was) in *Mackinnon v. Donaldson, Lufkin and Jenrette Securities Corp.* [1986] Ch 482 at p.493G : "The principle is that a state should refrain from demanding obedience to its sovereign authority by foreigners in respect of their conduct outside the jurisdiction".

105. The passage in Lord Wilberforce's speech in *Buttes Gas v. Hammer* [1982] AC 888 cited on the Congo's behalf has to do with the view taken by Her Majesty's Government that the issues in that case between Sharjah and Umm al Qaiwain and between their respective concessionaires were issues of international law involving difficult problems as to the width of territorial waters and the continental shelf.

106. Like the *Westinghouse* case, the decision of the English Court of Appeal in *British Airways v. Laker Airways* [1984] 1 QB 142 cited by the Congo involved the view taken by Her Majesty's Government on the extra-territorial effect claimed for United States anti-trust laws. And even then, when the case went to the House of Lords, this is what Lord Diplock said (in *British Airways v. Laker Airways* [1985] AC 58 at p.85C-D) :

> "Parker J., and subsequently the Court of Appeal and this House, had the advantage of statements by counsel instructed by the Attorney-General as to the attitude of Her Majesty's Government, i.e. the executive, towards Laker's

> American action. For my part, I regard this as a dubious advantage, for the litigation between Laker, B.A. and B.C. both in the United States and in England falls within the field of private law, where the sources of the public policy to which courts of justice give effect in litigation between subject and subject are to be found in judicial decisions and in legislation and not in the views of the executive government except in the relatively narrow field of international relations between sovereign states which is still reserved to the prerogative."

107. Not among the nine cases cited in para.28 of the Congo's printed case, but referred to in the course of oral argument, is the decision of the English Court of Appeal in *Princess Paley Olga v. Weisz* [1929] 1 KB 718. All that the judiciary took from the executive in that case was recognition, being the recognition by His Majesty's Government of the Soviet Government : first as a *de facto* government and later as a *de jure* government. The foreign law involved was determined judicially upon evidence. That left only the proposition that the English courts could not inquire into the validity of the acts of a recognised foreign sovereign power within its own territory. And that proposition was arrived at judicially upon the rival arguments of counsel. These were the unsuccessful argument (set out at pp 720-721 of the report) of Mr William Jowitt KC (as he then was) for Princess Paley and the successful argument (set out at p.721 of the report) of Sir Patrick Hastings KC for Mr Weisz.

108. Another case not among the nine referred to in para.28 of the Congo's printed case, but referred to in the course of oral argument, is the decision of the House of Lords in *Engelke v. Musmann* [1928] AC 433. It, too, was a "recognition" case. The issue was whether the defendant enjoyed diplomatic immunity. As to the defendant's status, the House of Lords acted on a statement made, at their Lordships' invitation, by the Attorney General who attended the hearing to give *information* if so required. The Attorney General's statement, made on the instructions of the Secretary of State for Foreign Affairs,

was that the defendant had been appointed a member of the staff of the German Ambassador under the style of Consular Secretary, and that his position as a member of the embassy was and had been since his appointment in 1920 recognised by the British Government without reservation or condition of any sort. At p.455 Lord Phillimore said that when a question arises in the courts as to whether a ruler is a sovereign, and a proper Secretary of State is consulted, the right answer is not "A.B. is a Sovereign", but "A.B. is recognised by His Majesty as a Sovereign", so that the exact inquiry in that case was not whether the defendant is a member of the ambassadorial staff but whether he had been accepted and recognised by the Crown as such a member.

109. On the matter of "one voice", it is possible to go back earlier than the earliest of the nine cases cited in the Congo's printed case. One can go back at least to 1828 when Shadwell V-C said in *Taylor v. Barclay* (1828) 2 Sim. 213 at p.221 that "the Courts of the King should act in unison with the Government of the King". But that case, too, was a "recognition" case. The question was whether the Federal Republic of Central America, as a revolted Spanish colony called itself, was recognised by Britain as an independent state.

110. As Dr F A Mann pointed out in *Foreign Affairs in English Courts* (1986) at p.11, when one comes across expressions like "the courts should in such matters speak with the same voice as the executive", it is necessary to ask : "What matters?". And it is in answer to this vital question that I have said the foregoing about all these cases.

111. The "Foreign Relations" title of *Halsbury's Laws of Hong Kong* is to be found in Vol. 13(2) of the 2008 Reissue. For this title, the original contributor is Dr Lin Feng. And Dr Wong Yun Bor came in as a contributor for the 2008 Reissue. Including footnotes, the topic "Limitation of Immunity" is

dealt with in para.190.041 at pp 124-127. The contributors say at p.124 that "[t]he restrictive theory of sovereign immunity is categorically denied by China". Then, further down the page, they say that China "accepts that there exist exceptions to the general principle of sovereign immunity". The footnote to this is n.7. It appears at p.126 and reads :

> "China accepts three exceptions out of those suggested by the International Law Commission, ie commercial contracts, commercial vessels, and the ownership, possession and use of immovable property : Huang Jiahua (then Chinese Ambassador to the UN) Speech at 41st General Assembly of the United Nations on the Report of the International Law Commission, 11 November 1986; full text in *Zhong Guo Guo Ji Fa Nian Kan (Chinese Yearbook of International Law)* (1987) at 836."

112. Coming back to the text, the contributors say this at p.125 :

> "Hong Kong courts adopted the doctrine of restrictive immunity before the transfer of sovereignty. It is not clear whether the same approach will be adopted in Hong Kong after the change of sovereignty. However, since the Basic Law excludes foreign affairs and defence affairs from the jurisdiction of the municipal courts of the HKSAR, the courts need to, in adjudication of relevant cases, seek a certificate from the Chief Executive. The Chinese position may be adopted through the certificate of the Chief Executive."

Such certificates are of course on questions of *fact*. The footnote to that last sentence is n.17, which appears at p.127. Interestingly, it reads :

> "It does not seem necessary to worry too much about the adoption of Chinese position in Hong Kong because the major difference between the Chinese position and the doctrine of restrictive immunity is theoretical. In practice, the Chinese pragmatic approach through its recognition of exceptions has reduced the practical difference to vanishing point."

113. There are many cases from around the world in which courts can be seen adjudicating upon state immunity as a matter of law. Examples are the decisions of : the Court of Appeal of Kenya in *Ministry of Defence of the Government of the United Kingdom v. Joel Ndegwa* (1982-88) KAR 135; the Supreme Court of Zimbabwe in *Barker McCormac (Pvt) v. Government of Kenya* 1985 (4) SA 197; the Supreme Court of India in *Harbhajan Singh Dhalla v. Union of India* AIR 1987 SC 9; the Supreme Court of Ireland in *Government*

of Canada v. Employment Appeals Tribunal [1992] 2 IR 484; the Supreme Court of Israel in *Her Majesty the Queen in Right of Canada v. Edelson* ILDC 577 (IL 1997); the Botswana High Court in *Angola v. Springbok Investments (Pty) Ltd* ILDC 7 (BW 2003); and the Court of Appeal of Singapore in *Philippines v. Maler Foundation* [2008] 2 SLR 857.

114. Recognition is of course a matter of *foreign* affairs for which the CPG has sole responsibility. But recognition is not in issue. As far as *external* affairs are concerned, I would cite the principal work to date of Hong Kong's leading constitutional scholar. It is Yash Ghai : *Hong Kong's New Constitutional Order*, 2nd ed. (1999) at p.461 onwards. There Professor Yash Ghai has – with clarity and concision as always – explained the extent to which, under the Basic Law following the Sino-British Joint Declaration, Hong Kong is empowered to conduct its external affairs. These are the relevant external affairs which, by virtue of art.13(3), Hong Kong has the CPG's authorisation to conduct on its own in accordance with the Basic Law. They are conducted by the executive. Whether the immunity available in the courts of Hong Kong is absolute or restrictive is a question of Hong Kong common law for Hong Kong's independent judiciary to adjudicate upon, independently of course. As pointed out in Antonio Cassese : *International Law*, 2nd ed. (2005) at p.99 n.1, "the 'Act of State' doctrine … should not be confused with the notion of immunity of sovereign States from jurisdiction (although the two concepts may partly overlap)". In regard to state immunity, recognition is a matter for the executive while the question of whether the immunity available in the courts is absolute or restrictive is a question of law for the judiciary.

115. As Lord Upjohn pointed out in *Carl Zeiss Stiftung v. Rayner & Keeler Ltd (No.2)* [1967] 1 AC 853 at p.950D-E, the executive expresses views

on recognition in answer to questions submitted to it by the courts, but the legal consequences that flow from recognition is a matter which is always left to the courts. That lies at the heart of the rule of law.

116. For an ideal example of the judicial approach in operation , I would point to what Lord Nicholls of Birkenhead said in *R v. Bow Street Magistrate, ex parte Pinochet (No.1)* [2000] 1 AC 61 at p.111C. He said that "[a]rguments on [the United Kingdom's] diplomatic relations with Chile if extradition were allowed to proceed, or with Spain if refused, are not matters for the court". Judicial independence is pure and simple, and the rule of law depends on it.

117. There are indeed some matters on which the judiciary and the executive should of course speak with one voice. But nothing said on behalf of any of the appellants shows that that is so on the question of whether the state immunity available in the courts is absolute or restrictive so as not to extend to commercial transactions.

118. The Intervener submits that there can only be one system of state immunity within one state. He says "one state, one immunity". By that he means absolute immunity. He and the other appellants deny that, or at least query whether, restrictive immunity has attained the status of a rule of customary international law. And they say that China has been a persistent objector to restrictive immunity so as to be free to apply absolute immunity even if restrictive immunity has become a rule of customary international law. FG says that restrictive immunity has become a rule of customary international law. It denies that, or at least queries whether, China has indeed been a persistent objector to restrictive immunity. In that regard, FG points out that China is a party to many treaties that espouse restrictive immunity. And FG denies that, or at least queries whether, a state can exempt itself from a rule of

customary international law by objecting, whether persistently or otherwise, to what forms the substance of that rule.

119. Let us by all means exercise all the caution advised in Philip Sales and Joanne Clement, "International Law in Domestic Courts : The Developing Framework" (2008) 124 LQR 388. That said, however, it should be remembered that there may well be areas in which – as Professor Martin Flaherty put it in "Aim Globally" (2000) 17 Constitutional Commentary 205 at p.213 – international custom proves more important than treaties. Of course while a domestic court is by no means wholly unconcerned with international law, its jurisdiction is domestic. And I would note two things said by Professor Robert McCorquodale in his contribution "The Rule of Law Internationally" to *Tom Bingham and the Transformation of the Law* (2009) (eds Mads Andenas and Duncan Fairgrieve) (2009). He acknowledges (at p.141) that "[m]ost studies have tended to indicate that the rule of law cannot be applied to the international legal system, as that system has not yet developed sufficiently to have the necessary frameworks and institutions to allow the rule of law to operate in a meaningful way". But then (at p.145) he makes the observation that "[t]he rule of law remains an important aspect of all national systems and would enable a better international legal system".

120. In the *Military and Paramilitary Activities* case 1986 ICJ Rep 14 the International Court of Justice said (at para.186) that "[i]n order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules". Professor Vaughan Lowe QC for the Intervener has shown the Court materials (including but not limited to Ernest K Bankas : *The State Immunity Controversy in International Law* (2005) at pp 168-171) which indicate that there still are states which have not moved from absolute to restrictive immunity. Lord Pannick, no doubt with

the assistance of Professor Dan Sarooshi among others, has drawn the Court's attention to a wealth of authoritative materials, both judicial and academic, which indicates that the immunity available in the courts of the overwhelming majority of states is restrictive and which supports the view that restrictive immunity is now a rule of customary international law. But as Lord Pannick recognised – and indeed stressed – holding that the immunity available in the courts of Hong Kong is restrictive does not require a general pronouncement by the Court that restrictive immunity is a rule of customary international law. Lord Pannick put it like this : the common law which applied and still applies to Hong Kong has had its debate in that regard, and restrictive immunity won.

121. Since I am not speaking of – and cannot speak of – the position in the Mainland, it is unnecessary for me to say whether I consider restrictive immunity to be a rule of customary international law. Nor is it necessary for me to decide whether persistent objection works. If it were necessary to do so, I would accept that China has been a persistent objector to restrictive immunity. That is a fact which emerges from the OCMFA's letters. And there is no need to trouble the CE for an art.19(3) certificate repeating that fact.

122. It is settled that a state cannot opt out of a rule of customary international law once it has crystallised into such a rule. But there is the question of a state's persistent objection to a practice preventing that practice from crystallising into a rule of customary international law or at least enabling that state to avoid being bound by that rule despite such crystallisation. I do not propose to say anything more about whether restrictive immunity has crystallised into a rule of customary international law or about persistent objection, for the Court cannot pronounce on the immunity available in Mainland proceedings. What immunity is available in the courts of Hong Kong

cannot affect or influence the position in the Mainland. Nor can it properly be used by anyone to put pressure on the position there.

123. The expression "one state, one immunity" may be a convenient means of identifying the submission of counsel which it summarises. But in itself, the expression is of no value. In the absence of a "one country, two systems" situation, it would hardly be necessary to employ such an expression. And in a "one country, two systems" situation, employing such an expression is a distraction and a dangerous one. On the "one country, two systems" principle the whole of Hong Kong's post-handover constitutional order rests. That this principle would work was once doubted by many and is still doubted by some. But it has worked. The part of state immunity which involves recognition is a matter of "country". And the part which involves whether immunity is absolute or restrictive is a matter of "systems". Under Hong Kong's system, it is for the judiciary to decide independently, without consulting the executive, whether the immunity available in the courts of Hong Kong is absolute or restrictive. It is never a contest between "one country" and "two systems". The principle does not admit of such a contest. At all times and in all matters, the principle operates as a whole.

124. It has been suggested that it would threaten Chinese sovereignty, embarrass China and result in prejudice to China if the Court were to pronounce in favour of restrictive immunity in the courts of Hong Kong. Not for one moment does the Court take any of these concerns lightly. But judicial independence and the rule of law are also to be taken seriously. The law never threatens, rather does it always serve, Chinese sovereignty. And if some embarrassment or even some prejudice be seen as one side of it, the other side would be a clear and valuable demonstration of the vitality of the "one country, two systems" principle. It is a principle in which China, both the Mainland and

Hong Kong, can take pride. The Court's direct concern is of course only with the principle's application in Hong Kong. But I should at least indicate my awareness of its full and wider importance, as attested by Mr Ji Peng Fei's statement, in the speech referred to earlier, that : " 'One country, two systems' is the fundamental policy of the Chinese Government for bringing about the country's reunification".

125. In the course of his address, Lord Pannick made the point that the judiciary cannot decline to decide a case in accordance with law even if so deciding it would embarrass the executive when dealing with foreign countries. He said that it might happen, for example, that in the exercise of the freedom of speech guaranteed by art.27 of the Basic Law, a person or the media says something about a foreign state or leader that would, if tolerated in Hong Kong, embarrass the country in its dealings with that foreign state and even provoke a strong reaction from it contrary to the country's interests. But that would not, Lord Pannick stressed, be any ground for the courts of Hong Kong to deny freedom of speech.

126. Initially, I saw that as a forensic flourish. But its substance soon appeared. When Mr McCoy came to reply – doing so with the force that never deserts him even though no counsel's heart is fated always to be in the same place as his instructions – he spoke of the judiciary's inability to assess the extent of the executive's embarrassment in the country's relationship with foreign states. So it became important to ask Mr Yu, when he came to make his reply, whether he accepted that the courts must decide cases according to law even if doing so would cause the executive embarrassment in the country's relationship with foreign states. Mr Yu said that he accepted that. It is the fit response to give on behalf of the Secretary for Justice.

127. The Court never acts contrary to the interests of the country as a whole. That is reflected in the case of *Chen Li Hung v. Ting Lei Miao* (2000) 3 HKCFAR 9. It is the one cited by Professor Crawford as a case in which the Court could not avoid or ignore international implications. The Court had to decide whether a person who had been appointed a trustee in bankruptcy by an order of a Taiwanese court had capacity to sue in the courts of Hong Kong to recover assets in Hong Kong for the benefit of persons in Taiwan who had been defrauded by the bankrupt. Naturally we proceeded on the basis that the Taiwanese government is a usurper government, as that government is in the eyes of China of which Hong Kong is an inalienable part.

128. We held that the Taiwanese trustee in bankruptcy had capacity to sue in the courts of Hong Kong on the following basis. Non-recognised courts can be of two types. The first type consists of courts sitting in foreign states the governments of which are not recognised by our sovereign. And the second type consists of courts sitting in territory under the *de jure* sovereignty of our sovereign but presently under the *de facto* albeit unlawful control of a usurper government. The Taiwanese courts were of the second type. Whether the non-recognised court concerned was of one type or the other, the courts of Hong Kong would give effect to its order where : (i) the rights covered by the order are private rights; (ii) giving effect to such order accords with the interests of justice, the dictates of common sense and the needs of law and order; and (iii) giving it effect would not be inimical to the sovereign's interests or otherwise contrary to public policy. The Taiwanese bankruptcy order concerned met those criteria.

129. Lord Collins of Mapesbury (then Sir Lawrence Collins) said of our decision that it "maintained the position of principle of the People's Republic of China but reached a pragmatic result consistent with its interests". One sees

that in his article "Foreign Relations and the Judiciary" (2002) 51 ICLQ 485 at p.492. There is only one more observation to make before leaving this part of the case, and it is this. None of the counsel who have addressed the Court has suggested that any state would or should fail to respect China's actions in applying the "one country, two systems" principle to a part of Chinese territory and providing, as art.19(1) does, that it "shall be vested with independent judicial power, including that of final adjudication".

(14) Restrictive immunity now

130. Among the materials drawn to the Court's attention is United Nations Document A/CN 4/343. This document is the product of a survey conducted by the ILC on the topic of the jurisdictional immunities of states and their property. Not many states responded. And the responses received were mixed, which is what Professor Lowe stressed for the Intervener. But, as Lord Pannick stressed for FG, they are outdated, belonging to the 1980s since when things have moved on.

131. The materials shown to the Court amply bears out Dame Rosalyn Higgins's observation that the Privy Council's decision in *The Philippine Admiral* was clearly influenced by the changing international perception of immunity for commercial acts. And that was so even as long ago as 1975.

132. I would mention Mr Gavan Griffith QC's contribution "Foreign State Immunity in Australia" in *Estudios en Homenaje a Jorge Barrera Graf : Tomo II* (1989) p.837. After referring to *The Philippine Admiral,* the *Trendtex* case and *I Congreso del Partido,* Mr Griffith (whose experience includes that of having been the Solicitor General of Australia from 1984 to 1997) points out (at p.840) that similar approaches were adopted, either independently or relying on the United Kingdom decisions, by the courts of Canada (in 1977), South Africa

(in 1980) and Pakistan (in 1981). The decisions cited are that of : the Quebec Court of Appeal in *Zodiak International Products Inc. v. Polish People's Republic* (1977) 81 DLR (3d) 656; the Eastern Cape Division of the Supreme Court of South Africa in *Kaffraria Property Co. (Pty) Inc. v. Government of the Republic of Zambia* [1980] 2 SALR 709; and the Supreme Court of Pakistan in *A M Qureshi v. Union of Soviet Socialist Republics* PLD 1981 SC 377. These are some examples drawn from a very long list. And as attested by the *Midland Investment* case decided in 1956, Hong Kong comes early in that list.

133. As the Supreme Court of Pakistan noted in *Qureshi's* case at p.396, the Vienna Convention on Diplomatic Relations 1964 does not deal with the immunity of sending states from the jurisdiction of the courts of receiving states. So, as pointed out in Jonathan Brown : "State Practice on Diplomatic Immunity" (1988) 37 LQR 53 at p.80, disputes thereon fall to be determined by the receiving state's law on state immunity. Four of the cases cited to the Court are of "labour" claims brought by former embassy employees. First, there is *Heusala v. Turkey* ILDC 576 (FI 1993) brought by a former secretary and translator at the Turkish Embassy in Finland. Secondly, there is *A v. B* ILDC 23 (NO 2004) brought by a former driver at the Republic of B's Embassy in Norway. Thirdly, there is *AA v. Austrian Embassy* ILDC 826 (PT 2007) brought by a former secretary at the Austrian Embassy in Portugal. Fourthly, there is *Adelaida Garcia de Borrisow v. Embassy of Lebanon* ILDC 1009 (CO 2007) brought by a lady who had been employed, in a capacity not made clear in the report, at the Lebanese Embassy in Colombia.

134. In each case, the applicable immunity was held to be restrictive. Such immunity protected Turkey in *Heusala's* case : because the Supreme Court of Finland held that Ms Heusala's duties were meant to serve the official duties of a member of the diplomatic staff of Turkey's mission in Finland and

that entering into a contract with her had therefore been a part of Turkey's activities governed by public law. And it also protected the Republic of B in *A v. B* : because the Supreme Court of Norway, while noting that immunity had evolved from an absolute to a restrictive form, felt that there was little doubt overall that the activities at embassies lie in the core area of government jurisdiction But restrictive immunity did not protect Austria in *AA's* case : because the Supreme Court of Portugal held that the former employee who sued had not performed any activities connected with the exercise of governmental authority. Nor did it protect Lebanon in *de Borrisow's* case : because the Supreme Court of Colombia took the view that restrictive immunity did not bar claims based on worker's rights and benefits.

135. It should be mentioned that, as appears from Annex III to the Basic Law, one of the national laws to be applied in Hong Kong is "Regulations of the People's Republic of China Concerning Diplomatic Privileges and Immunities". That deals with diplomatic privileges and immunities rather than state immunity.

136. In the case of *Claim against the Empire of Iran* (1963) 45 International Law Reports 57 the Federal Constitutional Court of the Federal Republic of Germany said this at p.80 :

> "As a means for determining the distinction between acts *jure imperii* and *jure gestionis* one should rather refer to the nature of the State transaction or the resulting legal relationships, and not to the motive or purpose of the State activity. It thus depends on whether the foreign State has acted in exercise of its sovereign authority, that is in public law, or like a private person, that is in private law."

Cited (also at p.80) in support of that were : the "judicial practice" of the Austrian, Belgian, Egyptian, Italian and Swiss courts; the "codification endeavours" of the International Law Association and the Institut de Droit International; and a large body of academic writings.

137. It is worth mentioning that the activity concerned in *Holland v. Lampen-Wolfe* [2000] 1 WLR 1573 was the provision by a state of general educational courses for its military personnel enhancing their career prospects within as well as outside military service. Despite that military element, it was with some hesitation that the House of Lords held that the activity concerned was *jure emperii* rather than *jure gestitionis*. That case is also worth citing for Lord Cooke of Thorndon's neat description (at p.1578H) of restrictive immunity as that "whereby the trading or commercial activities of states are not protected".

138. Prior to the handover, the state immunity available in the courts of Hong Kong was restrictive so as not to extend to commercial transactions. And that remains so today. Restrictive immunity was a rule of Hong Kong common law. For a time it rested on a statutory basis confirmatory of the common law position. When that statute ceased to have effect in Hong Kong on 1 July 1997, that rule of Hong Kong common law once again stood on its own feet. Just as it was more consonant with Hong Kong justice before the handover, so is restrictive immunity more consonant with Hong Kong justice now. And just as it was applied in the courts of Hong Kong then, so is restrictive immunity to be applied in the courts of Hong Kong now. In saying that restrictive immunity is more consonant with justice, I am not saying that legislating for absolute immunity would be an unconstitutional step. I neither encourage nor discourage the enactment of such legislation. But at least proceeding by way of legislation would be within the rule of law.

139. Dealing with the matter at common law, however, I would not undo the justice that restrictive immunity accords. Among the points made by Sir Hersch Lauterpacht in Chapter 5 of his *International Law and Human Rights* (1950) is the point that "[t]he moral claims of today are often the legal rights of

tomorrow". Where a moral claim has become a legal right, turning it back into a mere moral claim is not what developing the common law is about.

140. Although the present case is at the "suit" rather than "execution" stage, it would be unsatisfactory to leave undecided the appellants' contention, disputed by FG, that even if immunity from suit is restrictive, immunity from execution would be absolute. Since the appellants needed some time to prepare their submissions in support of that contention of theirs, we directed that the rival submissions thereon be put in writing in accordance with the time-table which we laid down. Those written submissions, lodged after the end of the oral hearing, have been received and considered.

141. In my view, there is no basis for holding that even if immunity from suit is restrictive in Hong Kong, immunity from execution in Hong Kong would be absolute.

(15) Transactions underlying the awards

142. The Intervener has put forward the argument (the details of which were foreshadowed in paras 125 to 135 of his printed case) that even if the transactions underlying the award are commercial, the commercial exception provided by restrictive immunity does not apply because, he submits, the present proceedings relate to the awards and not the transactions, and are therefore *jure imperii* (rather than *jure gestionis*). FG's answer to this argument is foreshadowed in para.16.1 to para.16.7 of its printed case.

143. For this argument of his, presented by Ms Theresa Cheng SC, the Intervener relies on the decision of Stanley Burnton J (as he then was) in *AIC Ltd v. Federal Government of Nigeria* [2003] EWHC 1357. The part of the decision relied upon by the Intervener relates to the issue of whether a judgment

against a state may be registered under s.9 of the Administration of Justice Act 1920 and enforced in England. In particular, the Intervener relies on para.24 of Stanley Burnton J's judgment where he says : "In my judgment, the proceedings resulting from an application to register a judgment under the 1920 Act relate not to the transaction or transactions underlying the original judgment, but to that judgment. The issues in such proceedings are concerned essentially with the question whether the original judgment was regular or not".

144. One therefore sees at once the difference between those proceedings and the proceedings with which the present case is concerned. There is no issue as to whether the awards are regular or not. The issue is whether the Congo enjoys state immunity from enforcement under them. Nor is the SIA engaged in the present case as it was in that case. The present case turns on the common law and not on statute.

145. Nevertheless I should for the sake of completeness mention the decision of the Supreme Court of Canada in *Kuwait Airways Corp. v. Iraq* 2010 SCC 40 and the decision of the Supreme Court of the Netherlands in *SEEE v. Yugoslavia* (1973) 65 International Law Reports 356. In the *Kuwait Airways* case, Iraq pleaded state immunity in proceedings for the enforcement in Canada of an English order that Iraq pay Kuwait Airways costs totaling approximately Canadian $84 million. The plea failed. Even in a statutory context not dissimilar to that in the United Kingdom, the Supreme Court of Canada looked to Iraq's acts which constituted the foundation of the costs order. Those acts were performed in the context of Iraq's intervention in commercial litigation in which its national airline was involved.

146. *SEEE v. Yugoslavia* concerned the enforcement in the Netherlands of an arbitral award obtained against Yugoslavia. The Supreme Court of the

Netherlands looked to the underlaying transaction. It said (at p.361) that Yugoslavia had "concluded a private law transaction whereby a private legal person was to construct a railway" and that it "[made] no difference that the transaction [had] been concluded under an enabling Act nor that the railway [had] a military or strategic character".

147. This argument put forward by the Intervener does not get off the ground.

(16) No immunity

148. The state immunity from suit and execution available in the courts of Hong Kong is restrictive. It does not extend to commercial transactions. These are commercial transactions. And these proceedings relate to them. So there is no immunity. The foregoing is sufficient to dispose of these appeals in FG's favour. Equally a waiver of immunity by the Congo would be sufficient to dispose of these appeals in FG's favour even assuming a doctrine of absolute immunity. The issue of waiver has been fully argued, and I turn now to its resolution.

(17) Waiver of immunity (if absolute)

149. It is contended by the Congo (in para.35 of its supplemental printed case) that FG cannot argue waiver because it has not "issued" a cross-appeal. That contention is wrong. The position, as was explained by a single judge of the Court in *Thanakharn Kasikorn Thai Chamkat (Mahachon) v. Akai Holdings Ltd (No.1)* (2010) 13 HKCFAR 283 at paras 3 and 4, is this. A respondent to a civil appeal to the Court of Final Appeal who seeks to defend a result on further or other grounds does not need leave to advance such grounds. It may do so simply by including such grounds in its printed case. Only if the respondent wishes not merely to defend but actually to improve the result in its favour does

it have to do so by way of a cross-appeal, for which leave is needed. And that is the basis on which the appeal to the Court in that case proceeded. In arguing waiver, FG is not seeking to improve the result in its favour. It is merely seeking to defend the result on a further or other ground.

150. FG's argument on waiver can be stated thus. By the inclusion of an ICC arbitration clause in each credit agreement, further or alternatively by signing terms of reference agreeing to each arbitration being conducted under the ICC's 1998 rules of arbitration (rule 28.6 of which is quoted above), the Congo had effectively waived its right to claim immunity from enforcement in any court, especially one in a jurisdiction where the New York Convention applies. And it ought not to be held that a submission to jurisdiction or a waiver can only be made before the court.

151. No part of that argument enjoys the support of Reyes J or any member of the panel which heard FG's appeal to the Court of Appeal. I have of course given respectful consideration to their view against waiver, their reasons for taking that view and the arguments advanced for and against such a view. Ultimately the conclusion which I have reached on the issue of waiver, and why I have reached it, can be stated without anything like an exhaustive recitation of the reasons expressed below on that issue or the rival arguments advanced here thereon.

152. The Court has been shown a number of cases on waiver. Nobody pretends that they are the only cases. But they are worthy of attention. And the Court has had the benefit of the rival submissions of Ms Cheng and Lord Pannick on them. In the Swedish case of *Libyan American Oil Co. v. Socialist People's Arab Republic of Libya* (1981) 20 ILM 893 the Court of Appeals of Svea held (by a majority) that Libya had waived immunity by

agreeing to arbitration. And in *The French State v. SEEE* (1986) Kluwer Law International 1987 – No.2 p.149, the Cour de Cassation is reported as having held (according to the unofficial free translation into English supplied to us) that "[t]hrough the stipulation of an arbitration clause, the foreign state, which submitted to the jurisdiction of the arbitrators, accepted, by that act, that their award benefit from exequatur".

153. Then in *Creighton Ltd v. Government of the State of Qatar* 181 F 3d 118 (1999) the United States Court of Appeals held that since Qatar had not signed the New York Convention, its agreement to arbitrate in a signatory country did not, without more, demonstrate the requisite intent to waive its sovereign immunity in the United States.

154. But then in *TMR Energy Ltd v. State Property Fund of Ukraine* 2003 FC 1517 the Federal Court of Canada said at para.65 that "by the mere fact that a state entity should have entered into an arbitration agreement providing for arbitration in a country signatory to [the New York Convention], without reserving its right to jurisdictional immunity, it must be taken to have known and accepted that any resulting award could be subject to recognition and enforcement by judicial process, and thus, have waived jurisdictional immunity in relation to the recognition of the award".

155. And then in *Svenska Petroleum Exploration AB v. Government of Republic of Lithuania (No.2)* [2007] QB 886 the English Court of Appeal held, taking it most conveniently from para.117, that "[a]rbitration is a consensual procedure and the principle underlying [s.9 of the SIA] is that, if a state agreed to submit to arbitration, it has rendered itself amenable to such process as may be necessary to render the arbitration effective". Lord Pannick was of course quick to acknowledge that the present case is not under the SIA (s.9 of which

provides that "[w]here a state has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the state is not immune as respects proceedings in the courts of the United Kingdom which relate to the arbitration"). But he rightly points to the English Court of Appeal's reference to "the principle underlying" that section.

156. In "International Commercial Arbitration and the Municipal Law of States" (1977) 157 *Recueil des cours de l' Academie de droit international de la Hay* 9 at p.93 Professor Riccardo Luzzatto wrote that state immunity

> "has been frequently invoked by States with a view to getting rid, either of the obligation to arbitrate, or of the duty to execute the award. There should be, however, no doubt, in this connection, that an agreement to arbitrate constitutes an implicit waiver and that therefore international or municipal rules granting sovereign immunity should not apply."

While that and some of the other materials which I am about to mention refer to execution as well as suit, it should be remembered that so far the present case is still at the "suit" stage, the suit being an enforcement leave application. Writing in 1988, Lady Fox concluded her article "States and the Undertaking to Arbitrate" (1988) 37 ICLQ 1 with five propositions, the fourth (at p.29) expressed thus :

> "In international commercial arbitration the undertaking of the State to arbitrate cannot of itself constitute consent to the award being enforced by court proceedings. Such consent may be construed or imputed as consent to enforcement by English courts where the State in the arbitration agreement consents to the applicable law as English law or to the arbitration being held in England, and identifies the arbitration as relating to commercial matters and commercial property. Section 9 of [the SIA] should be so construed."

157. For something more recent, the Court's attention has been drawn to *The Leading Arbitrator's Guide to International Arbitration* (eds Lawrence W Newman and Richard D Hill), 2nd ed. (2008) at pp 144-145. It is acknowledged that there are *several* systems in which it is still an open question whether the waiver of immunity constituted by an arbitration clause extends to

execution. But it is recorded that the *generally held* view is that waiver extends to execution.

158. In regard to state immunity, the Court's attention has been drawn to two valuable reports of the ILC to the General Assembly of the United Nations. One is the report on the work of the ILC's fortieth session (as to which extracts from its *1988 Yearbook* have been provided). The other is the report on the work of the ILC's forty-third session (as to which extracts from its *1991 Yearbook* have been provided).

159. A further multilateral convention on the enforcement of arbitral awards against state parties would of course be of great use if one can be achieved. But I think that the reality is as described by Professor Andrea Bjorklund's observation in *International Investment Law for the 21st Century* (eds Christina Binder, Ursula Kriebaum, August Reinisch and Stephan Wittich) (2009) at p.321 that

> "further development of State immunity law in a manner that is consistent with one of the goals underlying arbitral proceedings – that winning an award means collecting any monetary recompense due in addition to achieving a victory as to principle – will likely come only in incremental and discrete steps as municipal courts grapple with increased numbers of enforcement measures sought against increased numbers of recalcitrant States".

Professor Christoph Schreuer has made a similar point in regard to state immunity as a whole. In *State Immunity : Some Recent Developments* (1988), he pointed out the difficulty of achieving codification by way of a general convention. And then he said (at p.169) that "national legislation and court practice is likely to remain the most important source of law in this area for the foreseeable future".

160. In *I Congreso del Partido* Lord Wilberforce noted the willingness of states to enter into commercial, or other private law, transactions with

individuals. He pointed out two things. First, that it is necessary in the interest of justice to individuals having such transactions with states to allow them to bring such transactions before the courts. And secondly, that to require a state to answer a claim based upon such transactions does not involve a challenge to or inquiry into any act of sovereignty or governmental act of that state. He then said (at p.262D-E) that "[i]t is, in accepted phrases, neither a threat to the dignity of that state, nor any interference with its sovereign functions".

161. Those words were cited and employed by Gross J (as he then was) in *The Altair* [2008] 2 Lloyd's Rep 90. That case was about requiring a state to honour an arbitral award in respect of salvage services which it had enjoyed. At para.57 Gross J said that requiring a state to do that was "neither a threat to the dignity of that state, nor any interference with its sovereign functions". That is as true in respect of the awards in the present case as it is of the award in that case. And as it seems to me, it is positively consonant with the dignity of a state that it should honour judgments and arbitral awards in respect of commercial transactions into which it has entered.

162. In his book *Mixed International Arbitration : Studies in Arbitrations between States and Private Persons* (1990) Professor Stephen Toope expressed the view (at p.146) that "the enforcement of an arbitral award against the contracting state is not precluded by sovereign immunity, because the agreement to arbitrate constitutes a waiver of that immunity". He cites *Ipitrade International SA v. Federal Republic of Nigeria* (1978) 465 F.Supp. 824 as well as other American decisions and decisions given in the Netherlands, Sweden and, with an important caveat, Switzerland.

163. Subject to the question of whether a waiver of state immunity can only be made before the court, I view a state's submission to arbitration in a

commercial dispute as a waiver of any immunity from an enforcement leave application that it might have had in Hong Kong.

164. "It has been said", as Professor TE Holland observed in his *Elements of Jurisprudence*, 11th ed. (1910) at p.354, "that the law is concerned more with remedies than rights". Rights under an award are worthless if unenforceable. I agree with the statement in Fouchard, Gaillard and Goldman : *International Commercial Arbitration* (1999) at p.391 that "[i]t would be absurd to conclude that a state could agree to submit disputes to arbitration despite its immunity from jurisdiction, but that it could subsequently prevent the award from becoming enforceable by simply relying on that immunity". Even states cannot blow hot and cold in the same breath.

165. Moreover FG is able to point to the terms of the references to arbitration in the present case. Each reference was, as we have seen, made on the footing that "the parties undertake to carry out any Award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made". Unless no waiver of state immunity is validly made except when it is made before the court, each of those references clearly constitutes an effective waiver of any immunity from an enforcement leave application that the Congo might have had in Hong Kong.

(18) Either before the court or at an earlier stage

166. So I turn to the question of whether a waiver of state immunity can only be made before (or, as it is sometimes put, in the face of) the court.

167. FG asks us to depart from, while its opponents ask us to follow, the rule laid down by the House of Lords in *Duff Development v. Kelantan* that a

waiver of state immunity can only be made before the court. That decision of the House of Lords was not unanimous. Lord Carson dissented.

168. At pp 833-834 he referred to s.1 of the Arbitration Act of 1889. Headed "References by consent out of Court", that section provided that "[a] submission, unless a contrary intention appears, shall be irrevocable, except by leave of the Court or a judge, and shall have the same effect in all respects as if it had been made an order of the Court". "The jurisdiction therefore of the Court to see that the submission is duly carried out and the machinery for making it effective attaches", Lord Carson said, "from the moment of the submission". As long ago as in 1947 the force of Lord Carson's dissent was recognised in Hong Kong when, in *The Yuk Kee Firm v. Francis Ling* (1947) 31 HKLR 102 at p.111, Williams J said that it was based on "the broad principle that justice could not be done between the parties except by making the law applicable equally to both parties".

169. In *Dallah Co. v. Ministry of Religious Affairs* [2010] 3 WLR 1472 Lord Mance JSC said (in para.19) that the first instance judge had said that

> "when a French court is considering the question of the common intention of the parties, it will take into account 'good faith', and (iii) under French law a state entering into an arbitration agreement thereby waives its immunity, both from jurisdiction (as under English law : section 9(1) of the State Immunity Act 1978 and *Svenska Petroleum Exploration AB v. Government of the Republic of Lithuania (No.2)* [2007] QB 886) and (unlike English law) also from execution".

The words "unlike English law" were added by Lord Mance. But the *Dallah* case did not turn on *Duff Development v. Kelantan* (which was not cited by or to the United Kingdom Supreme Court). The question of whether *Duff Development v. Kelantan* ought to be followed or departed from did not arise.

170. I turn now to *A Co. Ltd v. Republic of X* [1990] 2 Lloyd's Rep 520 in which Saville J (as he then was) proceeded on the basis that (as he put it at p.524 col.1) "on the authorities no mere inter partes agreement could bind the State to [a waiver of state immunity], but only an undertaking or consent given to the Court at the time when the Court is asked to exercise jurisdiction over or in respect of the subject matter of [such immunity]".

171. That decision was heavily criticised by Dr F A Mann in his note "Waiver of Immunity" (1991) 107 LQR 362. At p.364 he cited E J Cohn, "Waiver of Immunity" (1958) 34 British Year Book of International Law 260. He cited it by way of example for the view that the rule that a waiver could only be made before the court was a peculiar (and unjustifiable) rule of English law. Then at the same page, he said that the decision in *A Co. Ltd v. Republic of X* should not be treated as a precedent or even a guide. His closing observation (still at that page) was that "[i]t is sad to notice a revival of an English aberration which was believed to have been buried".

172. Now, there is something which ought in all fairness to be said at once. It is to be said in fairness to Saville J who proceeded on a rule with which Dr Mann so strongly disagreed. And it is to be said also in fairness to Dr Mann who so strongly disagreed with that rule. Quite simply, it is that Saville J was proceeding on the basis of binding precedent.

173. So was the English Court of Appeal in *Kahan v. Pakistan Federation*. It was, just like Saville J in *A Co. Ltd v. Republic of X*, bound by the decision of the House of Lords in *Duff Development v. Kelantan.* And it is to be noted that both Jenkins and Birkett LJJ (as they then were) made it clear that they were proceeding on the basis of binding precedent. Thus at p.1012 Jenkins LJ said that "[r]egarding the matter as if it were free from authority,

there [was] a considerable attraction in [counsel for the plaintiff's] argument". And at p.1018 Birkett LJ said that he was "exercised about" that argument. (*Kahan v. Pakistan Federation* was heard by a two-judge panel).

174. The stage at which a state's immunity may be waived is addressed in *Oppenheim* at pp 351-352. It is there said that a state "may do so by expressly submitting to the jurisdiction of the court before which it is sued, either by express consent given in the context of the particular dispute which has already arisen, or by consent given in advance in a contract or international agreement".

175. I must say that I have never come across an instance in which Marshall CJ's approach was less than highly instructive. Let us look at what he said in *The Schooner Exchange* at p.133 in regard to a nation's consent to exceptions to its full and complete power within its own territory. He said that such consent may be express or implied. "In the latter case", he said, "it is less determinate, exposed more to the uncertainties of construction; but, if understood, no less obligatory". The same can, in my view, be said of an earlier waiver as compared with one made before the court. A waiver made otherwise than in the face of the court may not always be as easy to establish as one made in the face of the court. But if it is established, whether with ease or after some difficulty, treating it as ineffective would be a denial of justice.

176. It might have been awkward for Reyes J and for the Court of Appeal not to follow the decision of the House of Lords in *Duff Development v. Kelantan*. But the position is wholly different in this Court. In my view, a waiver of state immunity can be made either before the court or at an earlier stage. And there has been an effective waiver in the present case.

177. Having found a waiver in the present case without placing any reliance on the case of *Chung Chi Cheung v. R* [1939] AC 160, I will now say why I think that such a finding happens to sit well with the decision of the Privy Council in that case. A British subject, who was a cabin boy on board an armed Chinese Maritime Customs cruiser, shot to death the ship's captain, who was also a British subject, while the vessel was in Hong Kong territorial waters. Proceedings instituted by the Chinese authorities for the extradition of the cabin boy failed on the ground that he was a British national. He was then tried in Hong Kong for murder, and was convicted. His conviction was affirmed on intermediate appeal and then on final appeal to the Privy Council. The Privy Council rejected the contention that the Hong Kong courts had no jurisdiction in the matter. As stated in the headnote of the report (at pp 160-161), that contention was rejected for the following reasons :

> "The immunities which, in accordance with the conventions of international law, are accorded to a foreign armed public ship and its crew and its contents do not depend upon an objective exterritoriality, but on an implication of the domestic law, and flow from a waiver by the local sovereign of his full territorial jurisdiction. Those immunities are conditional and can themselves be waived by the nation to which the public ship belongs. The Chinese government, not in fact having made, as they could have done, a diplomatic request for the surrender of the appellant after the failure of the extradition proceedings, and having subsequently permitted members of their service to give evidence before the British Court in aid of the prosecution, plainly consented to the British Court exercising jurisdiction, and such jurisdiction was therefore validly exercised."

178. In that case, the waiver of immunities lay in what the Chinese authorities did. As to that, Lord Atkin, delivering the advice of the Privy Council, said (at pp 176-177) that

> "it appears to their Lordships as plain as possible that the Chinese Government, once the extradition proceedings were out of the way, consented to the British Court exercising jurisdiction. It is not only that with full knowledge of the proceedings they made no further claim, but at two different dates they permitted four members of their service to give evidence before the British Court in aid of the prosecution. That they had originally called in the police might not be material if, on consideration, they decided to claim jurisdiction themselves. But the circumstances stated, together with the fact

> that the material instruments of conviction, the revolver bullets, etc., were left without demur in the hands of the Hong Kong police, make it plain that the British Court acted with the full consent of the Chinese Government. It therefore follows that there was no valid objection to the jurisdiction, and the appeal fails.

That is a practical, purposeful and just approach to the waiver of immunity. I see nothing practical, purposeful or just in the notion that a state which, despite its immunity from jurisdiction, has agreed to submit disputes to arbitration can afterwards rely on that immunity to prevent enforcement of the award.

(19) Restrictive. Waived if absolute

179. Even assuming a doctrine of absolute immunity, I would nevertheless dispose of these appeals in FG's favour on the basis of waiver. Of course as I have already said, I hold that the state immunity from suit and execution available in the courts of Hong Kong is restrictive so as not to extend to commercial transactions. And the transactions to which these proceedings relate are commercial.

(20) Conclusion

180. In thanking counsel and solicitors, I single out for special mention their wholehearted cooperation in the implementation of a new practice designed to render the hearing of appeals very much more efficient – particularly (although not limited to) those in which there is a massive bulk of written material to look at during the hearing. This practice was requested by the Court through one of its members at an informal case management meeting. It was perfected in the course of the hearing itself. Briefly described, the practice is this. Immediately before each session (morning and afternoon), each member of the Court is provided with a relatively small "working" bundle. This bundle would contain the documents (consisting of extracts from cases, books, articles and other written materials) which counsel would be referring to during

that session. It would have an index, and the index would indicate from where in the main bundles each item comes. As to the result, I would dismiss these appeals and order that costs be dealt with on written submissions as to which the parties should seek procedural directions from the Registrar. That is the result which I consider to be required by the independent judicial application of the law that is at all times and in all circumstances an indispensable element of our legal system.

Mr Justice Chan PJ, Mr Justice Ribeiro PJ and Sir Anthony Mason NPJ :

181. The successful transition of Hong Kong from a British Colony to a Special Administrative Region of the People's Republic of China under the principle of "one country two systems" has frequently been acknowledged. An essential component of that success is the fact that this is a society with a strong commitment to the rule of law and its concomitants of an independent judiciary and respect for the separation of powers. The rule of law in the Hong Kong Special Administrative Region is founded on the Basic Law which provides the architecture for implementing the principle of "one country two systems". Many of its Articles are devoted to establishing the separate system whereby the executive, legislative and judicial branches of government in the Region exercise a high degree of autonomy, safeguarding the fundamental rights and freedoms and the way of life of residents and others present here. Other provisions of the Basic Law establish the identity and status of Hong Kong as an inalienable part of China, the "one country" element of the "one country two systems" principle. In this appeal, it falls to the Court to consider provisions in the latter category, in particular, provisions concerning the management and conduct of foreign affairs. This is an area involving powers which have always been reserved to the Central People's Government, falling outside the limits of the Region's autonomy.

182. Three main questions arise on this appeal: (i) What is the legal doctrine of state immunity applicable in the Hong Kong Special Administrative Region ("HKSAR")? In particular, can the HKSAR validly adhere to a doctrine of state immunity which is inconsistent with the doctrine adopted by the People's Republic of China ("PRC")? (ii) In the present case, has state immunity in any event been waived? (iii) What steps, if any, should the Court take in the light of the provisions of Article 13, Article 19(3) and Article 158(3) of the Basic Law respectively?

183. For the reasons which we develop below, we have arrived at the following conclusions which, in accordance with Article 158(3), are necessarily tentative and provisional, namely, that:

(a) The HKSAR cannot, as a matter of legal and constitutional principle, adhere to a doctrine of state immunity which differs from that adopted by the PRC. The doctrine of state immunity practised in the HKSAR, as in the rest of China, is accordingly a doctrine of absolute immunity.

(b) There is no basis in law for holding that the 1st defendant has waived its immunity before the courts of the HKSAR.

(c) Prior to rendering a final judgment in this matter, the Court is under a duty pursuant to Article 158(3) of the Basic Law to refer, and does hereby refer, the questions set out in Section G of this judgment to the Standing Committee of the National People's Congress, being questions relating to the interpretation of Articles 13 and 19 of the Basic Law, those Articles being provisions which concern respectively foreign affairs within the responsibility of the Central People's Government and the relationship between the Central Authorities and the Region, the

interpretation sought being necessary for the Court's adjudication of the present case.

184. In this judgment:

(a) Section A sets out the factual background;

(b) Section B describes the course of the proceedings and the decisions in the courts below;

(c) Section C examines the development of the doctrine of state immunity at common law and considers the arguments advanced by the plaintiff in favour of a commercial exception to absolute immunity;

(d) Section D deals with the effect of the Basic Law on the doctrine of state immunity in the HKSAR after China's resumption of the exercise of sovereignty on 1st July 1997;

(e) Section E deals with the plaintiff's arguments supporting the proposition that the HKSAR may validly adhere to a policy on state immunity at variance with that of the PRC;

(f) Section F examines the contention that the 1st defendant has waived any immunity it might possess;

(g) Section G deals with reference under Article 158(3) of the Basic Law; and

(h) Section H identifies the matters not dealt with in this judgment and sets out the formal Orders we provisionally make.

A. The factual background

A.1 The basis of the plaintiff's claim

185. In 1980 and 1986, Energoinvest JNA ("Energoinvest"), a company incorporated in Yugoslavia, entered into credit agreements with the Republic of Zaire and with a Zaire corporation known as Société Nationale d'Electricité

("SNE"). The 1st defendant, the Democratic Republic of the Congo, is the successor to the Republic of Zaire and in this judgment, we shall refer to them both simply as "the DRC".

186. Energoinvest provided credit to the DRC and SNE in the sum of US$15.18 million under the first agreement and US$22.525 million under the second. Those amounts were used to finance construction of a hydro-electric facility and high-tension power lines. Each contract contained an agreement for arbitration to be held in Paris and Zurich respectively under ICC Paris rules and applying Swiss law.

187. The borrowers defaulted and on 4 March 2001, Energoinvest commenced arbitrations against them. On 30 April 2003, Energoinvest obtained two arbitral awards against the DRC and SNE in the sums of US$11.725 million and US$18.43 million, with interest on those amounts.

188. The Respondent in this appeal, FG Hemisphere Associates LLC ("FGH" or "the plaintiff"), is a Delaware company based in New York and dealing in what it describes as "distressed assets". On 16 November 2004, in consideration of an undisclosed sum, Energoinvest executed an absolute assignment of its rights in the arbitration awards and the underlying debts to FGH which then sought to enforce those awards against any available DRC assets.

A.2 The development project

189. In the meantime, the PRC and the DRC had agreed to a development scheme whereby the PRC would finance and construct extensive infrastructure projects in return for the right to exploit certain DRC mineral resources. Cooperation agreements had been signed by the two States in 2001.

They were followed by a Memorandum of Agreement dated 17 September 2007 between the DRC and a consortium of Chinese state enterprises setting out a framework for dealing with the first tranche of financing for the development scheme. The Memorandum provided for the formation of a joint venture company to be owned as to 68% by PRC interests and 32% by DRC interests, which would engage in mining activities and would distribute dividends to be used to finance the infrastructure projects.

190. On 22 April 2008, a Cooperation Agreement was entered into between the DRC on the one hand and two Chinese enterprises, namely China Railway Group Limited ("China Railway") and Sinohydro Corporation Limited ("Sinohydro"), on the other. China Railway is a limited company incorporated in the PRC and listed on the Hong Kong Stock Exchange. It has been joined by FGH as the 5th defendant in the present proceedings. China Railway and Sinohydro undertook to raise and put in place the financing and construction of the intended infrastructure projects in return for mining rights to be granted to the intended joint venture company. Those mining rights were owned by a DRC state-owned company called La Générale des Carrières et des Mines ("Gécamines", also known as "Congo Mining") and the parties agreed that Gécamines would transfer those rights to the proposed joint venture company pursuant to a Joint Venture Agreement to which Gécamines would be a party, along with five subsidiaries of the two Chinese contracting parties. The Cooperation Agreement identified the mineral rights and infrastructure projects involved and, of particular relevance to the present case, provided for the payment by the Chinese parties to the DRC of certain "Entry Fees" subject to certain conditions precedent being satisfied.

191. The mining rights to be granted related to some 10.6 million MT of copper and 626,000 MT of cobalt. The infrastructural works to be undertaken

included the construction, upgrading, restoration or modernization of some 3,215 km of railways; 3,400 km of asphalted roads; 2,738 km of beaten earth roads; 550 km of urban roadways; a 450-bed hospital; 31,150 hospital beds distributed among 26 provinces; 145 health centres each with 50 beds; two hydroelectric dams; 5,000 accommodation units; two universities; two electricity distribution networks; two vocational training centres and two airports.

192. The Joint Venture Agreement by which the development scheme was to be implemented is also dated 22 April 2008. The parties representing DRC interests were Gécamines and a certain Mr Gilbert Kalamba Banika. Mr Banika was subsequently replaced by another DRC corporation called La Société Immobilière du Congo ("Simco"). As envisaged in the Memorandum of Agreement, Gécamines and Simco together hold 32% of the shares in the joint venture company. On the Chinese side, there are in the first place, three wholly-owned subsidiaries of the 5th defendant, namely, China Railway Group (Hong Kong) Limited, China Railway Resources Development Limited and China Railway Sino-Congo Mining Limited, all companies incorporated in Hong Kong. They have been sued by FGH in the present proceedings as the 2nd, 3rd and 4th defendants respectively and are referred to in this judgment as "the China Rail defendants". The China Rail defendants together hold a total of 43% of the shares in the joint venture company. The other Chinese parties are the Sinohydro subsidiaries, Sinohydro International Engineering Co Ltd and Sinohydro Harbour Co Ltd, together holding a 25% interest in the joint venture.

193. Since entry into the Joint Venture Agreement by its three subsidiaries constituted a discloseable transaction under the applicable Listing Rules, the 5th defendant issued a public announcement dated 22 April 2008 describing the main terms of the Cooperation and Joint Venture Agreements. It

stated that subject to certain conditions, an "entry fee" of US$350 million, (payable as to US$221 million by the China Rail defendants and as to US$129 million by the Sinohydro companies) would be paid to the Government of the DRC and Gécamines. A further public announcement, again making reference to the Entry Fees, was issued on 9 May 2008.

B. The proceedings in the Courts below

B.1 Ex parte orders made by Saw J

194. Contending that the US$221 million share of the Entry Fees payable by the China Rail defendants under the abovementioned contracts represents an asset of the DRC in Hong Kong, FGH launched proceedings against the DRC and the 2nd to 5th defendants to enforce the arbitral awards in this jurisdiction. On 15 May 2008, on an *ex parte* application before Saw J, FGH obtained (i) an interim injunction restraining the China Rail defendants from paying to the DRC or otherwise disposing of a US$104 million portion of the abovementioned sum of US$221 million, and restraining the DRC from receiving that portion of the Entry Fees; (ii) leave to enforce the two arbitration awards "in the same manner as judgments or orders" of the HKSAR Court; (iii) leave to serve the DRC with the proceedings out of the jurisdiction; and (iv) a direction for the hearing of an application to appoint receivers by way of equitable execution to receive the Entry Fees in satisfaction of the arbitral awards. The sum of US$104 million which FGH claimed to be owing as at 15 May 2008 was calculated on the basis that the awards carry interest respectively at 9% and 8.75% per annum compounded, so that interest was then accruing at the rate of about US$24,500 per day.

195. The DRC acknowledged service for the purpose of disputing jurisdiction and issued a summons dated 7 July 2008 seeking (among other things) a declaration that the Court has no jurisdiction over it in respect of the subject-matter of the claim or the relief sought. On 12 November 2008, the Secretary for Justice applied for, and was subsequently granted, leave to intervene.

B.2 The 1st OCMFA Letter

196. The hearing of the DRC's jurisdictional challenge commenced before Reyes J on 18 and 19 November 2008. A central issue was whether the doctrine of state immunity applicable in the HKSAR is one which grants to foreign states absolute immunity from the jurisdiction of our courts and from execution upon their property (as contended for by the DRC and the China Rail defendants); or whether, (as FGH submitted) the applicable doctrine is one of "restrictive immunity" in which an exception to absolute immunity is recognized, allowing jurisdiction to be exercised over a foreign state in relation to its commercial as opposed to public or state activities and assets.

197. At the end of the hearing, the Secretary for Justice placed before the Court a letter dated 20 November 2008 from the Office of the Commissioner of the Ministry of Foreign Affairs ("OCMFA") addressed to the Constitutional and Mainland Affairs Bureau of the HKSAR government ("the 1st OCMFA Letter"), setting out (in translation) the position adopted on state immunity by the Central People's Government ("CPG") as follows:

> "Regarding the issue of state immunity involved in the case *FG Hemisphere Associates LLC v Democratic Republic of the Congo and Ors* (HCMP 928/2008) before the Court of First Instance of the High Court of the Hong Kong Special Administrative Region, the Office of the Commissioner of the Ministry of Foreign Affairs of the People's Republic of China in the Hong Kong Special Administrative Region, having been duly authorized, makes the following statement as regards the principled position of the Central People's Government:
>
> The consistent and principled position of China is that a state and its property shall, in foreign courts, enjoy absolute immunity, including absolute immunity from jurisdiction and from execution, and has never applied the so-called principle or theory of 'restrictive immunity'. The courts in China have no jurisdiction over, nor in practice have they ever entertained, any case in which a foreign state or government is sued as a defendant or any claim involving the property of any foreign state or government, irrespective of the nature or purpose of the relevant act of the foreign state or government and also irrespective of the nature, purpose or use of the relevant property of the foreign state or government. At the same time, China has never accepted any foreign courts having jurisdiction over cases in which the State or

> Government of China is sued as a defendant, or over cases involving the property of the State or Government of China. This principled position held by the Government of China is unequivocal and consistent."

B.3 Reyes J's judgment

198. In his judgment dated 12 December 2008,[1] Reyes J held that it was not necessary to choose between the rival contentions favouring (with certain variants) absolute as opposed to restrictive immunity since the transactions underlying payment of the Entry Fees were, in his view, not commercial in nature.[2] Thus, even if the law applicable in the HKSAR's courts adopted restrictive immunity, the DRC would still enjoy immunity in the present case. His Lordship arrived at that conclusion noting that the Cooperation and Joint Venture Agreements had been made under the "umbrella cooperation agreements" between the PRC and the DRC; that the joint venturers were state-owned enterprises; that the undertaking was "massive and ambitious" providing for "no more nor less than the development of the whole of the DRC for the economic benefit and well-being of its citizens" made possible by its "being driven by two governments ... as opposed to private entities"; and that the agreements involved granting special tax and customs status to the Chinese parties.[3] Reyes J considered these to be attributes of a sovereign, inter-state arrangement and not merely a commercial relationship. His Lordship likened the Entry Fees to a licence fee payable to the DRC for exploiting its mineral rights, and therefore payments which only "a state or government can extract".[4]

199. Reyes J also decided that the DRC had not waived its immunity. He rejected the argument that an agreement to arbitrate in accordance with the

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1 [2009] 1 HKLRD 410.
2 At §70.
3 At §§85-90.
4 At §91.

ICC Rules amounted to such a waiver, holding in particular that it was not a waiver of immunity from execution.[5]

200. His Lordship therefore set aside Saw J's orders and declared that the Court has no jurisdiction over the DRC in the proceedings. He went on *obiter* to express the "provisional view" that the law in this jurisdiction confers only restrictive immunity on foreign States, being a doctrine of the common law made applicable in the HKSAR by virtue of Articles 8 and 18 of the Basic Law (to which we shall return).[6]

201. In expressing such views, Reyes J noted the contents of the 1st OCMFA Letter and recognized that there was no doubt "that until recently the Mainland took the absolute immunity position".[7] However, he was troubled that the Letter did not discuss the signing by the PRC in September 2005 of the United Nations Convention on Jurisdictional Immunities of States and Their Property 2004 ("the UN Convention") which adopts a restrictive approach to state immunity.[8] Even though he noted that the UN Convention had not secured sufficient signatories to enter into force, Reyes J thought that "having signed the Convention, the PRC Government must be taken to have at least indicated its acceptance of the wisdom of the provisions therein."[9] He therefore did not think the CPG's position was "as clear-cut as the Letter states"[10] and that it was therefore not an obstacle to his reaching the provisional view expressed.

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5 At §§104-117 and §121.
6 At §§43-44 and 71.
7 At §63.
8 At §64 and §81.
9 At §65.
10 At §62.

B.4 The 2nd OCMFA Letter

202. FGH filed its Notice of Appeal against Reyes J's decision on 18 December 2008. Before the appeal came on for hearing, the Secretary for Justice placed before the Court a further letter from the OCMFA dated 21 May 2009 ("the 2nd OCMFA Letter"), designed to explain the CPG's position regarding the UN Convention. After referring to the 1st OCMFA Letter, it states (in translation) as follows:

> "Having been duly authorized, the (OCMFA) in the (HKSAR) makes the following statement as regards the signature of China of the UN Convention on Jurisdictional Immunities of States and Their Property (hereinafter referred to as the 'Convention'):
>
> 1. China considers that the issue of state immunity is an important issue which affects relations between states. The long-term divergence of the international community on the issue of state immunity and the conflicting practices of states have had adverse impacts on international intercourse. The adoption of an international convention on this issue would assist in balancing and regulating the practices of states, and will have positive impacts on protecting the harmony and stability of international relations.
>
> 2. In the spirit of consultation, compromise and cooperation, China has participated in the negotiations on the adoption of the Convention. Although the final text of the Convention was not as satisfactory as China expected, but as a product of compromise by all sides, it is the result of the coordination efforts made by all sides. Therefore, China supported the adoption of the Convention by the United Nations General Assembly.
>
> 3. China signed the Convention on 14 September 2005, to express China's support of the above coordination efforts made by the international community. However, until now China has not yet ratified the Convention, and the Convention itself has not yet entered into force. Therefore, the Convention has no binding force on China, and moreover it cannot be the basis of assessing China's principled position on relevant issues.
>
> 4. After signature of the Convention, the position of China in maintaining absolute immunity has not been changed, and has never applied or recognized the so-called principle or theory of 'restrictive immunity' (annexed are materials on China's handling of the Morris case)."

203. Annexed were copies of a letter dated 25 January 2006 and a legal memorandum from the Chinese Embassy in Washington DC to the United States Department of State setting out China's position on state immunity and

asserting absolute immunity in respect of a claim sought to be made by one Marvin L Morris Jr against the PRC on the basis of certain bonds issued by the then Chinese government in 1913.[11]

B.5 The Court of Appeal's decision[12]

204. On 10 February 2010, by a majority comprising Stock VP and Yuen JA, the Court of Appeal reversed the decision of Reyes J.

205. Yeung JA dissented, holding that:

> "... the constitution in Hong Kong SAR, bearing in mind the clear and unequivocal foreign policy of the PRC with regard to state immunity, does not permit the application of the doctrine of restrictive immunity and that the only state immunity doctrine that should be adopted in Hong Kong SAR is one of absolute immunity."[13]

206. His Lordship based his decision in particular on Articles 1, 8, 13 and 19 of the Basic Law, holding that determining the scope of state immunity is a matter of foreign affairs so as to require the HKSAR's practice to be consistent with that of the PRC.[14]

207. The majority held that the law confers only restrictive immunity on a foreign State. Its reasoning runs along the following lines: Before 1st July 1997, Hong Kong adopted a restrictive approach to state immunity, recognizing a commercial exception, both as a matter of statute and of common law.[15] The common law remains applicable after 1st July 1997 unless inconsistent with the Basic Law or later legislation. No later inconsistent legislation has been enacted. Nor has the CPG applied any national law on state immunity to Hong Kong via Annex III of the Basic Law. Such omissions are a significant indication that it

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11 See *Marvin L Morris v PRC* 478 F Supp 2d 561 (SDNY 2007).
12 [2010] 2 HKLRD 66.
13 At §228.
14 At §§224-225.
15 At §§77-78 and §§246, 253.

was not intended to change the restrictive immunity doctrine in the HKSAR as incorporated into the common law from customary international law.

208. The majority then held that restrictive immunity is not incompatible with any Basic Law provision and that there was nothing to suggest that adoption of that policy would in any way infringe upon or prejudice the sovereignty of the PRC.[16] While they recognized that the Court had to have close regard to the two OCMFA Letters, they considered those letters not decisive of the case but merely intended to bring the CPG's policy to the Court's attention and to assert the PRC's claim of absolute immunity as a matter of international consistency.[17] Accordingly, they concluded that the restrictive doctrine applies in the HKSAR.[18]

209. The Court of Appeal unanimously rejected the suggestion that the DRC had waived its immunity, at least in relation to execution against its alleged assets.[19]

210. Having decided that the restrictive approach to state immunity applies in the HKSAR, the majority held that there was "a good arguable case" that the Entry Fees were debts payable to the DRC and sited in Hong Kong. They also held that there was "a good arguable case" that such part of the Entry Fees as was intended to be paid to Gécamines (thought to amount to US$100 million to US$150 million) was intended to be used for commercial as opposed to governmental or sovereign purposes so that the arbitral awards might be enforced against that element of the Entry Fees. They set aside Reyes J's

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16 At §89, §118, §256, §258 and §§264-267.
17 At §87 and §123.
18 At §112, §246, §257, §260 and §267.
19 At §177, §§231-234, §267 and §274.

Orders and directed that the case be remitted to the Court of First Instance for an inquiry to determine:

> "... to what extent, if any, the entry fees payable by the 2nd to 5th defendants inclusive are intended by the DRC for payment to Gecamines and, further, whether the amount thus payable is amenable to or immune from execution..."

B.6 The 3rd OCMFA Letter

211. The Secretary for Justice placed before the Court a further letter from the OCMFA dated 25th August 2010 which, after referring to the first two OCMFA Letters and the decision of the Court of Appeal, stated (in translation) as follows:

> "The judgment held that there was no evidence suggesting that the sovereignty of China would be prejudiced if the common law as applied in the Hong Kong Special Administrative Region incorporated the principle of 'restrictive immunity'; in practice, the application of the principle of 'restrictive immunity' by the courts of the SAR would neither prejudice the sovereignty of China nor place China in a position of being in breach of international obligations under the Convention; there was also no mention in the above-mentioned two letters of the Office of the Commissioner of the Ministry of Foreign Affairs in the Hong Kong Special Administrative Region that the application of the principle of 'restrictive immunity' in the Hong Kong Special Administrative Region would prejudice the sovereignty of China.
>
> Given the inconsistencies between the above understanding as stated in the judgment of the Court of Appeal of the High Court of the Hong Kong Special Administrative Region and the actual situation, the Office of the Commissioner of the Ministry of Foreign Affairs in the Hong Kong Special Administrative Region, having been duly authorized, further makes the following statement as regards the issue of state immunity:
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> 1. The Office of the Commissioner of the Ministry of Foreign Affairs in the Hong Kong Special Administrative Region has clearly indicated in the letter (2009) Wai Shu Zi No. 37[20] that the issue of state immunity is an important issue which affects relations between states. Therefore, the application in the Hong Kong Special Administrative Region of a principle of state immunity that is not consistent with the position of China would obviously prejudice the sovereignty of China.
>
> 2. In fact, the regime of state immunity is an important aspect of relations between states as well as the handling of external relations by a state, and is an important component of the foreign affairs of the state. Each state

[20] The 1st OCMFA Letter.

adopts a regime of state immunity that is consistent with its own interests, in light of its national circumstances as well as foreign policy.

3. The Office of the Commissioner of the Ministry of Foreign Affairs in the Hong Kong Special Administrative Region has also stated clearly in the above-mentioned two letters that, regarding the issue of state immunity, the consistent position of China is that a state and its property shall, in foreign courts, enjoy absolute immunity, including absolute immunity from jurisdiction and from execution. The courts in China have no jurisdiction over any case in which a foreign state is sued as a defendant or any claim involving the property of any foreign state. China also does not accept any foreign courts having jurisdiction over cases in which the State of China is sued as a defendant, or over cases involving the property of the State of China. The regime of state immunity concerns the foreign policy and overall interests of the state, and the above-mentioned state immunity regime adopted by China uniformly applies to the whole state, including the Hong Kong Special Administrative Region.

4. Before 30 June 1997, the United Kingdom extended the State Immunity Act 1978 to Hong Kong. That Act involved matters of foreign affairs and the so-called principle or theory of 'restrictive immunity' reflected therein was inconsistent with the consistent position of China in maintaining absolute immunity. Furthermore, from 1 July 1997, the Central People's Government would be responsible for the foreign affairs relating to the Hong Kong Special Administrative Region. Therefore, the above-mentioned State Immunity Act of the United Kingdom was not localized as were most other British laws that previously applied in Hong Kong when the issue of localization of Hong Kong laws was being dealt with during the transitional period. The principle of 'restrictive immunity' which was reflected in the Act no longer applied in the Hong Kong Special Administrative Region upon the resumption of the exercise of sovereignty by China over Hong Kong. At that time, the representatives of the Central People's Government also made it clear in the Sino-British Joint Liaison Group that the uniform regime of state immunity of China would be applicable in the Hong Kong Special Administrative Region from 1 July 1997.

5. If the Hong Kong Special Administrative Region were to adopt a regime of state immunity which is inconsistent with the position of the state, it will undoubtedly prejudice the sovereignty of China and have a long-term impact and serious prejudice to the overall interests of China:

(1) The issue of state immunity obviously involves the understanding and application of the principle of state sovereignty by China, and concerns relations between states. If the position of the Hong Kong Special Administrative Region on this issue were not consistent with that of the state, the overall power and capacity of the Central People's Government in uniformly conducting foreign affairs would be subjected to substantial interference, which would not be consistent with the status of the Hong Kong Special Administrative Region as a local administrative region.

(2) The consistent position of China in maintaining absolute immunity on the issue of state immunity has already been widely acknowledged by the international community. Being an inalienable part of China, if the Hong Kong Special Administrative Region were to adopt the principle of 'restrictive immunity', the consistent position of China in maintaining absolute immunity would be open to question.

(3) The Central People's Government is responsible for the foreign affairs relating to the Hong Kong Special Administrative Region, which entails that in the area of foreign affairs, the international rights and obligations concerned would be assumed by the Central People's Government. If the courts of the Hong Kong Special Administrative Region were to apply its jurisdiction over foreign states and their property by adopting the principle of 'restrictive immunity', it would be possible for the state concerned to make representations to the Central People's Government, and accordingly the Central People's Government may have to assume state responsibility, thus prejudicing the friendly relations between China and the state concerned. As a matter of fact, since the inception of the case *FG Hemisphere Associates LLC v Democratic Republic of the Congo and Others*, the Government of the Democratic Republic of the Congo has repeatedly made representations to the Central People's Government through the diplomatic channel.

(4) The consistent principled position of China to maintain absolute immunity on the issue of state immunity is not only based on the fundamental international law principle of 'sovereign equality among nations', but also for the sake of protecting the security and interests of China and its property abroad. If the principle of 'restrictive immunity', which is not consistent with the principled position of the state on absolute immunity, were to be adopted in the Hong Kong Special Administrative Region, the states concerned may possibly adopt reciprocal measures to China and its property (which are not limited to the Hong Kong Special Administrative Region and its property), thus threatening the interests and security of the property of China abroad, as well as hampering the normal intercourse and co-operation in such areas as economy and trade between China and the states concerned.

(5) The international community has been supporting the economic development of impoverished states and the improvement of the livelihood in these states through debt relief initiatives and assistance schemes. Supporting the economic development of developing states has also been one of the foreign policies of China. In recent years, certain foreign companies have acquired the debts of impoverished African states and profited from claiming those debts through judicial proceedings, thus adding to the financial burden of these impoverished states and hampering the efforts of the international community in assisting these states. Such practice is inequitable and some states have even enacted legislation to impose restrictions on the same. If the Hong Kong Special Administrative Region were to adopt a regime of state immunity that is not consistent with that of the state and thereby facilitate the pursuance of the above-mentioned practice, it would be contradictory to the above-mentioned foreign policy of China and tarnish the international image of China."

C. The doctrine of state immunity at common law

C.1 The doctrine prior to 1st July 1997

212. Prior to the resumption of the exercise of sovereignty by the PRC on 1st July 1997, the position on state immunity in this jurisdiction was governed initially by the common law and then by a United Kingdom statute extended to Hong Kong.

213. Before 1975, the traditional common law doctrine, applied in Hong Kong as in the United Kingdom, was that the immunity of foreign states was absolute. This was encapsulated by Lord Atkin in *Cia Naviera Vascongado v SS Cristina* (*"The Cristina"*)[21] in the following terms:

> "The foundation for the application to set aside the writ and arrest of the ship is to be found in two propositions of international law engrafted into our domestic law which seem to me to be well established and to be beyond dispute. The first is that the courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings whether the proceedings involve process against his person or seek to recover from him specific property or damages.
>
> The second is that they will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control. There has been some difference in the practice of nations as to possible limitations of this second principle as to whether it extends to property only used for the commercial purposes of the sovereign or to personal private property. In this country it is in my opinion well settled that it applies to both."

214. However, even in *The Cristina* decision itself, some of their Lordships noted that a doctrine of restrictive immunity was emerging, reflecting the increase in State commercial activity, although such approach was then considered insufficiently established to be incorporated into English common law.[22]

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[21] [1938] AC 485 at 490. See also Lord Wilberforce's summary of the position in *I Congreso del Partido* [1983] 1 AC 244 at 261.

[22] *Ibid,* per Lord Macmillan at 497-498; per Lord Maugham at 521-522.

215. Developments in the United States were to prove influential. In 1945, in *Republic of Mexico v Hoffman*,[23] for instance, the question arose as to whether the United States courts should recognize immunity from an Admiralty suit *in rem* "of a merchant vessel solely because it is owned though not possessed by a friendly foreign government".[24] The United States Supreme Court concluded that it was national policy not to extend immunity to such a vessel, holding that:

> "... it is the duty of the courts, in a matter so intimately associated with our foreign policy and which may profoundly affect it, not to enlarge an immunity to an extent which the government, although often asked, has not seen fit to recognize."[25]

216. That decision was followed in 1952 by the well-known "Tate Letter", the effect of which was summarised in 1971 by Ritchie J in the Supreme Court of Canada[26] as follows:

> "...the Tate Letter, written in 1952 by Professor J B Tate who was then the acting legal adviser to the State Department, ... categorically stated that '… it will hereafter be the Department's policy to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity'. This position appears to have been generally accepted in the United States courts although they have some leeway in cases where the State Department refuses to make a suggestion of immunity..."

217. Some four years later, in 1975, the first step towards the general adoption of a restrictive theory in English and Hong Kong common law was taken by the Privy Council in *"The Philippine Admiral"*[27] on an appeal from Hong Kong. Lord Cross of Chelsea, giving the advice of the Board, pointed to an increasing tendency to distinguish between a State performing sovereign or

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23 (1945) 324 US 30.
24 At 31.
25 At 38.
26 *La Republique democratique du Congo v Venne* [1971] SCR 997 at 1004.
27 [1977] AC 373.

public acts (acts "*jure imperii*") and a State performing private, often commercial, acts (acts "*jure gestionis*"):

> "There is no doubt ... that since the Second World War there has been both in the decisions of courts outside this country and in the views expressed by writers on international law a movement away from the absolute theory of sovereign immunity championed by Lord Atkin and Lord Wright in *The Cristina* towards a more restrictive theory. This restrictive theory seeks to draw a distinction between acts of a state which are done *jure imperii* and acts done by it *jure gestionis* and accords the foreign state no immunity either in actions *in personam* or in actions *in rem* in respect of transactions falling under the second head."[28]

218. Having considered what their Lordships held to have been an erroneous reading of *The Porto Alexandre*,[29] a decision previously thought to govern the position, and having referred to developments in the United States and elsewhere, the Privy Council decided that the doctrine of restrictive immunity ought to be applied to Admiralty *in rem* actions, while accepting that immunity in relation to *in personam* actions against foreign States remained absolute – a position which they acknowledged to be illogical and anomalous. Nonetheless, they proceeded to adopt the restrictive theory to such limited extent on the basis that "the restrictive theory is more consonant with justice".[30]

219. The next development occurred in 1977 with the English Court of Appeal's decision in *Trendtex Trading Corporation v Central Bank of Nigeria*.[31] The Central Bank had issued a letter of credit to pay for a shipment of cement and then sought to repudiate its liability thereunder, pleading state immunity. The Court held that the Bank was not a department or other emanation of the State of Nigeria and so was not entitled to claim state immunity.[32] However, the majority, consisting of Lord Denning MR and Shaw LJ, while acknowledging that there was no international consensus as to

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28 At 397.
29 [1920] P 30.
30 [1977] AC 373 at 403.
31 [1977] QB 529.
32 At 560, 563, 572 and 575.

whether state immunity was absolute or restrictive,[33] went on to adopt the principle of restrictive immunity, holding that the Central Bank would therefore in any event not enjoy immunity in respect of the letter of credit claim.[34] Stephenson LJ was in favour of restrictive immunity but held that absolute sovereign immunity was the rule until the House of Lords or the legislature declared it no longer to be so.[35]

220. The following year the United Kingdom Parliament enacted the State Immunity Act 1978 ("SIA 1978") which was made applicable to Hong Kong by the State Immunity (Overseas Territories) Order 1979 ("SI(OT)O 1979"). The SIA 1978 provided that a State is immune from the jurisdiction of the courts of the United Kingdom (and therefore Hong Kong) subject to the exceptions set out in the legislation.[36] Those exceptions included situations where the State had submitted to the jurisdiction and where the proceedings related to a commercial transaction or a contract to be performed wholly or partly in the forum State.

221. In 1981, the House of Lords confirmed the adoption of the restrictive immunity theory as a matter of common law in *I Congreso del Partido*,[37] a case which was concerned with state immunity as it existed in the United Kingdom prior to enactment of the SIA 1978. Lord Wilberforce explained the basis of this change in the law as follows:

> "It is necessary to start from first principle. The basis upon which one state is considered to be immune from the territorial jurisdiction of the courts of another state is that of '*par in parem*' which effectively means that the sovereign or governmental acts of one state are not matters upon which the courts of other states will adjudicate.

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33 At 552 and 576.
34 At 556-557, 576 and 579.
35 At 572.
36 Section 1.
37 [1983] 1 AC 244.

> The relevant exception, or limitation, which has been engrafted upon the principle of immunity of states, under the so called 'restrictive theory,' arises from the willingness of states to enter into commercial, or other private law, transactions with individuals. It appears to have two main foundations: (a) It is necessary in the interest of justice to individuals having such transactions with states to allow them to bring such transactions before the courts. (b) To require a state to answer a claim based upon such transactions does not involve a challenge to or inquiry into any act of sovereignty or governmental act of that state. It is, in accepted phrases, neither a threat to the dignity of that state, nor any interference with its sovereign functions."[38]

222. Up to 30 June 1997, the position regarding state immunity in this jurisdiction was governed by the SIA 1978, extended to Hong Kong by the SI(OT)O 1979. On 1st July 1997, with China's resumption of the exercise of sovereignty over Hong Kong, that statute ceased to have effect. Lord Pannick QC[39] submits, and we are prepared to accept, that if the SIA 1978 had been disapplied to Hong Kong prior to 1st July 1997, the common law as developed in the trio of cases *The Philippine Admiral*, *Trendtex* and *I Congreso* would have been taken to define the applicable doctrine of state immunity at common law. We therefore proceed on the footing that on 30 June 1997, the theory of state immunity applied by the Hong Kong courts, whether under the SIA 1978 or on the basis of some underlying doctrine of common law, was a restrictive theory, recognizing a commercial exception to what was otherwise an absolute immunity.

C.2 The fundamental issue

223. We wish to reiterate that for clarity of exposition, we analyse relevant legal arguments and state our views and conclusions on them. Our views and conclusions on Basic Law questions do not constitute a final judgment but are subject to the question of reference under Article 158(3) discussed in Section G below.

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[38] At 262.

[39] Appearing with Professor Dan Sarooshi and Ms Zabrina Lau for FGH.

224. The "consistent and principled position of China" in relation to state immunity is unequivocally stated in the OCMFA Letters referred to above. It is "that a state and its property shall, in foreign courts, enjoy absolute immunity, including absolute immunity from jurisdiction and from execution". There is no room for doubting that such is and has consistently been the policy of the State of the PRC. None of the parties have sought to suggest otherwise, although they differ as to the effect and weight to be attributed to those letters.

225. The fundamental question which falls to be determined in the present appeal is whether, after China's resumption of the exercise of sovereignty on 1st July 1997, it is open to the courts of the HKSAR to adopt a legal doctrine of state immunity which recognizes a commercial exception to absolute immunity and therefore a doctrine on state immunity which is different from the principled policy practised by the PRC.

226. In our view, for the reasons developed below, the answer is clearly "No". As a matter of legal and constitutional principle, it is not open to the HKSAR courts to take such a course. The doctrine of state immunity which presently applies in the HKSAR is the doctrine of absolute immunity. This is a conclusion compelled by the very nature of the doctrine of state immunity, the status of Hong Kong as a Special Administrative Region of the PRC and the material provisions of the Basic Law. We are, with respect, unable to endorse Professor Mushkat's suggestion that:

> "It may be assumed that HKSAR judges will continue to follow the 'restrictive approach' to state immunity as incorporated in the common law, although this may give rise to some doctrinal conflicts with their Mainland counterparts."[40]

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[40] R Mushkat, *One Country, Two International Legal Personalities* (HKUP 1997), p 66.

C.3 The nature of "state immunity"

C.3a A doctrine concerned with the relations between States

227. The decision of the United States Supreme Court in *The Schooner Exchange v M'Faddon*[41] is often treated as the starting-point for the common law doctrine. It has influenced leading decisions in the English and Canadian courts, among others.[42] In his well-known judgment, Marshall CJ identified the basis of sovereign or state immunity as the mutual acknowledgment of equality among sovereign States and explained that the grant to a foreign State and its property of immunity from the jurisdiction of the forum State's domestic courts represents the forum State's decision to refrain from exercising the jurisdiction which it, as sovereign, has within its own territory over that other State. [43]

228. The principle, sometimes referred to by the Latin maxim *par in parem non habet imperium*, was expressed by the English Court of Appeal in *The Parlement Belge*[44] in the following terms:

> "The principle to be deduced from all these cases is that, as a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign state to respect the independence and dignity of every other sovereign state, each and every one declines to exercise by means of its Courts any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public property of any state which is destined to public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and, therefore, but for the common agreement, subject to its jurisdiction."

229. The doctrine of state immunity, both in international law and at common law, is therefore concerned with relations between States. It recognizes that States may not only grant and claim such immunity vis-à-vis other sovereign States, but also that they may choose to waive such immunity,

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41 11 US (7 Cranch 116) (1812).

42 See, for instance, *The Parlement Belge* [1880] 5 PD 197 at 208-209; *La Republique democratique du Congo v Venne* [1971] SCR 997 at 1006-1007 ; and *The "Philippine Admiral"* [1977] AC 373 at 391.

43 At 136.

44 [1880] 5 PD 197 at 214-215, per Bagallay LJ.

submitting themselves to the jurisdiction of the courts of a forum State. As Lord Sumner put it in *Duff Development Co Ltd v Government of Kelantan*:[45]

> "The principle is well settled, that a foreign sovereign is not liable to be impleaded in the municipal Courts of this country, but is subject to their jurisdiction only when he submits to it, whether by invoking it as a plaintiff or by appearing as a defendant without objection."

230. Accordingly, the traditional theory of state immunity while absolute, is subject to the exception of waiver or submission to the forum State's jurisdiction. This is reflected in Lord Atkin's encapsulation of the doctrine in *The Cristina* already referred to, stressing that States do not exercise jurisdiction over other foreign States *against their will*.[46]

231. It is also a State's prerogative to decide on the scope of the immunity it is prepared to confer on other States and in particular, whether to recognize further exceptions to absolute immunity. Thus, as noted by Lord Cross of Chelsea in the passage from his speech in *The Philippine Admiral* cited above,[47] since the mid-twentieth century, increasing numbers of States have decided to adopt a commercial exception, distinguishing between acts done *jure imperii* and acts done *jure gestionis*, granting to the foreign State no immunity in respect of transactions falling under the second head.[48]

C.3b Which organ of State decides?

232. The determination and implementation of a State's policy on state immunity require various decisions to be taken from time to time. Is a particular entity to be recognized as a co-equal foreign State? Is a party claiming state immunity against suit or execution to be treated as a representative or emanation of a foreign State qualifying for such immunity?

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45 [1924] AC 797 at 822. See also *Mighell v Sultan of Johore* [1894] 1 QBD 149 at 159, 160 and 163-164.
46 Section C.1 above.
47 Section C.1 above.
48 See also Dicey, Morris and Collins, *The Conflict of Laws*, (Sweet & Maxwell) 14th Ed, §10-004.

What are the boundaries of the State claiming to exercise territorial jurisdiction? What exceptions to state immunity does the forum State recognize? The answer to such questions will often vary with different States. As Lord Denning MR stated in *Trendtex*: "Each country delimits for itself the bounds of sovereign immunity. Each creates for itself the exceptions from it."[49]

233. Much of the argument in the present case focuses on the question: Who – that is, which branch of government – should be responsible for providing the answers and therefore laying down the State's policies on state immunity? Many States place the responsibility on the executive branch of government – typically the Ministry of Foreign Affairs. Other States may regulate state immunity questions through legislation. In yet others, the courts of law may take it upon themselves to determine the nature and extent of the applicable state immunity doctrine. The approach adopted in any particular State must depend on its own constitutional allocation of powers and the particular doctrine of state immunity espoused will depend on how it perceives its own foreign policy interests.

C.4 The practice of the United Kingdom and the United States: the "one voice principle"

234. In an earlier phase of the doctrine's development, the courts of both the United Kingdom and the United States looked to the executive to define the State's policy on such questions. The principle adopted was that the courts and the executive should "speak with one voice" and the courts would follow the executive's lead.

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[49] *Trendtex Trading Corp v Central Bank of Nigeria* [1977] QB 529 at 552.

235. *Duff Development Co Ltd v Government of Kelantan*,[50] may serve as an example. The court was concerned to establish whether the Sultanate of Kelantan was a sovereign State entitled to state immunity, a question which was complicated by the peculiarities of its relationship with the British Government. Kelantan had been a dependency of Siam before the Siamese Government transferred its rights to the United Kingdom by treaty in 1912. Subsequently, the Sultan entered into an agreement with the United Kingdom, promising to have no political relations with any foreign power except through the British Government. Was the Sultanate to be recognized in such circumstances as a sovereign State qualifying for state immunity? The Secretary of State answered in the affirmative, a decision accepted without hesitation by the court. Thus, in the House of Lords, Viscount Cave stated:

> "...the recognition or non-recognition by the British Government of a State as a sovereign State has itself a close bearing on the question whether it is to be regarded as sovereign in our Courts. In the present case the reply of the Secretary of State shows clearly that notwithstanding the engagements entered into by the Sultan of Kelantan with the British Government that Government continues to recognize the Sultan as a sovereign and independent ruler ... If after this definite statement a different view were taken by a British Court, an undesirable conflict might arise; and, in my opinion, it is the duty of the Court to accept the statement of the Secretary of State thus clearly and positively made as conclusive upon the point."[51]

236. Lord Dunedin put it thus:

> "If our sovereign recognizes and expresses the recognition through the mouth of his minister that another person is a sovereign, how could it be right for the Courts of our own sovereign to proceed upon an examination of that person's supposed attributes to examine his claim and, refusing that claim, to deny to him the comity which their own sovereign had conceded?" [52]

237. And Lord Sumner expanded on the theme as follows:

> "It is the prerogative of the Crown to recognize or to withhold recognition from States or chiefs of States, and to determine from time to time the status with which foreign powers are to be deemed to be invested. This being so, a

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50 [1924] AC 797.
51 At 808-809.
52 At 820.

> foreign ruler, whom the Crown recognizes as a sovereign, is such a sovereign for the purposes of an English Court of law, and the best evidence of such recognition is the statement duly made with regard to it in His Majesty's name. Accordingly where such a statement is forthcoming no other evidence is admissible or needed. I think this is the real judicial explanation why it was held that the Sultan of Johore was a foreign sovereign.[53] In considering the answer given by the Secretary of State, it was not the business of the Court to inquire whether the Colonial Office rightly concluded that the Sultan was entitled to be recognized as a sovereign by international law. All it had to do was to examine the communication in order to see if the meaning of it really was that the Sultan had been and was recognized as a sovereign."[54]

238. *Republic of Mexico v Hoffman*,[55] decided in 1945, illustrates a similar approach in the United States Supreme Court. Stone CJ, speaking for the Court, described its practice as follows:

> "... in *The Exchange*, Chief Justice Marshall introduced the practice, since followed in the federal courts, that their jurisdiction *in rem* acquired by the judicial seizure of the vessel of a friendly foreign government, will be surrendered on recognition, allowance and certification of the asserted immunity by the political branch of the government charged with the conduct of foreign affairs when its certificate to that effect is presented to the court by the Attorney General."[56]

239. This reflected the United States courts' acceptance of the constitutional allocation of responsibility for the conduct of foreign affairs to the executive:

> "Every judicial action exercising or relinquishing jurisdiction over the vessel of a foreign government has its effect upon our relations with that government. Hence it is a guiding principle in determining whether a court should exercise or surrender its jurisdiction in such cases, that the courts should not so act as to embarrass the executive arm in its conduct of foreign affairs. 'In such cases the judicial department of this government follows the action of the political branch, and will not embarrass the latter by assuming an antagonistic jurisdiction'.[57] ... It is therefore not for the courts to deny an immunity which our government has seen fit to allow, or to allow an immunity on new grounds which the government has not seen fit to recognize. The judicial seizure of the property of a friendly state may be regarded as such an affront to its dignity and may so affect our relations with it, that it is an accepted rule of substantive law governing the exercise of the jurisdiction of the courts that they accept

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53 Referring to *Mighell v Sultan of Johore* [1894] 1 QBD 149.
54 [1924] AC 797at 824.
55 (1945) 324 US 30.
56 At 34.
57 Citing *United States v Lee*, 106 U.S. 209; and *Ex parte Peru*, 318 U.S. 588.

> and follow the executive determination that the vessel shall be treated as immune."[58]

240. The policy that the courts and the executive should "speak with one voice" dates back to the nineteenth century. As Sir Lancelot Shadwell VC put it in *Taylor v Barclay*[59] in 1828:

> "...sound policy requires that the Courts of the King should act in unison with the Government of the King."

241. Most commonly, the guidance sought by the courts from the executive relates to a party's claim to the status of a sovereign or the territorial limits of a State's jurisdiction. Lord Pannick QC submits that the "one voice principle" is limited to such questions, but we do not see why that should be so. If in principle it is accepted (as Lord Pannick QC accepts) that it is for the executive branch of government to determine whether a particular claimant is a sovereign State upon whom the forum State should confer immunity, we fail to see why it should not equally be for the executive to determine what exceptions may exist to the grant of such immunity.

242. Indeed, as we have seen, in United States practice, the executive's declared policy in the Tate Letter of 1952 that it would thenceforth be the State Department's policy "to follow the restrictive theory of sovereign immunity in the consideration of requests of foreign governments for a grant of sovereign immunity" – a statement of policy obviously going beyond recognition and territorial limits – was generally followed by the United States courts.

243. It is nevertheless true that reported instances of the United Kingdom courts adopting the one voice principle in respect of issues involving foreign affairs going beyond such questions are rare, as Mr Lawrence Collins

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58 At 35-36.
59 (1828) 2 Sim 213 at 221.

(as Lord Collins of Mapesbury then was) noted.[60] But, as Professor Vaughan Lowe QC[61] points out, that is not surprising since the normal run of cases raising such immunity issues are cases about people claiming to be diplomats or disputes over who is the government of a State and so forth.

244. However, one case where the House of Lords applied the one voice principle, adopting the stance of the United Kingdom's executive on a sensitive foreign policy issue, was *Rio Tinto Zinc Corporation v Westinghouse Electric Corporation*,[62] a case decided in 1977. The issue concerned the United States' assertion of extraterritorial jurisdiction in connection with its anti-trust legislation. Lord Wilberforce took a broad view, suggesting that the policy of the executive could properly be consulted on any matter affecting the United Kingdom's sovereignty:

> "...that in a matter affecting the sovereignty of the United Kingdom, the courts are entitled to take account of the declared policy of Her Majesty's Government, is in my opinion beyond doubt."[63]

245. He applied that to the case at hand:

> "The intervention of Her Majesty's Attorney-General establishes that quite apart from the present case, over a number of years and in a number of cases, the policy of Her Majesty's Government has been against recognition of United States investigatory jurisdiction extraterritorially against United Kingdom companies. The courts should in such matters speak with the same voice as the executive (see *The Fagernes* [1927] P 311): they have, as I have stated, no difficulty in doing so."[64]

246. Lord Fraser of Tullybelton considered it the duty of the Court to act in unison with the government in such cases:

> "...I can hardly conceive that if any British court, or your Lordships' House sitting in its judicial capacity, was informed by Her Majesty's Government that they considered the sovereignty of the United Kingdom would be

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60 In an academic article in (2000) 16 ICLQ 487.
61 Who appears with Ms Teresa Cheng SC as part of the team led by Mr Benjamin Yu SC for the Intervener.
62 [1978] AC 547.
63 At 616.
64 At 617.

> prejudiced by execution of a letter of request in a particular case it would not be its duty to act upon the expression of the Government's view and to refuse to give effect to the letter. The principle that ought to guide the court in such a case is that a conflict is not to be contemplated between the courts and the Executive on such a matter: see *The Fagernes* [1927] P 311, 324 per Atkin LJ."[65]

247. Accordingly, where constitutional responsibility for the conduct of foreign affairs is allotted to the executive, and where the courts accept a "one voice" principle, there is no reason to exclude that approach in relation to the executive's policy regarding the recognition or non-recognition of a commercial exception to absolute state immunity.

C.5 Adoption of legislation in the United States

248. As we have seen, following the US State Department's declaration in the Tate Letter in 1952, the United States courts generally followed the executive's lead in adopting a commercial exception to absolute immunity. The United States Congress then decided to regulate this practice by statute, enacting the Foreign Sovereign Immunities Act 1976 ("FSIA 1976").[66] Having stated the view of Congress (corresponding to that of the executive) that international law accepts a commercial exception,[67] §1602 of the Act provides that:

> "Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter."

249. It goes on to decree that foreign States are presumptively immune, in other words, that jurisdictional immunity is to be accorded to foreign States except where the case falls within an exception provided for in the Act. Relevant exceptions include those covering cases of waiver and certain suits

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65 At 650-651.

66 28 USC §§ 1330, 1602-1611.

67 "Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities." §1602.

based on commercial activity by the foreign State. Similar provision is made for immunity against execution.[68] Thereafter, as Ginsburg J noted in *Creighton Ltd v Government of the State of Qatar*,[69] the FSIA 1976 became the sole basis for obtaining jurisdiction over a foreign state in US courts.

250. Recent cases have tended to regard the passing of the FSIA 1976 as a response to the development of an unsatisfactory and inconsistent practice on the part of the State Department in its relationship with the courts. In *Ungar v Palestine Liberation Organization*, [70] referring to the committee report accompanying the FSIA 1976, Selya J explained that the Act was designed to counteract the perceived tendency of the Federal Courts "to rely less on international law and more on the actions of the State Department in determining whether to grant immunity in individual cases". He regarded the Act as aimed at "taking immunity decisions out of the hands of the executive branch and depositing them in the judicial branch" on the premise that "decisions on claims by foreign states to sovereign immunity are best made by the judiciary on the basis of a statutory regime which incorporates standards recognized under international law."

251. In the recent US Supreme Court decision in *Samantar v Yousuf*,[71] Stevens J described the practice which followed issue of the Tate Letter as having thrown immunity determinations "into some disarray" because "political considerations sometimes led the [State] Department to file 'suggestions of immunity in cases where immunity would not have been available under the

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68 §§1605 and 1609.

69 181 F 3d 118 (US Court of Appeals for the DC Circuit, 1999) at 121-122, citing the decision of the US Supreme Court in *Argentine Republic v Amerada Hess Shipping Corp*, 488 US 428 at 434 (1989).

70 402 3d 274 (US Court of Appeals for the First Circuit, 2005) at 283-4.

71 130 S Ct 2278 (2010).

restrictive theory'."[72] In his Honour's view, "Congress responded to the inconsistent application of sovereign immunity by enacting the FSIA in 1976."[73]

252. It was accordingly because the practice which had developed was perceived to be unsatisfactory that the US Congress decided to take over from the executive by legislation, constitutional responsibility for determining the state immunity policy of the United States. It entrusted to the courts the task of implementing that policy pursuant to the FSIA 1976.

C.6 Development of the United Kingdom's approach to state immunity

253. As we have seen,[74] the United Kingdom, whose constitutional division of powers on state immunity questions was made applicable to Hong Kong, also moved to the adoption of a statutory regime, namely, that contained in the SIA 1978. However, before that occurred, there was an additional phase of development at common law involving the Privy Council's decision in *"The Philippine Admiral"*[75] and that of the English Court of Appeal in *Trendtex Trading Corp v Central Bank of Nigeria*.[76]

254. As we have noted above,[77] in 1975 the Privy Council in *The Philippine Admiral* took the first step towards adopting a general commercial exception by holding that a restrictive approach should be adopted in relation to immunity claimed for vessels arrested in Admiralty *in rem* actions. What is significant for the purposes of the present discussion is that Lord Cross of Chelsea (who delivered the Board's advice) arrived at that conclusion on the basis of a common law analysis of precedent and the expressed view that

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72 At II [2].
73 At II [3][4].
74 Section C.1 of this judgment.
75 [1977] AC 373.
76 [1977] QB 529.
77 Section C.1 of this judgment.

restrictive immunity was more consonant with justice,[78] without anyone seeking or receiving any input from the Foreign and Commonwealth Office. Indeed, his Lordship made a comment (to which we shall return[79]) which, in contrast to what was said two years later by Lord Wilberforce and Lord Fraser in *Rio Tinto Zinc Corporation v Westinghouse Electric Corporation*,[80] might be thought to suggest a distaste for entertaining such governmental views:

> "It was not suggested by counsel on either side that their Lordships should seek the help of the Foreign and Commonwealth Office in deciding this appeal by ascertaining which theory of sovereign immunity it favours. But it is not perhaps wholly irrelevant to observe that the later American case of *Rich v Naviera Vacuba SA* (1961) 197 F Supp 710 suggests that if the courts consult the executive on such questions what may begin by guidance as to the principles to be applied may end in cases being decided irrespective of any principle in accordance with the view of the executive as to what is politically expedient." [81]

255. Similarly, in *Trendtex*, Lord Denning MR, who with Shaw LJ constituted the majority of the English Court of Appeal, felt able to extend the commercial exception to *in personam* cases on the basis that in the United Kingdom, it fell to the nation's courts to define the State's policy on state immunity and its exceptions:

> "The nations are not in the least agreed upon the doctrine of sovereign immunity. The courts of every country differ in their application of it. Some grant absolute immunity. Others grant limited immunity, with each defining the limits differently. There is no consensus whatever. Yet this does not mean that there is no rule of international law upon the subject. It only means that we differ as to what that rule is. Each country delimits for itself the bounds of sovereign immunity. Each creates for itself the exceptions from it. It is, I think, for the courts of this country to define the rule as best they can, seeking guidance from the decisions of the courts of other countries, from the jurists who have studied the problem, from treaties and conventions and, above all, defining the rule in terms which are consonant with justice rather than adverse to it. That is what the Privy Council did in *The Philippine Admiral* [1977] AC 373 : see especially at pp 402-403; and we may properly do the same."[82]

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78 [1977] AC 373 at 403.
79 See Section C.9a below.
80 [1978] AC 547 at 616, 617 and 650-651, as discussed in Section C.4 of this judgment.
81 [1977] AC 373 at 399.
82 [1977] QB 529 at 552-553.

256. As we have also seen, those developments were confirmed by the House of Lords in *I Congreso del Partido*[83] in 1981, again without consulting the Secretary of State, although that is perhaps not surprising since, by then, the SIA 1978 legislatively confirming adoption of the commercial exception had been passed. Nevertheless it is worth noting that Lord Wilberforce endorsed the courts' earlier assumption of the role of defining the doctrine of state immunity and its exceptions, moving from absolute to restrictive immunity :

> "In *The Philippine Admiral* the Judicial Committee of the Privy Council, in an appeal from Hong Kong, declined to follow *The Porto Alexandre* [1920] P 30 and decided to apply the 'restrictive' doctrine to an action *in rem* against a state-owned trading vessel. In the comprehensive judgment which was delivered on behalf of the Board, it was said that to do so was more consonant with justice. It was further commented that it was open to the House of Lords to move away from the absolute rule of immunity in actions *in personam*. Sitting in this House I would unhesitatingly affirm as part of English law the advance made by *The Philippine Admiral* [1977] AC 373 with the reservation that the decision was perhaps unnecessarily restrictive in, apparently, confining the departure made to actions *in rem*."

257. There was (and is) of course no written constitution in the United Kingdom so that it has often been left to its courts to determine the proper allocation of constitutional responsibilities. In any event, as we have seen, by enacting the SIA 1978, a year after *Trendtex* was decided, the British Parliament took over responsibility for defining the scope of and exceptions to state immunity as applied in the United Kingdom and extended to Hong Kong.

258. The executive branch retains important functions under the SIA 1978. First, by its section 21, a certificate by or on behalf of the Secretary of State binds the courts as conclusive evidence on certain matters. Secondly, under section 15, the SIA 1978 empowers the executive, by Order in Council, to restrict or extend the immunities and privileges conferred on a foreign State

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[83] [1983] 1 AC 244, discussed in Section C.1 above.

by the Act if it should appear to the government that such privileges and immunities exceed those accorded by the law of that State in relation to the United Kingdom; or are less than those required by any international agreement to which that State and the United Kingdom are parties. In other words, the SIA 1978 empowers the executive to calibrate the extent of state immunity granted to a foreign State on the basis of reciprocity and in accordance with the international rights and obligations of the United Kingdom.

C.7 The practice of the PRC

259. The regime adopted by the PRC is described in the three OCMFA Letters whose terms have been set out above.[84] It is a policy determined by the executive, no national law having been promulgated to regulate the matter.

260. The Letters make it clear that China has consistently adhered to the doctrine that a state and its property enjoy absolute immunity from jurisdiction and from execution. It has never subscribed to the theory of restrictive immunity and Chinese domestic courts claim no jurisdiction over foreign States or governments and have never in fact entertained any case in which claims have been brought against a foreign State or its property, irrespective of the nature of the act of the foreign State founding the claim or the nature, purpose or use of its property. China has always claimed the same immunities for itself before foreign domestic courts. An example of China making such a claim may be found in *Russell Jackson v PRC*,[85] in the US Court of Appeals for the 11th Circuit in 1986.

261. In the 2nd OCMFA Letter, the Ministry dispelled the doubts expressed by Reyes J as to whether the PRC's signing of the UN Convention on

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84 In Sections B.2, B.4 and B.6 above.
85 794 F 2d 1490 at 1494.

14 September 2005 meant that absolute immunity was no longer a part of its foreign policy. The letter makes it clear that while China supported the Convention's adoption and became a signatory to it, the Convention has not come into effect, lacking the minimum of thirty signatories required, and has not been ratified by the PRC. A State may obviously sign a proposed multilateral treaty but withhold ratification unless and until a sufficient number of States are willing to be bound by it to enable it to take effect with a meaningfully broad and multilateral coverage. As the Letter states, China's signature of the Convention cannot be the basis of assessing its principled position on state immunity. It plainly provides no basis for suggesting that China had thereby abandoned its practice of absolute immunity.

262. On the contrary, continued adherence to absolute immunity after signing the Convention is evidenced by China's assertion of absolute immunity as set out in a legal memorandum filed on 25 January 2006 in *Marvin L Morris v PRC*,[86] a case in which certain American plaintiffs sought to sue the PRC "to collect almost $90 billion from the People's Republic of China for the failure of the PRC to pay the principal and interest on bonds issued in 1913 by the predecessor government of Yuan Shih-Kai".[87] Such immunity from suit has also been asserted, for instance, in letters from the Chinese Embassy in Washington DC to the United States State Department dated 11 November 2009 and 24 November 2010 in connection with purported claims in *Walters v PRC*,[88] and *Solid Oak Software v PRC*.[89]

263. The PRC's practice has been to favour resolving relevant disputes involving foreign States by diplomatic means or in specialised international

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86 *Marvin L Morris v PRC* 478 F Supp 2d 561 (SDNY 2007).

87 On 21 March 2007, Richard J Howell J dismissed the claim, holding that the Court lacked subject-matter jurisdiction under the FSIA 1976 and that the claim was in any event time-barred.

88 672 F Supp 2d 573 (SDNY 2009).

89 CV10-0038 (Central District of California 2010).

tribunals [90] or through procedures established by specialised international institutions[91] instead of by recourse to the compulsory jurisdiction of domestic courts. Exceptions to that policy have been made in the form of specific waivers of immunity expressly stipulated in particular multilateral or bilateral treaties.[92]

C.8 Material aspects of state immunity doctrine

264. We pause at this stage to highlight three aspects of the practice of state immunity emerging from the foregoing discussion which are relevant to the fundamental issues in the present case.

265. First, it is plain that the conferring or withholding of state immunity is a matter which concerns relations between states, forming an important component in the conduct of a nation's foreign affairs in relation to other States.

266. Secondly, different states may, according to their own constitutional arrangements, allocate to different organs of government the responsibility for laying down the policy to be adopted on state immunity, including any exceptions to such immunity. An examination of the practice of the United Kingdom and the United States shows that such allocation of responsibility may change over time, such as by the legislature taking over responsibility from the executive (and, in the case of the United Kingdom, with the judiciary having assumed responsibility in the interim), especially where the pre-existing practice is thought to have given rise to inconsistencies.

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90 Such as the Law of the Sea Tribunal set up pursuant to the Law of the Sea Convention 1982.

91 Such as the World Trade Organization in respect of trade disputes.

92 "Immunities of States and Their Property: The Practice of the People's Republic of China", Huang Jin and Ma Jingsheng, Hague Yearbook of International Law 1988. Cited in the Court of Appeal's judgment at §111.

267. Thirdly, as the 3rd OCMFA Letter asserts, the practice or doctrine of state immunity adopted in a unitary State applies uniformly to the whole State. At common law, it has been held that a federal constitution may vest sovereignty in a member state or province in such terms as to enable it separately to claim state immunity in a British court.[93] However, there is nothing in the common law jurisprudence to suggest that a region or municipality forming part of a unitary State can establish its own state immunity practice at variance with that of the State to which it belongs.

268. And, in the case of the HKSAR, it lacks the very attributes of sovereignty which might enable a State or province to establish its own policy or practice of state immunity, independently of the policy or practice of the State of which it forms part. As will appear, the provisions of the Basic Law state with compelling clarity the proposition that the HKSAR is not such a state or province but a local administrative region which does not exercise sovereign powers and has no responsibility for foreign affairs, including its own foreign affairs. In so far as the HKSAR has conduct of its external affairs, it does so under powers delegated to the HKSAR by the CPG.[94]

269. It is self-evident that any attempt by such a region or municipality to adopt a divergent state immunity policy would embarrass and prejudice the State in its conduct of foreign affairs. The need to avoid the embarrassment and prejudice of asserting more than one policy on state immunity for the same State is well recognized and reflected in the "one voice principle" adhered to in

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93 *Mellenger v New Brunswick* [1971] 1 WLR 604.
94 Article 13(3) of the Basic Law.

various forms, whether statutory or otherwise. As the learned editors of *Oppenheim's International Law*,[95] explain:

> "The practice followed in the United Kingdom is one approach to the general problem of seeking ways to avoid major, and possibly internationally damaging, divergencies between decisions taken by national courts and the views of the government of the state on matters affecting international relations; it is necessary to reconcile judicial independence from the executive, and the desirability of organs of the state acting consistently with each other in matters affecting other states. Ways of achieving this general objective vary from state to state, in the light of their differing constitutional and legal principles and practices, but nevertheless the practice adopted in the United Kingdom has its broad counterpart in other states."

C.9 FGH's case on state immunity at common law

270. FGH's case is that the common law doctrine of state immunity as developed in *Philippine Admiral*, *Trendtex* and *I Congreso*[96] continues to represent the law of state immunity in the HKSAR, having been made applicable by Articles 8 and 18 of the Basic Law. The effect of those Articles is discussed later when we turn to consider the relevant Basic Law provisions.[97] We wish at this stage to examine on their own terms, five policy arguments advanced by FGH in favour of adopting the position established at common law by those three judicial decisions.

C.9a "Political expediency"

271. The first of FGH's arguments is that it should be for the HKSAR courts and not the executive to define the scope of and exceptions to state immunity by reference to legal precedent and especially by reference to the trio of cases mentioned above. To defer to the executive on such matters would, to paraphrase Lord Cross of Chelsea in *Philippine Admiral*, involve accepting the risk of replacing principled decisions of law with unprincipled decisions based on political expediency.

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95 Oppenheim's International Law (Longman, 9th Ed) Vol 1, pp 1050-1051.
96 Described in Sections C.1 and C.6 above.
97 Section E.1 below.

272. That argument must be rejected. As we have seen in the foregoing description of the PRC's practice, the position which has consistently been taken by the CPG is that China adopts the absolute theory of state immunity. As Professor Lowe QC points out, what that means is that China's position in international law is that its obligation and its right is to maintain the doctrine of absolute immunity. It adopts that position in relation to all foreign States generally and, as pointed out in the 3rd OCMFA Letter, its practice is widely acknowledged by the international community. In circumstances where absolute immunity is considered inappropriate, the PRC's practice has been specifically to waive such immunity in relevant multilateral or bilateral treaties. China affords absolute immunity to foreign States and claims absolute immunity for itself. It is not a capricious policy or one which fluctuates as a matter of "political expediency". Consulting its own interests in the light of its own foreign policy, the PRC favours in principle the solution of disputes which involve foreign States through diplomatic channels and similar means, rather than submitting such disputes to the compulsory, and necessarily less flexible, jurisdiction of a municipal court. This is no less principled an approach than the stance taken by the US State Department in declaring its general position in favour of restrictive immunity in the Tate Letter.

273. There is nothing new or unusual about such an approach. The possible unsuitability of leaving it to domestic courts to exercise jurisdiction against foreign States was one of the considerations that underpinned adoption of absolute immunity in the United Kingdom's and United States' practice for well over a century. Thus, in *Luther v Sagor*,[98] Scrutton LJ, referring to a possible dispute with a foreign sovereign over title to property, stated :

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[98] [1921] 3 KB 532 at 555.

> "If by any misadventure the authorized representative of a sovereign state should claim property not really belonging to the state it appears to me that the remedy is by diplomatic means between states, not by legal proceedings against an independent sovereign. The case may be different where the sovereign state submits to the jurisdiction as plaintiff, and asks the Court to use its remedies in favour of the plaintiff. But where the sovereign state is defendant I cannot conceive the Courts investigating the truth of its allegation that the goods in question, which it exported from its own territory, are its public property."

274. A similar sentiment was expressed by Stone CJ in *Republic of Mexico v Hoffman* regarding the seizure of vessels owned by foreign States:[99]

> "This practice is founded upon the policy recognized both by the Department of State and the courts that the national interests will be best served when controversies growing out of the judicial seizure of vessels of friendly foreign governments are adjusted through diplomatic channels rather than by the compulsion of judicial proceedings."

275. Nor do we accept the suggestion that the courts are the most appropriate organ of government and that legal analysis the most appropriate means for determining a nation's state immunity policy. Each State will allot responsibility to the executive, the legislature or the courts as the case may be, in accordance with its own constitutional arrangements. And as the 3rd OCMFA Letter points out:

> "Each state adopts a regime of state immunity that is consistent with its own interests, in light of its national circumstances as well as foreign policy."

276. The United Kingdom's unwritten constitution accommodated the assumption of responsibility to define the scope of state immunity by the courts in the trio of cases mentioned. But that arrangement was, as it turns out, rapidly replaced by a legislative scheme enacted by Parliament which caters, as we have seen, for an important continuing role for the executive in the determination of state immunity policy. There is in any event simply no warrant for suggesting, whether at common law or under the Basic Law, that

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[99] (1945) 324 US 30 at 34.

the courts of the HKSAR can simply arrogate to themselves such an assumption of responsibility by treating the trio of cases mentioned as legal precedents. Such a proposition ignores the entirely different constitutional arrangements governing the position in the HKSAR.

C.9b "More consonant with justice"

277. FGH's second argument is that the doctrine of restrictive immunity established by the abovementioned trio of cases is a doctrine which is more "consonant with justice" [100] and that acceptance of absolute immunity as practised in the PRC would be "regressive". As Lord Wilberforce put it in *I Congreso*, given the willingness of states to enter into commercial, or other private law, transactions with individuals:

> "It is necessary in the interest of justice to individuals having such transactions with states to allow them to bring such transactions before the courts." [101]

278. The first thing to note about this second argument is that, like the first, it pays no attention to the fundamental issue which is whether the HKSAR can validly adopt a legal doctrine of state immunity which is inconsistent with the doctrine adopted by the Chinese State. It proceeds implicitly on the basis that our courts are free to choose whichever doctrine to adopt on the basis of what they consider to be "more consonant with justice" even though the HKSAR is not an independent sovereign State. However, the real issue in the present case is not (as in other countries) whether the courts, as opposed to the executive, should be taking responsibility for defining the *nation's* state immunity policy, and if so, for deciding what policy is more consonant with justice. The HKSAR courts obviously have no such role to play. The question

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100 Per Lord Cross of Chelsea, [1977] AC 373 at 403.

101 [1983] 1 AC 244 at 262.

is whether they can validly seek to define the *region's* state immunity policy in a manner at variance with that of the nation.

279. Nevertheless, we can see that this second argument has a lawyerly appeal: How can it be fair or just to allow a foreign State to sue as plaintiff but not to be sued as a defendant in our courts? It is an argument that resonates within the confines of an individual dispute being decided in a municipal court. But it does not address the complete picture. It does not take account of policy considerations proceeding on the national and international plane which are legitimately given priority by nations, including the PRC. As Lord Denning MR recognized in *Trendtex*,[102] each country delimits for itself the bounds of and exceptions to sovereign immunity. And as the 3rd OCMFA Letter stresses, each state adopts a regime of state immunity that is consistent with its own interests, in the light of its national circumstances and foreign policy.

280. The rapid evolution of China's foreign policy in Africa and elsewhere over the last decade is well-known. It often involves international agreements for large-scale development projects such as the agreement for mineral rights in exchange for infrastructural development in the present case. It follows that the PRC's foreign policy, which obviously differs from many other countries' foreign policy, requires it to invest heavily abroad on projects which may arguably be characterised as having "commercial" elements. As the 3rd Letter explains:

> "(4) The consistent principled position of China to maintain absolute immunity on the issue of state immunity is not only based on the fundamental international law principle of 'sovereign equality among nations', but also for the sake of protecting the security and interests of China and its property abroad. If the principle of 'restrictive immunity', which is not consistent with the principled position of the state on absolute immunity, were to be adopted in the Hong Kong Special Administrative Region, the states concerned may possibly adopt reciprocal measures to China and its property (which are not

[102] *Trendtex Trading Corp v Central Bank of Nigeria* [1977] QB 529 at 552.

> limited to the Hong Kong Special Administrative Region and its property), thus threatening the interests and security of the property of China abroad, as well as hampering the normal intercourse and co-operation in such areas as economy and trade between China and the states concerned."

281. In our view, it is not for the Court to express its opinion about the appropriateness of the CPG's policy of absolute as opposed to restrictive immunity. The municipal courts are simply not equipped to make such a judgment, lacking relevant information and being ill-placed to gauge the full implications of adopting any specific policy on state immunity. It is for this reason that, as Viscount Finlay acknowledged, the English courts have generally accepted the executive's view on "any question of the status of any foreign power", the information so obtained from the Minister being information "upon a matter which is peculiarly within his cognizance."[103]

282. The executive is also in a position to tailor its response to a dispute involving a foreign State on a case-by-case or treaty-by-treaty basis. FGH's second argument fails to take this into account. It fails to recognize that municipal court proceedings are not the only way to address the justice of a dispute and that other means for resolving or avoiding disputes involving foreign States are available. As noted above, such means include the use of diplomatic channels, specifically agreed waivers and recourse to international tribunals and procedures – means which may quite properly be regarded as preferable to allowing domestic courts to implead foreign States.

283. This is particularly so given the acknowledged difficulty in some cases of deciding whether or to what extent particular State activities or property may fall within a "commercial" exception. In *I Congreso*, while Lord Wilberforce took the view that certain types of cases would pose no problems,

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[103] *Duff Development Co Ltd v Government of Kelantan* [1924] AC 797 at 813.

and while he was unwilling to allow difficulties of classification to deter the House of Lords from adopting a doctrine of restrictive immunity, his Lordship acknowledged the conceptual difficulties in the following terms:

> "The activities of states cannot always be compartmentalised into trading or governmental activities; and what is one to make of a case where a state has, and in the relevant circumstances, clearly displayed, both a commercial interest and a sovereign or governmental interest? To which is the critical action to be attributed? Such questions are the more difficult since they arise at an initial stage in the proceedings and, in all probability, upon affidavit evidence. This difficulty is inherent in the nature of the 'restrictive' doctrine, introducing as it does an exception, based upon a certain state of facts, to a plain rule."[104]

284. And in *Holland v Lampen-Wolfe*,[105] Lord Clyde noted that the distinction:

> "...is one which in some cases may be subtle and delicate to define and has indeed been criticised as one which may not be workable: Lady Hazel Fox, 'State Immunity: The House of Lord's decision in *I Congreso Del Partido'* (1982) 98 LQR 94. Indeed Professor Lauterpacht ('The Problem of Jurisdictional Immunities of Foreign States' (1951) 98 BYIL 220, 222) refers to the difficulty of defining the distinction as the main argument in favour of an absolute immunity from jurisdiction."

His Lordship added:

> "In some cases, as was noticed in *United States of America v Public Service Alliance of Canada* (1992) 91 DLR (4th) 449, 468, even when the relevant activity has been identified it may have a double aspect, being at once sovereign and commercial, so that it may then have to be determined precisely to which aspect the proceedings in question relate."[106]

285. As the 2nd OCMFA Letter explains, China's support for a multilateral approach defined by an international convention was in part motivated by "the long-term divergence of the international community on the issue of state immunity and the conflicting practices of states" which produce an adverse impact on international intercourse. As we have seen, international

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104 [1983] 1 AC 244 at 264.
105 [2000] 1 WLR 1573 at 1579.
106 At 1580.

consensus was insufficient to bring the UN Convention into force and the difficulties of defining a generally accepted restrictive theory remain.

286. Absolute immunity of course remains the rule even in countries which recognize a commercial exception. So in cases falling outside such exception, the "injustice", viewed at the level of the individual dispute, is generally accepted as a matter of international State practice, reflecting the long-established principle of not impleading foreign States in the domestic courts in recognition of the sovereign equality of States.[107]

C.9c "No prejudice to the State's sovereignty"

287. The third FGH argument we address is the contention, as Lord Pannick QC puts it, that "a restrictive theory of state immunity is no challenge whatsoever to the sovereignty of the state".[108] He relies in the first place on what Lord Wilberforce said in the passage from *I Congreso* cited above, namely, that:

> "To require a state to answer a claim based upon such [commercial] transactions does not involve a challenge to or inquiry into any act of sovereignty or governmental act of that state. It is, in accepted phrases, neither a threat to the dignity of that state, nor any interference with its sovereign functions."[109]

288. With respect, Lord Pannick QC's argument based on that passage is misdirected. Lord Wilberforce was there addressing the impact of the United Kingdom adopting restrictive immunity on the *impleaded* state. His Lordship's proposition was that a State which descends into the commercial market place is no longer really acting like a State and cannot complain about any affront to its dignity or sovereignty if it is treated like an ordinary litigant in a commercial dispute. The observations of the US Supreme Court in *Alfred Dunhill of*

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107 That is, applying the *par in parem* principle discussed in Section C.3a above.
108 Day 4/339.
109 [1983] 1 AC 244 at 262.

London Inc. v. Republic of Cuba 425 US 682 (1976) at pp 697-698 to the effect that the Court would not recognise as an act of state the purely commercial conduct of a foreign government fall into the same category. The PRC's concern, for the reasons given in the 3rd OCMFA Letter, is that the sovereignty *of the PRC* – not of an impleaded state – may be prejudiced if the HKSAR were to adopt an inconsistent state immunity doctrine. China's practice is to afford absolute immunity to foreign States. Arguments like Lord Wilberforce's, seeking to justify the grant of a more restricted immunity to impleaded States have no bearing on that practice.

289. Lord Pannick QC does of course also address the question whether the Chinese State would be prejudiced by the HKSAR striking out on its own. He submits that it is "unrealistic" of China to be worried about any undermining of its sovereignty. This, he argues, is because such action by the HKSAR would not put the PRC in breach of any treaty or other international obligations, China having, moreover, signed the UN Convention. Furthermore, Lord Pannick QC submits:

> "... the vast majority of states, the vast, overwhelming majority ... apply the restrictive theory of state immunity. Hong Kong would be continuing to be among them, or be joining them, however one puts it. And if the adoption of a restrictive theory of state immunity is really likely to provoke retaliatory measures, there would be a large number of states, most of the world, almost all of the world, on the receiving end, and there is no actual example of any such retaliation."[110]

290. These points are refuted by the 3rd OCMFA Letter which was written specifically to rebut the suggestion made by the Court of Appeal that adoption of a divergent policy on state immunity by the HKSAR would cause no prejudice to the PRC. The effect of such conduct by the HKSAR on China's foreign policy is a matter peculiarly within the cognizance of the CPG which conducts China's foreign affairs. It has, through the Office of the

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[110] Day 5/401.

Commissioner, informed the Court that a divergent approach adopted by the courts of the HKSAR:

(a) would interfere with the power and capacity of the CPG uniformly to conduct foreign affairs and would not be consistent with the HKSAR's status as a local administrative region (a matter to which we will return in our discussion of the Basic Law);[111]

(b) would, because of the HKSAR's status as an inalienable part of the PRC, be attributed to the State and undermine China's consistent claim to absolute immunity in international law;[112]

(c) would expose China to possible claims by impleaded States that it should be held responsible under international law for the refusal by the HKSAR courts to grant them immunity on the basis of a commercial exception that is incompatible with China's consistent claim of a right to absolute immunity and its acceptance of an obligation under international law to grant such immunity to foreign States;[113]

(d) would expose China to the risk of being impleaded and its property abroad being attached by the courts of foreign countries on the basis that reciprocity requires acceptance of a commercial exception to state immunity;[114] and

(e) would hamper the normal intercourse and cooperation in such areas as economy and trade between China and its foreign trading and investment partners,[115] as illustrated by the present case, where the plaintiff seeks to implead the DRC and attach funds originating

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111 3rd OCMFA Letter, §5(1).

112 *Ibid,* §5(2).

113 *Ibid,* §5(3). An example of such a claim cited by the Intervener is of Germany's application to the International Court of Justice in respect of alleged refusals by Italian courts to confer jurisdictional immunity on Germany as a sovereign State, filed on 23 December 2008.

114 *Ibid,* §5(4).

115 *Ibid,* §5(4) and §5(5).

from China earmarked for the development scheme negotiated between the PRC and the DRC.

291. The view taken by the majority in the Court of Appeal[116] as to the absence of prejudice to the PRC was arrived at without the benefit of the 3rd OCMFA Letter.

C.9d "A threat to judicial independence"

292. It is self-evident that in the submissions on FGH's behalf, the OCMFA Letters are given little if any weight. Those submissions proceed on the footing (i) that by those letters, the Ministry is seeking to bind the Court to follow its direction; and (ii) that to follow such directions other than in cases falling within Article 19(3) of the Basic Law (to which we shall return) is unwarranted and would involve accepting interference with the independence of the judiciary. It is for the HKSAR courts to determine as a matter of common law, and not for the executive to determine as a matter of policy, what the doctrine of state immunity is. This is the fourth of FGH's arguments we propose to address.

293. It is an argument which suffers from the same crucial flaw of ignoring the HKSAR's status as a local administrative region of the PRC which adheres to a doctrine of absolute state immunity as a matter of its rights and obligations as a State under international law. It fails to address the central question whether the HKSAR can as a matter of constitutional principle, espouse a different state immunity doctrine.

294. If the true issue is borne in mind, the context, nature and effect of the OCMFA Letters emerge. It is a distortion to suggest that they seek to

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116 At §§89, 118, 256, 258, and 264-266.

dictate to the HKSAR courts how state immunity cases should be decided. The Letters address solely the position adopted by the PRC. The 1st Letter informs the Court that absolute immunity is the principle consistently adhered to. The 2nd Letter declares that such has remained China's position after signing the UN Convention which has never come into effect and never been ratified by China. The 3rd Letter identifies the prejudice to the sovereignty of the Chinese State which would result if the HKSAR courts were to purport to promulgate a divergent state immunity doctrine.

295. Statements such as those contained in the OCMFA Letters are properly treated as determining "facts of state", to use terminology adopted by Professor F A Mann. They establish:

> "... facts, circumstances, and events which lie at the root of foreign affairs and their conduct by the Executive... [and] are facts which are peculiarly within the cognisance of the Executive."[117]

296. In our view, leaving aside for the moment the question whether such declarations may be made the subject of a certificate from the Chief Executive under Article 19(3) and thereby made binding on the courts, they are to be treated in much the same way as declarations of such facts of state by the executive have been treated at common law (and indeed in statutory state immunity regimes) in the United Kingdom and the United States. As Professor Mann points out, such statements are generally accepted by the courts, according precedence to the executive under the "one voice principle", because:

> "... it is the Executive which conducts foreign affairs, and it is the judiciary which is expected not to embarrass the Executive, not to interfere with that conduct, not to obstruct its implementation."[118]

The learned Professor adds that this is true in democratic states:

> "... whether the constitution is written or unwritten, the principle is explained by the nature of things in a democracy; neither the Head of State nor

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117 F A Mann, *Foreign Affairs in English Courts* (Clarendon Press, 1986), p 23.
118 *Ibid.*

> Parliament nor the judiciary can or does conduct foreign relations. Rather this is the privilege of the Executive."[119]

297. Having had such facts of state authoritatively established, it falls to the courts to determine their legal consequences; and in particular (no statute now being applicable in the HKSAR) to decide whether and in what way the common law on state immunity needs to be modified or adapted to give proper effect to the HKSAR's constitutional status under and in accordance with the Basic Law. Moreover, as discussed in Section E.2a below, such facts of state are relevant to the courts' determination of any claim that an issue is non-justiciable on the ground of act of state.

298. It appears to us that the only substantive or practical aspect of the common law doctrine likely to require consequential modification involves the rejection of a commercial exception in state immunity cases. Subject to the possible application of the Article 19(3) certificate procedure discussed below,[120] the courts will continue (as they did before 1st July 1997) to look to the executive to be informed on such facts of state as whether a particular entity is recognized as a sovereign state, whether a particular party claiming immunity is recognized as a department or other emanation of a sovereign State; whether state immunity is to be accorded to a particular international organization which is not a State; whether state immunity has been regulated by some bilateral or multilateral convention in a particular context, and so forth. The common law jurisprudence on matters such as waiver of state immunity and the interplay between such rules and other branches of the law including the law of arbitration will continue to require judicial determination in particular cases. No doubt further legal issues will arise for judicial decision from time to time.

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119 *Ibid* at p 24. Professor Mann goes on to state: "The problem of reconciling [the decisions of the Executive] with the law is one of the most serious ..."

120 In Section E.2b.

299. We accordingly reject the suggestion that acceptance by the courts of statements by the executive such as those contained in the OCMFA Letters as conclusively establishing the facts of state they declare somehow involves the courts in an abdication of their proper judicial role.

C.9e State immunity and fundamental values

300. The fifth broad question of policy we wish to address involves FGH's suggestion that for the HKSAR to "revert" to absolute immunity would, as Lord Pannick QC puts it, be to return to "the Legal Dark Ages" and be damaging to the vital interests and fundamental values protected by the Basic Law.

301. It is of course right to say that the law must be vigilant whenever any legal immunity is conferred, whether immunity of an individual against criminal prosecution or immunity of a State against being impleaded in civil proceedings, to take just two examples. Immunity from prosecution derogates from equality before the law. And to deny a commercial party the right to sue a State *prima facie* involves denial of that party's access to a court. Such immunities therefore must be justified and seen to pursue legitimate countervailing societal aims in an appropriate manner. These are perhaps considerations that underlie the contention, discussed above,[121] that adoption of a more restrictive theory of state immunity is "more conducive to justice".

302. These very issues were raised and considered in the European Court of Human Rights in relation to state immunity in three decisions published in November 2001. In all three cases, the domestic courts had upheld the immunity of the State being sued and those decisions were subjected to

[121] Section C.9b.

challenge in the Strasbourg Court for violation of the plaintiffs' right to a fair trial under Article 6(1) of the European Convention on Human Rights.[122]

303. The first was *Al-Adsani v United Kingdom*,[123] where the plaintiff alleged that he had been tortured and sought to sue the Government of Kuwait in proceedings brought in the United Kingdom. The second was *Fogarty v United Kingdom*,[124] where an employee of the United States Embassy in London sought to sue the United States Government alleging sexual discrimination. And the third was *McElhinney v Ireland*,[125] where the plaintiff sought to sue the British Government in the Irish courts claiming to have suffered personal injury arising out of an incident at a British military roadblock. In all of these cases it was held that no statutory or other exception from state immunity was available.

304. In rejecting all three challenges[126] the Strasbourg Court affirmed the legitimacy and proportionality of recognizing state immunity in such cases. The effect of the three decisions is concisely summarised in Dicey, Morris and Collins[127] as follows:

> "The European Court on Human Rights held that whilst a limitation on the right of access to court must pursue a legitimate aim and must be proportionate, the grant of state immunity in civil proceedings pursued the legitimate aim of complying with international law to promote comity and good relations between States through respect for another State's sovereignty; and measures taken which reflected generally recognised rules of public international law could not in principle be regarded as imposing a disproportionate restriction on the right of access to a court. Just as the right of access to a court was an inherent part of the guarantee of a fair trial, so some restrictions on access were inherent, such as those limitations generally

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122 Article 6(1) materially provides: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

123 (2002) 34 EHRR 273.

124 (2002) 34 EHRR 302.

125 (2002) 34 EHRR 322.

126 By nine votes to eight, 16 votes to one and 12 votes to five respectively.

127 *Op cit*, §10-003.

> accepted by the community of nations as part of the doctrine of state immunity."

305. In *Jones v Minister of Interior of Kingdom of Saudi Arabia*,[128] Lord Bingham of Cornhill and Lord Hoffmann expressed some doubt as to whether Article 6(1) was engaged in state immunity cases on the doctrinal basis that a State which lacked jurisdiction against the immune State sought to be impleaded could not be regarded as denying access to a court which lacked relevant jurisdiction. Nonetheless, proceeding on the assumption that the Article *was* engaged, Lord Hoffmann agreed with the view of the majority in the European Court of Human Rights in *Al-Adsani v United Kingdom* that measures taken by a State which "reflect generally recognised rules of public international law" could not in principle be regarded as imposing a disproportionate restriction on access to a court and that state immunity was such a rule.[129]

306. The PRC's practice of subscribing to absolute immunity is consistent with the aforesaid principles. We accordingly reject any suggestion that it is any way inherently objectionable or regressive.

D. The Basic Law and the doctrine of state immunity

D.1 The relevant constitutional instruments

307. The HKSAR was established by the National People's Congress ("NPC") pursuant to Article 31 of the Chinese Constitution.[130] It did so by promulgating the Basic Law on 4 April 1990 which reflected the terms of the Joint Declaration agreed to by the Governments of China and the United Kingdom on 19 December 1984, coming into force on 30 June 1985.

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128 [2007] 1 AC 270 at 283, §14 and 298, §64.

129 At 292, §§40-41.

130 Article 31: "The state may establish special administrative regions when necessary. The systems to be instituted in special administrative regions shall be prescribed by law enacted by the National People's Congress in the light of specific conditions."

308. On 28 March 1990, shortly before the Basic Law's promulgation, an Explanation of the Draft Basic Law was given to the Third Session of the Seventh National People's Congress by Mr Ji Peng Fei, Chairman of the Drafting Committee for the Basic Law ("the 1990 Explanation").

309. On 23 February 1997, the Standing Committee of the National People's Congress ("SCNPC"), in whom the power of interpretation of the Basic Law is vested by Article 158(1), published its Decision "On the Treatment of the Laws Previously in Force in Hong Kong in accordance with Article 160 of the Basic Law" ("the 1997 Decision").

310. As the Court held in *Director of Immigration v Chong Fung Yuen*,[131] the HKSAR courts adopt a common law approach to the interpretation of the Basic Law, seeking to ascertain the meaning borne by the language of its Articles considered in the light of its context and purpose. In accordance with such approach, pre-promulgation documents including the Joint Declaration and the 1990 Explanation, which are extrinsic materials capable of throwing light on the context or purpose of the Basic Law or its particular provisions, are admissible as aids to interpretation if (but only if) the meaning of the Basic Law's language is ambiguous and reasonably capable of more than one interpretation.

311. The 1997 Decision stands on a different footing. Article 160 materially provides:

> "Upon the establishment of the Hong Kong Special Administrative Region, the laws previously in force in Hong Kong shall be adopted as laws of the Region except for those which the Standing Committee of the National People's Congress declares to be in contravention of this Law. ..."

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[131] (2001) 4 HKCFAR 211 at 223-224.

312. The 1997 Decision therefore represents the Standing Committee's declaration made pursuant to the duty delegated to it by Article 160 of the Basic Law of excluding incompatible laws. In carrying out that duty, the Standing Committee listed in Annexes 1 and 2 of the Decision a number of ordinances, items of subsidiary legislation and particular legislative provisions previously in force in Hong Kong which it decided were in contravention of the Basic Law and which therefore were not adopted as part of the HKSAR's laws on 1st July 1997.

313. The 1997 Decision recognizes that the laws previously in force in Hong Kong which are adopted as part of the laws of the HKSAR may be capable of being applied in ways which might be incompatible with the Basic Law or with the changed status of Hong Kong. It therefore goes on in its paragraph 4 to provide as follows:

> "4. Such of the laws previously in force in Hong Kong which have been adopted as the laws of the Hong Kong Special Administrative Region shall, as from 1 July 1997, be applied subject to such modifications, adaptations, limitations or exceptions as are necessary so as to bring them into conformity with the status of Hong Kong after resumption by the People's Republic of China of the exercise of sovereignty over Hong Kong as well as to be in conformity with the relevant provisions of the Basic Law."

314. The 1997 Decision, by its paragraph 4(1), also requires the laws previously in force (referring to ordinances and subordinate legislation) which are adopted and which relate to foreign affairs in respect of the HKSAR to be subject to national laws applied in the HKSAR and "consistent with the international rights and obligations of the Central People's Government".

315. The 1997 Decision was formally adopted at the Twenty Fourth Session of the Standing Committee of the Eighth National People's Congress. The terms of its paragraphs 4 and 4(1) are substantially reproduced in

section 2A of the Interpretation and General Clauses Ordinance,[132] which relevantly provides as follows:

> "(1) All laws previously in force shall be construed with such modifications, adaptations, limitations and exceptions as may be necessary so as not to contravene the Basic Law and to bring them into conformity with the status of Hong Kong as a Special Administrative Region of the People's Republic of China.
>
> (2) Without prejudice to the generality of subsection (1), in any Ordinance-
>
> (a) provisions relating to foreign affairs in respect of the Hong Kong Special Administrative Region which are inconsistent with any national law applied in the Hong Kong Special Administrative Region shall be construed subject to that national law and shall be so construed as to be consistent with the international rights and obligations of the Central People's Government of the People's Republic of China; ..."

D.2 The HKSAR's high degree of autonomy

316. As we noted at the beginning of this judgment, a large part of the Basic Law is devoted to establishing the difference and high degree of autonomy of the HKSAR's system under the principle of "one country two systems" which is referred to in the Preamble.

317. Numerous Articles of the Basic Law address in detail particular aspects of the separate system. For present purposes, it is sufficient to note that by Article 2, the NPC authorizes the HKSAR "to exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication" in accordance with the provisions of the Basic Law. Moreover, Article 22(1) of the Basic Law prohibits interference in affairs which come within the sphere of the HKSAR's autonomy:

> "No department of the Central People's Government and no province, autonomous region, or municipality directly under the Central Government may interfere in the affairs which the Hong Kong Special Administrative Region administers on its own in accordance with this Law."

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[132] Cap 1.

D.3 Relevant provisions of the Basic Law

318. Two main groups of provisions in the Basic Law and in admissible associated instruments are relevant to the determination of this appeal: first, there are the provisions which establish the status of the HKSAR in relation to the PRC; and secondly, there are the provisions which allocate responsibility for the management and conduct of foreign affairs to the executive, that is, to the CPG, placing foreign affairs outside the limits of the HKSAR autonomy.

D.3a The status of the HKSAR in relation to the PRC

319. The desire for national reunification and territorial integrity is an important theme underlying China's recovery of Hong Kong.[133] This was recognized by this Court in the case concerning desecration of the national flag.[134]

320. The very first Article of the Basic Law states : "The Hong Kong Special Administrative Region is an inalienable part of the People's Republic of China." Article 12 spells out the HKSAR's status:

> "The Hong Kong Special Administrative Region shall be a local administrative region of the People's Republic of China, which shall enjoy a high degree of autonomy and come directly under the Central People's Government."

321. As appears from the discussion in Section C of this judgment, state immunity at common law is a doctrine, derived from international law, concerned with relations between States. It is for States to define the bounds of and exceptions to their own practice of state immunity. The "one voice principle" and the acceptance of declarations of facts of state as conclusive are rules, whether judicially developed or statutory, are designed to avoid inconsistency between organs of government in defining national foreign policy.

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133 See Joint Declaration Article 1 and Article 3(1) and (2); Basic Law, Preamble.

134 *HKSAR v Ng Kung Siu* (1999) 2 HKCFAR 442 at 447, 460 and 461.

The debate tends to centre on which branch of government usually either the executive or the legislature – ought to be allocated responsibility for authoritatively determining such policy, with the courts left to implement the same. It is unheard of for the courts of a region or municipality (which does not exercise sovereign powers) within a unitary State to declare their own separate policy on state immunity which differs from that practised by the State for the nation as a whole.

322. The position of the HKSAR is constitutionally defined by the Basic Law as an inalienable part of the Chinese State having the status of a local administrative region. The OCMFA Letters declare as a fact of state that China practises absolute immunity. Applying the common law principles as modified by the Basic Law, these matters taken together are decisive against FGH's contention that the HKSAR is entitled separately to recognize a commercial exception.

323. The difficulties facing FGH are particularly apparent when paragraph 4 of the 1997 Decision and section 2A of the Interpretation and General Clauses Ordinance are taken into account. As we have seen, they provide that laws previously in force (both common law and statute) and adopted in the HKSAR must be applied subject to such modifications, adaptations, limitations or exceptions as are necessary so as to bring them into conformity with the status of Hong Kong after resumption by the PRC of the exercise of sovereignty. Accordingly, even if one accepts FGH's argument (as we do) that the common law applicable in Hong Kong as at 30 June 1997 adopted a commercial exception to absolute immunity, the common law on state immunity which became adopted as part of the law of the HKSAR as from 1st July 1997 had to be modified or adapted to conform with the HKSAR's status a local administrative region of the PRC having no capacity of its own to

claim or confer state immunity on a basis different from that adhered to by the Chinese State. As previously noted, the sole substantive or practical modification required is the rejection of the commercial exception previously applied.

D.3b The constitutional allocation of responsibility for foreign affairs

324. The difficulties faced by FGH are accentuated by the provisions of the Basic Law which allocate to the CPG responsibility for the foreign affairs of the Region and exclude the management and conduct of foreign affairs from the sphere of the HKSAR's autonomy. Because the CPG's responsibility for foreign affairs is exclusive, subject only to the "external affairs" exception delegated by the CPG under Article 13(3), the institutions of the HKSAR, including the courts of the Region, are bound to respect and act in conformity with the decisions of the CPG on matters of foreign affairs relating to the PRC as a sovereign State. This, in our view, is a constitutional imperative.

325. It was made clear from the outset that the high degree of autonomy to be enjoyed by the HKSAR does not encompass the conduct of foreign affairs or defence. Thus, in the Joint Declaration, it was agreed that:

> "The Hong Kong Special Administrative Region will enjoy a high degree of autonomy, except in foreign and defence affairs which are the responsibilities of the Central People's Government."[135]

326. The Basic Law provides that the CPG bears the responsibility for the conduct and management of foreign affairs affecting the HKSAR and that the HKSAR Government may conduct "external affairs" only under the delegated authority of the CPG.[136] Thus, Article 13 provides:

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135 Article 3(2)

136 Examples of Basic Law Articles dealing with such delegation include Articles 48(2), 62(3), 96 and 133.

> (1) The Central People's Government shall be responsible for[137] the foreign affairs relating to the Hong Kong Special Administrative Region.
>
> (2) The Ministry of Foreign Affairs of the People's Republic of China shall establish an office in Hong Kong to deal with foreign affairs.
>
> (3) The Central People's Government authorizes the Hong Kong Special Administrative Region to conduct relevant external affairs on its own in accordance with this Law.

327. The Basic Law's reservation of the conduct of foreign affairs to the CPG is entirely consistent with the proposition postulated above that the determination of state immunity policy is a matter concerning relations between States and therefore a matter for the State's central authorities and not for some region or municipality acting separately within the State.

328. Certain provisions of the Basic Law implicitly recognize that principle. For instance, Article 150 provides:

> Representatives of the Government of the Hong Kong Special Administrative Region may, as members of delegations of the Government of the People's Republic of China, participate in negotiations at the diplomatic level directly affecting the Region conducted by the Central People's Government.

329. To take another example, Article 152 recognizes that where international intercourse affecting the Region occurs in a context "limited to states", representatives of the HKSAR can only take part as members of the PRC delegation:

> Representatives of the Government of the Hong Kong Special Administrative Region may, as members of delegations of the People's Republic of China, participate in international organizations or conferences in appropriate fields limited to states and affecting the Region, or may attend in such other capacity as may be permitted by the Central People's Government and the international organization or conference concerned, and may express their views, using the name 'Hong Kong, China'.

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[137] "Responsible for" in the Chinese text is rendered as 負責管理 (fuze guanli), which denotes a "responsibility for managing or conducting".

330. The Basic Law also leaves it to the CPG to decide what international agreements should be extended to the HKSAR "in accordance with the circumstances and needs of the Region, and after seeking the views of the government of the Region".[138]

331. The debate in other jurisdictions as to whether constitutional responsibility for determining state immunity policy should rest with the executive, the legislature or the judiciary is therefore settled by the Basic Law which allocates such responsibility to the CPG and not to the HKSAR authorities.

E. FGH's arguments in support of a separate state immunity policy in the HKSAR

332. Lord Pannick QC encapsulated his arguments in support of a separate state immunity policy for the HKSAR – deployed with his customary skill and persuasiveness – as follows:

> "... our submissions do not depend on any suggestion - and I make no such suggestion - that the HKSAR is a state or that it's entitled of itself to claim state immunity in the courts of another state. Our argument is very different. Our argument, as your Lordships know, is that the law to be applied in Hong Kong pursuant to Article 8, Article 18 and Article 19 is the common law rule of state immunity and that is not a matter upon which the courts are obliged to follow the Executive since it doesn't fall within Article 19(3). That's the first point that I wanted to make.
> There's a second point which is that I say that this general plea ... of one state, one doctrine of immunity, has no force, in my submission, in the exceptional context of one country, two systems."[139]

333. Lord Pannick QC's arguments therefore fall under three broad headings:

(a) First, he seeks to counter the "one State one immunity" argument by relying on the "one country two systems" principle as the basis

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138 Article 153.
139 Day 5/398-399.

for continuing to apply a restrictive approach under the common law, contending that the restrictive doctrine became part of the law of the HKSAR by operation of Articles 8, 18 and 19 of the Basic Law.

(b) Secondly, he addresses arguments based on his interpretation of Articles 13, 18(3), 19(3) and Annex III of the Basic Law, contending that continued recognition of the commercial exception offends no constitutional provision.

(c) Thirdly, he relies on arguments of policy as to why the HKSAR should not "revert" to absolute immunity. The series of arguments under this third head have already been addressed in Section C.9a to C.9e above and need no further mention.

334. Before dealing with the other two arguments, it is noteworthy that FGH accepts that the HKSAR cannot itself claim state immunity in the courts of a foreign State. It follows that if someone seeks to implead the HKSAR government or attach its property in a foreign State, state immunity would have to be claimed by China asserting, as it consistently does, absolute immunity. We fail to see how the HKSAR can anomalously claim to confer merely restrictive immunity on States sought to be impleaded in our courts.

E.1 The argument based on the one country two systems principle

335. The Basic Law provisions primarily relied on by FGH in support of the "one country two systems" argument provide as follows:

(a) Article 8:

> "The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region."

(b) Article 18(1):

> "The laws in force in the Hong Kong Special Administrative Region shall be this Law, the laws previously in force in Hong Kong as provided for in Article 8 of this Law, and the laws enacted by the legislature of the Region."

(c) Article 19(1) and 19(2):

> "(1) The Hong Kong Special Administrative Region shall be vested with independent judicial power, including that of final adjudication.
> (2) The courts of the Hong Kong Special Administrative Region shall have jurisdiction over all cases in the Region, except that the restrictions on their jurisdiction imposed by the legal system and principles previously in force in Hong Kong shall be maintained."

336. Emphasising the themes of continuity and respect for judicial independence, Lord Pannick QC contends that by virtue of those Articles, the common law doctrine of state immunity which embraced the commercial exception as at 30 June 1997 has become part of the law of the HKSAR. In our view, that argument does not sufficiently take account of Article 160 of the Basic Law, the 1997 Decision and section 2A of the Interpretation and General Clauses Ordinance. For the reasons given in Sections D.1 and D.3a above, the common law on state immunity became part of the law of the HKSAR as from 1st July 1997 with such modifications, adaptations, limitations or exceptions as are necessary to reflect the HKSAR's status a local administrative region of the PRC. It would follow that the commercial exception, being a doctrine inconsistent with that adhered to by the PRC, can no longer be maintained and that the doctrine now applicable in the HKSAR is a doctrine of absolute immunity.

337. Referring to the 1997 Decision, Lord Pannick QC states:

> "The only concern of paragraph 4 - and it is a narrow concern - is with the question of status and the question of status cannot be interpreted in a way which would be in conflict with the fundamental principles set out in the

> Basic Law itself which this document is seeking not to contradict but to implement."[140]

338. Paragraph 4 of the 1997 Decision (deriving from Article 160 and enacted as section 2A(1)) is indeed concerned with the HKSAR's status as defined in Articles 1 and 12 of the Basic Law. But FGH's argument fails to appreciate the fundamental importance of such status and consequently fails to recognize the force of the "one State one immunity" argument.

E.2 The argument based on Articles 13, 18(3), 19(3) and Annex III

E.2a Article 19(3)

339. Article 19(3) provides:

> The courts of the Hong Kong Special Administrative Region shall have no jurisdiction over acts of state such as defence and foreign affairs. The courts of the Region shall obtain a certificate from the Chief Executive on questions of fact concerning acts of state such as defence and foreign affairs whenever such questions arise in the adjudication of cases. This certificate shall be binding on the courts. Before issuing such a certificate, the Chief Executive shall obtain a certifying document from the Central People's Government.

340. It is echoed by section 4(2) to section 4(4) of the Hong Kong Court of Final Appeal Ordinance,[141] with section 4(1) giving the Court general jurisdiction.

341. Lord Pannick QC's central argument is that Article 19(3) is the only provision of the Basic Law which deprives the courts of jurisdiction, doing so expressly. However, he submits, it only removes jurisdiction "over acts of state such as defence and foreign affairs" and state immunity does not involve an "act of state" and so falls outside those words. He argues that Article 13 has nothing to do with the courts and has no impact on determining whether an

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140 Day 5/396.

141 Cap 484.

absolute or restrictive doctrine should be adopted by the HKSAR. An issue is accordingly raised as to the interpretation of Articles 13 and 19, raising questions concerning reference under Article 158(3) discussed below.[142]

342. Reiterating that our discussion of the interpretation of Articles 13 and 19(3) advanced on FGH's behalf is necessarily subject to what is said below about such reference, we do not accept Lord Pannick QC's interpretation of those provisions.

343. Article 19(3) is indeed of a relatively narrow ambit. By Article 19(2), the HKSAR courts are given general jurisdiction "over all cases in the Region". Article 19(3) then removes jurisdiction "over acts of state such as defence and foreign affairs", requiring the courts to obtain a certificate from the Chief Executive "on questions of fact concerning acts of state such as defence and foreign affairs whenever such questions arise in the adjudication of cases". The certificate then binds the courts.

344. Article 19(3) therefore does not deprive the courts of jurisdiction to decide *the case* in which such questions arise. There continues to be jurisdiction under Article 19(2). What Article 19(3) does is to prevent the courts from exercising jurisdiction "over acts of state such as defence and foreign affairs" and requires them to be bound by the facts concerning such acts of state as declared in the Chief Executive's certificate. In other words, such facts become "facts of state" binding on the courts, leaving the courts to determine their legal consequences and to decide the case on such basis.

345. The meaning of the phrase "acts of state such as defence and foreign affairs" is unclear. It is well known that the drafting of what is now

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142 In Section G.

Article 19, particularly Article 19(3), was a matter of considerable concern. The nature of the problem which gave rise to that concern is discussed in Professor Yash Ghai's "Hong Kong's New Constitutional Order".[143] Although at common law, as Lord Wilberforce described it, the doctrine of "act of state" is "a generally confused topic",[144] we are inclined to agree with Professor Yash Gai that Article 19(3) and section 4 of this Court's statute can be read as consistent with the common law doctrine of act of state. We will proceed on that basis.

346. It is a view which finds support in the 1990 Explanation of the Draft Basic Law given to the Third Session of the Seventh National People's Congress by Mr Ji Peng Fei, Chairman of the Drafting Committee for the Basic Law:

> "The draft vests the courts of the Special Administrative Region with independent judicial power, including that of final adjudication. This is certainly a very special situation wherein courts in a local administrative region enjoy the power of final adjudication. Nevertheless, in view of the fact that Hong Kong will practise social and legal systems different from the mainland's, this provision is necessary. Under the current judicial system and principles, the Hong Kong authorities have never exercised jurisdiction over acts of state such as defence and foreign affairs. While preserving the above principle, the draft stipulates that the courts of the Hong Kong Special Administrative Region shall obtain a certificate from the Chief Executive on questions of fact concerning acts of state such as defence and foreign affairs whenever such questions arise in the adjudication of cases. This certificate shall be binding on the courts. However, before issuing such a certificate, the Chief Executive shall obtain a certifying document from the Central People's Government. This stipulation not only appropriately solves the question of jurisdiction over acts of state, but also guarantees that the courts of the Region can conduct their functions in a normal way."

347. Mr Ji therefore points out that under the law as it stood prior to 1st July 1997, the Hong Kong authorities "have never exercised jurisdiction over acts of state such as defence and foreign affairs" – which is the position

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143 2nd ed, 1999, 319-320, especially footnote15 (which sets out earlier drafts of the provision).

144 *Buttes Gas v. Hammer* [1982] AC 888 at 930.

under the common law act of state doctrine – and explains that the draft of Article 19(3) preserves that position while introducing the certificate procedure, such arrangement "guaranteeing" that the HKSAR courts "can conduct their functions in a normal way".

348. The scope of the common law act of state doctrine is imprecise, with various types of cases having been held to fall within it. But in one strand of cases, as the learned editors of Dicey, Morris and Collins explain,[145] it has been held that the courts will not investigate the propriety of an act of the executive "performed in the course of its relations with a foreign State". Thus, in *Cook v Sprigg*,[146] Lord Halsbury LC stated:

> "It is a well-established principle of law that the transactions of independent states between each other are governed by other laws than those which municipal courts administer."

349. And in *Johnstone v Pedlar*,[147] Lord Sumner similarly stated:

> "Municipal courts do not take it upon themselves to review the dealings of State with State or of Sovereign with Sovereign."

350. In *Buttes Gas and Oil Co v Hammer (No 3)*,[148] Lord Wilberforce considered the act of state doctrine in the context of foreign affairs to be part of a "more general principle that the courts will not adjudicate upon the transactions of foreign sovereign states."

351. Such acts of state, as Fletcher Moulton LJ stated, "cannot be challenged, controlled or interfered with by municipal courts".[149] He added:

> "... if an act is relied upon as being an act of State, and as thus affording an answer to claims made by a subject, the Courts must decide whether it was in truth an act of State, and what was its nature and extent. ... But in such an

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145 See Dicey, Morris and Collins, *op cit*, §5-041.
146 [1899] AC 572 at 578.
147 [1921] 2 AC 262 at 290.
148 [1982] AC 888 at 931.
149 *Salaman v Secretary of State for India* [1906] 1 KB 613 at 639.

> inquiry the Court must confine itself to ascertaining what the act of State in fact was, and not what in its opinion it ought to have been."

352. These common law decisions dealing with acts of state in the field of foreign affairs are in substance consistent with Article 19(3). Is the act by the CPG of determining the policy of state immunity applicable to the HKSAR properly viewed as an act of state coming within the concept of "acts of state such as defence and foreign affairs" in Article 19(3)? In our view, the provisional answer, consistent with the common law and our interpretation of Article 19(3), is "Yes". It involves the CPG's determination of the PRC's policy in its dealings with foreign States with regard to state immunity.

353. The very close connection between the act of state doctrine and state immunity is brought out in Lord Millett's speech in *Holland v Lampen-Wolfe* where his Lordship said that the doctrine of state immunity:

> "... derives from the sovereign nature of the exercise of the state's adjudicative powers and the basic principle of international law that all states are equal."[150]

He added that the immunity:

> "... operates to prevent the official and governmental acts of one state from being called into question in proceedings before the courts of another."[151]

354. And in *Nissan v Attorney-General*,[152] Lord Wilberforce approved the "definition" of act of state offered by Professor E C S Wade,[153] namely:

> "… an act of the executive as a matter of *policy* performed in the course of its relations with another …" (our emphasis)

355. It is accordingly our view, contrary to Lord Pannick QC's submissions, that the determination by the CPG of the relevant rule of state

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150 At 1583.
151 *Ibid*.
152 [1970] AC 179.
153 *British Yearbook of International Law* (1934) Vol XV at 103.

immunity to be applied in the HKSAR courts is properly viewed as an "act of state such as ... foreign affairs" within Article 19(3). It would follow that FGH's submission that determination of such rule is a matter for the HKSAR courts and not the CPG must be rejected. It is a matter over which the HKSAR courts lack jurisdiction.

E.2b Certificates under Article 19(3)

356. As we have noted above, Article 19(3) provides a procedure for obtaining a certificate from the Chief Executive "on questions of fact concerning acts of state such as defence and foreign affairs". It requires the courts of the Region to obtain such a certificate "whenever such questions arise in the adjudication of cases" and provides that the certificate issued "shall be binding on the courts". The Chief Executive's certificate must be based on "a certifying document" provided by the CPG.

357. Having reached the provisional conclusion[154] that the CPG's act of determining that the relevant rule of state immunity to be applied in the HKSAR is an act of state coming within the phrase "acts of state such as defence and foreign affairs" in Article 19(3), we turn to consider whether it is necessary for the Court to obtain a certificate from the Chief Executive. For the reasons which follow, it is our view that in the circumstances of the present case, such a certificate is not required.

358. Article 19(3) states that the HKSAR courts "shall" obtain such a certificate on questions concerning such acts of state "whenever such questions arise in the adjudication of cases".

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[154] In Section E.2a above.

359. In practice, the possibility that Article 19(3) is engaged will arise if a party to litigation alleges that some issue in the litigation involves a non-justiciable act of state. Whether the Court accepts that there is in law such an act of state will, on the common law approach just described, depend on the proper characterisation of the transaction or other activity of the State relied on. But, as Article 19(3) envisages, questions of fact are likely to arise in that inquiry, particularly questions about what actually occurred in relation to the alleged act of state. Such questions of fact "concern" the alleged "acts of state such as defence and foreign affairs" in that they have to be established to enable the Court to decide whether an act of state exists as a matter of law with the result that the issue is not justiciable. Or, where on the available evidence, the Court is satisfied that an act of state does exist, questions of fact may still arise as to its precise nature and extent. It is possible that other types of factual questions might arise which "concern" acts of state.

360. The application of Article 19(3) therefore requires the Court first to identify what, if any, questions of fact there may be which concern the relevant act of state. Secondly, it requires the Court to consider whether such questions as arise need to be resolved in the adjudication of the case by using the certificate procedure.

361. The questions of fact which arise in the present case concern the act of state constituted by the PRC's determination of the applicable doctrine of state immunity. They are two-fold. The first relates to the fact that the doctrine adopted by the PRC is a doctrine of absolute immunity. The second involves the fact that adoption of a divergent position by the HKSAR courts would prejudice China's sovereignty and hamper its conduct of foreign affairs in the ways identified in the 3rd OCMFA Letter.

362. In our view, read purposively, the words "whenever such questions arise in the adjudication of cases" mean "whenever there is controversy or doubt about such questions which need to be resolved in adjudicating a case". We do not think it can have been intended that the Chief Executive should be troubled even where the relevant facts have been authoritatively established and are not in dispute.

363. That is the position in the present case. The Office of the Commissioner is the "office in Hong Kong" established to deal with foreign affairs under Article 13(2) of the Basic Law. Its letters therefore authoritatively establish what the PRC's foreign affairs policy on state immunity is and what prejudice is likely to flow from the HKSAR courts taking a deviating position. It is common ground among the parties that China's policy on state immunity is that the immunity is absolute. As indicated above,[155] those letters should be taken to have the status of declarations of facts of state, which the HKSAR courts (even without any Article 19(3) certificate) accept as authoritative statements of facts within the peculiar cognizance of the executive organ of government having charge of the nation's foreign policy. It falls to the courts to determine on the basis of those facts whether an act of state exists and if so, what its nature and extent is, attaching the legal consequence of non-justiciability if and insofar as appropriate. As we have indicated, the Court's provisional conclusion in the present case is that the CPG's determination of the PRC's policy of absolute state immunity comes within the phrase "acts of state such as defence and foreign affairs" in Article 19(3), a conclusion which is sufficiently supported by the undisputed and authoritative facts of state declared in the OCMFA Letters, without need for a certificate.

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[155] Section C.9d.

E.2c Article 13

364. Nor are we able to accept Lord Pannick QC's submission that Article 13 has no impact on the jurisdiction of the courts. As we have pointed out in Section D.3b above, Article 13 allocates to the CPG responsibility for foreign affairs and excludes the management and conduct of foreign affairs from the sphere of the HKSAR's autonomy. It therefore buttresses the conclusion that there is no room for the HKSAR courts adopting a different policy on state immunity, being a matter which (as Lord Pannick QC accepts) falls within the sphere of "foreign affairs".

365. Furthermore, since Article 13 assigns responsibility for the conduct of foreign affairs to the CPG, that Article is "a provision concerning affairs which are the responsibility of the CPG". Accordingly, if in adjudicating cases, the courts of the Region need to interpret Article 13, Article 158(3) is engaged, as discussed further in Section G below.

E.2d Articles 18(2), 18(3) and Annex III

366. Articles 18(2) and 18(3) are relevant to this argument. They provide as follows:

> (2) National laws shall not be applied in the Hong Kong Special Administrative Region except for those listed in Annex III to this Law. The laws listed therein shall be applied locally by way of promulgation or legislation by the Region.
>
> (3) The Standing Committee of the National People's Congress may add to or delete from the list of laws in Annex III after consulting its Committee for the Basic Law of the Hong Kong Special Administrative Region and the government of the Region. Laws listed in Annex III to this Law shall be confined to those relating to defence and foreign affairs as well as other matters outside the limits of the autonomy of the Region as specified by this Law.

367. As we have previously noted, the position before 1st July 1997 was governed by the SIA 1978, which lapsed upon China's resumption of the exercise of sovereignty over Hong Kong. The SIA 1978 has not been replaced

by any local Ordinance, nor has any national law on state immunity been made applicable to the HKSAR.

368. Lord Pannick QC's argument under this head runs along these lines: Article 18(3) of the Basic Law provides a mechanism for the CPG to make national laws apply in the HKSAR by adding them to those listed in Annex III. It has, however, chosen not to do so on the topic of state immunity, indicating that adoption of a divergent law on state immunity by the HKSAR is not a matter of concern to the CPG.

369. That suggestion bears a similarity to a line of reasoning adopted by the majority in the Court of Appeal, namely, that since absolute state immunity has not been prescribed by a national law nor by any legislation replacing the SIA 1978, "it is reasonable to assume that is not intended that Hong Kong should abandon the restrictive doctrine" as a matter of common law.[156]

370. The flaws in these propositions emerge when one examines the context in which the SIA 1978 was allowed to lapse without being replaced by any local legislation. In the first place, as we have previously noted, no national law on state immunity has been promulgated, the matter being treated, as in many other countries, as a matter of national policy determined by the executive and adhered to by the courts. There can be little doubt that if a national state immunity law were to come into existence, it would be applied to the HKSAR. Thus, the national laws listed in Annex III pursuant to Article 18(3) presently include those regulating Diplomatic Privileges and Immunities; Consular Privileges and Immunities; and Judicial Immunity from Measures Concerning the Property of Foreign Central Banks. But since there is no national law on state immunity, the mechanism of Article 18(3) does not come into play.

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[156] Court of Appeal §§118(2), 121, 260-262.

371. The absence of any HKSAR legislation to "localise" the SIA 1978 was not a chance omission. Legislative Council ("Legco") papers record how this came about.

(a) On 11 March 1996, the Constitutional Affairs Branch reported to the Legco Constitutional Affairs Panel on the progress that had so far been made on replacing applicable United Kingdom legislation. Some 300 British enactments were involved, half of which would be allowed to lapse. Of the remainder, 67 had already been localised in 15 Hong Kong Ordinances. These covered a range of matters including the Admiralty jurisdiction of the courts, merchant shipping, carriage by sea and by air, coinage and so forth. It listed 11 Bills under consideration in the Sino-British Joint Liaison Group ("JLG") including one on state immunity.

(b) On 12 December 1996, the Constitutional Affairs Branch reported afresh to the Legco Constitutional Affairs Panel. By then there were only eight localisation proposals awaiting JLG agreement. These included a Bill on state immunity which sought to localise many of the provisions of the SIA 1978. The report stated that "The most important provision in the Act is that a State will not be immune in respect of proceedings in relation to commercial dealings". The British side was therefore seeking agreement for there to be a localising Ordinance for the SIA 1978.

(c) On 3 March 1997, it was reported that the state immunity proposal was still outstanding. Then in a paper prepared for a Legco Constitutional Affairs Panel meeting to be held on 16 June 1997, the Secretary for Constitutional Affairs reported on the overall results of the localisation programme. The paper reported that "the few outstanding issues" included a category "on which progress

> cannot be made in the JLG because of the CPG's sovereignty concerns", including "the localisation of laws relating to state immunity".

372. It is therefore clear that the CPG specifically decided that there should not be legislation in the HKSAR to import the commercial exception to absolute immunity provided for under the SIA 1978. That is not surprising since such a rule would have diverged from its own established and consistent national policy. It was a matter giving rise to "sovereignty concerns". The Court of Appeal did not have the benefit of those Legco papers. Such material undermines the majority's assumption that the absence of a localized version of the SIA 1978 indicates an intention to adopt a rule of restrictive immunity at common law in the HKSAR.

373. Indeed, with respect, it was not a secure inference to draw even in the absence of the legislative (or non-legislative) history. The SIA 1978 lays down a detailed regime for state immunity, governing the scope of the commercial, waiver and other exceptions and prescribing, among other things, how certain types of claim and how arbitral awards should be treated, with provision made for service of proceedings and other procedural arrangements. If China's policy had been that restrictive immunity should continue to apply in the HKSAR, one would have expected the Act to be localised as an Ordinance to enable such detailed matters to be regulated and to avoid the inevitable debate as to what the common law on state immunity in the HKSAR consists of after having been superseded by the SIA 1978 since 1979.

F. Waiver

F.1 The issue

374. As noted above, it is clear as a matter of international law and common law that States can waive any immunity they may have. In so doing, they voluntarily submit to the jurisdiction of the domestic courts of the forum State.[157]

375. FGH invites the Court to hold that in the present case the DRC has *impliedly* waived its immunity, whether absolute or restrictive, in the HKSAR courts as a result of entering into an agreement with Energoinvest for arbitration in Paris and Zurich respectively under ICC Paris rules. FGH relies in particular on ICC Rule 28.6 which states:

> "Every Award shall be binding on the parties. By submitting the dispute to arbitration under these Rules, the parties undertake to carry out any Award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made."

376. As we have seen, Reyes J [158] and the Court of Appeal unanimously [159] held that there has been no implied waiver and thus no submission to the jurisdiction of the HKSAR's courts.

F.2 The nature of a waiver of state immunity

377. It is necessary to bear in mind that, as we have pointed out above,[160] state immunity is concerned with relations between States. A State which waives its immunity, does so by voluntarily submitting to the exercise of jurisdiction by the courts of the forum State over the waiving State's governmental entities or property. Obviously, when a State enters into an arbitration agreement with a private individual or company, that act does not

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157 See Section C.3a above.
158 At §§104-117 and §121.
159 At §§177, 180(1), §234 and §274.
160 Section C.3a.

constitute a submission to any other State's jurisdiction. It involves merely the assumption of contractual obligations vis-à-vis the other party to the agreement. So if a State fails to honour a promise made in the arbitration agreement to carry out the award and waive its immunity, it may put itself in breach of its contract but it will have done nothing to submit to the jurisdiction of any forum State.[161]

378. Against that background, one should distinguish three situations in which a waiver may be relevant. First, by taking part in an arbitration, a State is obviously agreeing to submit to the contractual jurisdiction of the arbitrators. But that is obviously not the same thing as submitting to the jurisdiction of another State's courts.[162] Such conduct may however constitute an implicit submission to the jurisdiction of the courts – the French and Swiss courts in the present case – exercising a supervisory jurisdiction over the conduct of the arbitration.[163]

379. What we are concerned with is a different question, namely, whether there has been a waiver of immunity and a submission by the DRC to the jurisdiction of the HKSAR's courts. It is well-established at common law that a party seeking to enforce an arbitration award (or a judgment) against a foreign State on the basis of a waiver of state immunity must establish a waiver at two distinct stages. The impleaded State must have waived both its jurisdictional immunity from suit in the forum State and the immunity of its property from execution by the forum State's process.[164]

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161 *Duff Development Co Ltd v Government of Kelantan* [1924] AC 797 at 810; *Kahan v Pakistan Federation* [1952] 2 KB 1003 at 1020.

162 *Duff Development Co Ltd v Government of Kelantan* [1924] AC 797 at 821, 829.

163 For a discussion of the position under international law, see Fox *The Law of State Immunity* 2d ed., (2008) at 501, cited in the Court of Appeal at §142.

164 Dicey, Morris and Collins, *op cit*, §10-74; *In re Suarez* [1917] 2 Ch 131 at 138-139; *The "Cristina"* [1938] AC 485 at 490-491.

380. The "suit" for such purposes is constituted in the present case by the FGH's application for leave to enforce the awards in the same way as judgments of the HKSAR courts pursuant to section 2GG of the Arbitration Ordinance[165] which provides:

> (1) An award, order or direction made or given in or in relation to arbitration proceedings by an arbitral tribunal is enforceable in the same way as a judgment, order or direction of the Court that has the same effect, but only with the leave of the Court or a judge of the Court. If that leave is given, the Court or judge may enter judgment in terms of the award, order or direction.
>
> (2) Notwithstanding anything in this Ordinance, this section applies to an award, order and direction made or given whether in or outside Hong Kong.

381. As Viscount Finlay pointed out in *Duff Development Co Ltd v Government of Kelantan*[166] in relation to the equivalent section in the Arbitration Act 1889, the only right which section 2GG gives to the party with the benefit of an award is a right to apply for leave to enforce the award. And as he explains:

> " ... this leave will be granted only in suitable cases. It is not a suitable case if a foreign Government is concerned, unless there has been a clear waiver by that Government of its sovereign rights for this purpose."

382. An application for the grant of leave to enforce the award, often referred to as the "recognition" phase of enforcement, therefore involves discretionary adjudicative proceedings in which the impleaded State may claim state immunity.

383. It is furthermore clear, as stated above, that even where the recognition proceedings are successful, when the applicant subsequently seeks to execute the award (now treated like a judgment of the court), the impleaded State has a further right to object to execution against the targeted property on

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165 Cap 341.

166 [1924] AC 797 at 819.

the ground of state immunity. The parties have jointly requested the Court to focus only on the recognition proceedings, leaving aside questions of execution.

F.3 Implied waiver

384. A statute enacted in the forum State may of course deem a submission to arbitration to be an implied waiver of state immunity in that State's courts. Thus, section 9 of the SIA 1978 provides:

> "Where a State has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the State is not immune as respects proceedings in the courts of the United Kingdom which relate to the arbitration."

385. The English Court of Appeal held in *Svenska Petroleum Exploration AB v Government of the Republic of Lithuania (No 2)*,[167] that the words "proceedings ... which relate to the arbitration" go beyond proceedings in the court's supervisory jurisdiction and extend to cover proceedings relating to the enforcement of a foreign arbitral award. As Stock VP points out,[168] legislation on implied waivers may also be found in Australia and in the United States.

386. The HKSAR has no such legislation. The common law rules therefore apply and they are very chary about implying any waiver. They require there to be no doubt that a submission to the court's jurisdiction is actually what the impleaded State intends before jurisdiction is assumed. Thus, in *Mighell v Sultan of Johore*,[169]Lord Esher MR held that

> "...it is only when the time comes that the Court is asked to exercise jurisdiction over him that he can elect whether he will submit to the jurisdiction. If it is then shewn that he is an independent sovereign, and does not submit to the jurisdiction, the Court has no jurisdiction over him. It follows from this that there can be no inquiry by the Court into his conduct prior to that date."

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167 [2007] QB 886 at §117.
168 At §§150-151.
169 [1894] 1 QBD 149 at 159-160.

Lopes LJ put it thus:

> "In my judgment, the only mode in which a sovereign can submit to the jurisdiction is by a submission in the face of the Court, as, for example, by appearance to a writ."[170]

And Kay LJ stated:

> "... the foreign sovereign is entitled to immunity from civil proceedings in the Courts of any other country, unless upon being sued he actively elects to waive his privilege and to submit to the jurisdiction."[171]

387. *Duff Development Co Ltd v Government of Kelantan*,[172] was concerned specifically with whether submission of a dispute to arbitration constituted an implied submission by the Sultanate of Kelantan to the jurisdiction of the United Kingdom's courts. Their Lordships (with Lord Carson dissenting) approved *Mighell v Sultan of Johore*[173] and held that it did not. Viscount Finlay emphasised that (as pointed out above) participation in the arbitration is not a submission to any forum State's jurisdiction:

> "To the arbitration the Government of Kelantan had no objection; they attended the proceedings throughout. It was only when it was proposed to take a step which involved the right to execution against the Government that there was any occasion to raise the objection of sovereignty."[174]

388. Lord Sumner considered it:

> "... necessary to find something voluntarily done by the foreign sovereign in or towards the Court and to find in what is done something that really evinces an intention to submit."

389. More recently, in *A Company Ltd v Republic of X*,[175] Saville J summarised the position thus:

> "... on the authorities no mere *inter partes* agreement could bind the State to such a waiver, but only an undertaking or consent given to the Court itself at the time when the Court is asked to exercise jurisdiction over or in respect of the subject matter of the immunities..."

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170 *Ibid*, at 161.
171 *Ibid,* at 163-164.
172 [1924] AC 797 at 829.
173 [1894] 1 QBD 149.
174 [1924] AC 797 at 819.
175 [1990] 2 Lloyd's Rep 520 at 524.

390. Applying the common law rule to the present case, we agree with Reyes J and the Court of Appeal that there is no basis for finding that the DRC has waived its state immunity before the HKSAR courts, either in respect of recognition or execution of the arbitral awards. FGH is unable to rely on anything other than the terms of the arbitration agreement between the DRC and Energoinvest and the fact that two awards were made thereunder. That is plainly insufficient. When FGH came to ask our courts to exercise jurisdiction, far from giving its consent, the DRC has actively asserted its immunity.

391. As Lord Pannick QC points out, a significant body of academic opinion exists in favour of changing the law so that an implied waiver is more readily recognized.[176] He invites the Court to make such a change and to hold that the agreement to arbitrate in the present case constitutes an implied waiver of immunity in our courts.

392. We are, with respect, not persuaded that such a change would be wise or desirable. Whether or not a particular State accepts a commercial exception, the rationale of state immunity remains the *par in parem* principle. Mutual recognition as co-equal sovereign States leads each State to refrain from exercising jurisdiction over the foreign State concerned without the latter's consent. Questions of waiver only arise where the impleaded State *does* qualify for jurisdictional immunity in the forum State, or else there is nothing to waive. In such circumstances, the common law rule as to waiver is consonant with elementary good sense by requiring an unequivocal submission to the jurisdiction of the forum State at the time when the forum State's jurisdiction is

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[176] Including F A Mann, *Waiver of Immunity* (1991) 107 LQR 362 at 364; Frédéric Bachand, *Overcoming Immunity-Based Objections to the Recognition and Enforcement in Canada of Investor-State Awards*, Journal of International Arbitration, Vol 26 No 1 (2009), at pp 68-9; Riccardo Luzzatto, (1997) 157 *Recueil des cours de l'Académie de droit international de La Haye* 9 at p 93.

invoked against the impleaded State. Courts would be ill-advised to attempt to deem an impleaded State to have submitted to their jurisdiction when it has not done so explicitly by its words or conduct and where its objection to such jurisdiction is made clear in the recognition proceedings. Such a course is likely to be damaging to the relations between the two States and may very well be ineffectual in any event.

393. We accordingly agree with the courts below that there is no basis for holding that the DRC has waived its immunity before the HKSAR courts.

G. Reference under Article 158(3)

394. Article 158(3) of the Basic Law relevantly provides:

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

G.1 Approach of the Court to Article 158

395. On three previous occasions this Court has considered the circumstances in which it is required by Article 158(3) to refer a question of interpretation of the Basic Law to the SCNPC.

396. In *Ng Ka Ling v Director of Immigration*,[177] the Court held that, under Article 158(3), it had a duty to make a reference if two conditions are satisfied:

(a) "the classification condition": if the provisions of the Basic Law in question

(i) concern affairs which are the responsibility of the CPG; or

[177] (1999) 2 HKCFAR 4.

(ii) concern the relationship between the Central Authorities and the Region ((i) and (ii) being referred to as "the excluded provisions");

(b) "the necessity condition": if the Court of Final Appeal in adjudicating the case needs to interpret the excluded provisions and the interpretation will affect the judgment on the case.[178]

397. In relation to the classification condition, the Court adopted as the test: As a matter of substance what predominantly is the provision that has to be interpreted in the adjudication of the case? ("the predominant test")[179]

398. The Court went on to hold that once the classification and the necessity conditions were satisfied there was a duty to make a reference of the question of interpretation if it was "arguable" but not if it was "plainly and obviously bad" . In the course of the judgment on this question, it was said that the decision on the question of interpretation was a matter for the SCNPC if a reference has to be made and a matter for the Court if a reference does not have to be made. This statement was made in the context of final adjudication on the question of interpretation. It was not intended to preclude this Court from expressing its view on a question of interpretation which it is bound to refer and does refer to the SCNPC. The language of Article 158(3) plainly permits this Court to express its view on the question. What Article 158(3) precludes is the making of a final judgment before a reference is made in a case where a reference is required.

399. In *Ng Ka Ling* the question of interpretation related to Article 24 (a provision within the Region's autonomy), the argument being that Article 24

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178 *Ibid,* at 30-31.
179 Ibid at 33.

was qualified by reference to Article 22(4) which was an excluded provision. The Court held that there was no duty to make a reference because Article 24 was the "predominant" provision, being the source of the right sought to be enforced in the proceedings.

400. On 26 June 1999 the SCNPC issued an Interpretation of Articles 22(4) and 24(2)(3) under Article 67(4) of the PRC Constitution and Article 158(1) of the Basic Law. The Preamble to the Interpretation recited that, before making its final judgment, the Court in *Ng Ka Ling* had not sought an interpretation of the SCNPC in compliance with the requirements of the Basic Law. The Preamble continued:

> "Moreover, the interpretation of the Final Court of Appeal is not consistent with the legislative intent."

401. Paragraph 1 of the Interpretation then stated the meaning of Article 22(4), that meaning being inconsistent with this Court's interpretation in *Ng Ka Ling* of Article 22(4), while paragraph 2 of the Interpretation stated the meaning of Article 24(2)(3) in a way that was inconsistent with the interpretation placed upon that article by this Court in *Chan Kam Nga v Director of Immigration*.[180]

402. Although the Interpretation stated the meaning of Article 22(4), it did not do so by linking the interpretation of that provision to Article 24. Nevertheless, in *Lau Kong Yung v Director of Immigration*,[181] where this Court considered the effect of the Interpretation, Li CJ (with the concurrence of the other members of the Court), after noting that the Court in *Ng Ka Ling*, when applying the predominant test in that case, did not make a reference, said:

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180 (1999) 2 HKCFAR 82.
181 (1999) 2 HKCFAR 300.

> "The Preamble to the Interpretation expressed the view that before judgment the Court had not sought an interpretation of the relevant provisions of the Standing Committee 'in compliance with the requirement of Article 158(3)'. As this view proceeds upon an interpretation of Article 158(3) which differs from that applied by the Court in *Ng Ka Ling*, the Court may need to re-visit the classification and necessity conditions and the predominant test in an appropriate case."[182]

403. Although we were invited by Mr McCoy SC for the China Railway defendants to reconsider the predominant test, we do not consider this case to be an appropriate vehicle to reconsider that test. In the first place, the predominant test is of no relevance in the present case. It was applied in *Ng Ka Ling* where the scope of a non-excluded provision in the Basic Law was said to be qualified by reference to the scope of an excluded provision. Here the two Articles of the Basic Law on which the argument is centred are both excluded provisions. The first, Article 13, is a provision of the Basic Law concerning affairs which are the responsibility of the CPG. The second, Article 19, plainly concerns the relationship between the Central Authorities and the Region. Accordingly, there is no need to apply the predominant test. In a similar situation in *Director of Immigration v Chong Fung Yuen*[183] where this Court was not concerned with the relationship between an excluded provision and a provision within autonomy, the Court considered that it was not an appropriate case to re-examine the predominant test, saying that it might be proper to do so in a suitable case.[184]

404. Nor is there any occasion for us to re-visit the "arguability" threshold in relation to questions of reference. We consider questions relating to Articles 13 and 19 clearly arguable. No other conclusion as to arguability is possible when regard is had to the conflicting views expressed in the courts

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182 Ibid at 324G-H.
183 (2001) 4 HKCFAR 211.
184 Ibid at 230B-C.

below, particularly the division of opinion in the Court of Appeal. In addition, we have the division of opinion in this Court.

405. In the result, this case is not an appropriate vehicle to revisit the classification and the necessity conditions. There is no issue between the parties as to the classification condition. The only issue is whether the necessity condition is satisfied and it is to that issue we now turn.

G.2 The necessity condition

406. On the view which we have taken of the arguments advanced by the parties with respect to waiver of state immunity, the DRC has not waived its immunity.[185] Hence the case cannot be resolved without a determination of the questions of interpretation affecting the meaning of Articles 13 and 19 of the Basic Law, in particular in relation to the words "acts of state such as defence and foreign affairs". The necessity condition is therefore satisfied.

G.3 The questions to be referred to the Standing Committee of the National People's Congress

407. The procedure to be adopted by this Court on the making of a reference under Article 158(3) was discussed in *Chong Fung Yuen*,[186] although no definitive conclusions were reached. We did, however, invite the parties in the present case to submit draft questions, in the event that the Court concluded that a reference should be made. Having considered the draft questions put forward by the appellants and the Intervener, we conclude that the Court is bound to make a reference under Article 158(3) of the Basic Law to the Standing Committee of the National People's Congress of questions of interpretation of the Basic Law which involve Articles 13(1) and 19 which

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185 Section F.3 above.

186 (2001) 4 HKCFAR 211 at 230 C-E.

concern respectively affairs which are the responsibility of the CPG and the relationship between the Central Authorities and the Region. We make the obvious point that the duty to make a reference under Article 158(3) is limited to questions of interpretation of the Basic Law identified in that provision. The questions referred are:

(1) whether on the true interpretation of Article 13(1), the CPG has the power to determine the rule or policy of the PRC on state immunity;

(2) if so, whether, on the true interpretation of Articles 13(1) and 19, the HKSAR, including the courts of the HKSAR:

  (a) is bound to apply or give effect to the rule or policy on state immunity determined by the CPG under Article 13(1); or

  (b) on the other hand, is at liberty to depart from the rule or policy on state immunity determined by the CPG under Article 13(1) and to adopt a different rule;

(3) whether the determination by the CPG as to the rule or policy on state immunity falls within "acts of state such as defence and foreign affairs" in the first sentence of Article 19(3) of the Basic Law; and

(4) whether, upon the establishment of the HKSAR, the effect of Article 13(1), Article 19 and the status of Hong Kong as a Special Administrative Region of the PRC upon the common law on state immunity previously in force in Hong Kong (that is, before 1 July 1997), to the extent that such common law was inconsistent with the rule or policy on state immunity as determined by the CPG pursuant to Article 13(1), was to require such common law to be applied subject to such modifications, adaptations, limitations or exceptions as were necessary to ensure that such common law is consistent with the rule or policy on state immunity as determined by the CPG, in accordance with Articles 8 and 160 of the Basic

Law and the Decision of the Standing Committee of the National People's Congress dated 23 February 1997 made pursuant to Article 160.

G.4 Procedure to be followed on reference

408. In our view, the questions so stated are to be referred by the Secretary for Justice through the Office of the Commissioner of the Ministry of Foreign Affairs to the Standing Committee along with the following Court documents:

(1) the reasons for judgment delivered in this case by the members of this Court;

(2) the provisional orders of this Court;

(3) the judgments of the Court of Appeal in this case; and

(4) the judgment of Reyes J in this case.

H. Matters not dealt with and Orders provisionally made

H.1 Matters not dealt with in this judgment

409. Two issues, which were the subject of extensive and erudite argument on the present appeal, do not require treatment in this judgment given the provisional conclusions we have reached.

H.1a The rule of customary international law absorbed into the common law of the HKSAR

410. The first of those issues involves the Intervener's submission that in so far as customary international law is a source of the common law of the HKSAR, the rules of customary international law capable of being absorbed into our common law are confined to the rules which bind the Chinese State. The Intervener disputes the contention that the commercial exception to absolute immunity has become a norm of customary international law.

However, the argument runs, even if restrictive state immunity is properly regarded as a rule of customary international law, China has persistently objected to such a rule throughout the rule's formative period. Accordingly, under the persistent objector doctrine in international law, China is not bound by it whatever may be the position of other States. It would follow that no rule of customary international law prescribing restrictive immunity binds the PRC and no such rule is capable of being incorporated into the common law of the HKSAR.

411. With no disrespect to the submissions of the parties on this topic, we do not consider it necessary for us to enter upon that question given that we have provisionally reached the conclusion that, as a matter of municipal law and constitutional principle, the doctrine of state immunity applicable in the HKSAR is one of absolute immunity.

H.1b Absolute immunity against execution even if immunity is only restrictive at the recognition stage

412. While, as previously noted, the Court was requested to focus on the recognition stage of the proceedings brought by FGH to enforce the arbitral awards, the Intervener indicated that there was an issue as to whether, the doctrine of state immunity applicable at the execution stage is absolute even if it has been held to be restrictive at the recognition stage. This question was debated in writing as directed by the Court. However, as we have provisionally concluded that the state immunity doctrine at the recognition stage is absolute, the Intervener's fallback position regarding the execution stage does not arise for decision.

H.2 The Orders we provisionally make

413. We direct that the questions set out in Section G.3 of this judgment be referred to the Standing Committee of the National People's Congress for their interpretation pursuant to Article 158(3).

414. Subject to any submissions which any party, including the Intervener, may wish to make as to the procedure referred to in Section G.4 above, we direct that the questions to be referred should be referred in accordance with the aforesaid procedure. Any such submissions by any party should be lodged in writing with the Court within 7 days of the delivery of the Court's provisional judgment in this case.

415. Subject to the Standing Committee's interpretation of the provisions concerned, we make the following Orders, namely:

(a) That the appeal be allowed and that the Orders of the Court of Appeal dated 10 February 2010 be set aside;

(b) That it be declared and a Declaration granted that the HKSAR courts have no jurisdiction over the 1st defendant in the present proceedings;

(c) That paragraphs 2 to 6 of the Order of Reyes J dated 12 December 2008 setting aside prior orders for (i) an injunction against the 1st defendant; (ii) leave to enforce the arbitration awards against the 1st defendant; and (iii) leave to serve the Originating Summons (HCMP 928/2008) dated 16 May 2008 on the 1st defendant outside the jurisdiction and subsequently by way of substituted service; be restored;

(d) That the Order of Reyes J dated 26 February 2009 discharging prior orders for injunctions against the 1st to 5th defendants be restored;

(e) That the said originating Summons, as subsequently amended, be dismissed as against all defendants;

(f) That costs be reserved until the interpretation of the Standing Committee pursuant to the Court's reference shall be known.

416. This appeal will be restored to the list after receipt of the Interpretation by the Standing Committee of the National People's Congress to be dealt with as appropriate.

Mr Justice Mortimer NPJ :

417. I have had the great advantage of reading the other judgments in these appeals. I regret that I am unable to agree with the majority decision. I agree with Mr Justice Bokhary PJ's judgment in its conclusions and its reasoning. However, mindful of the constitutional importance of our decision I wish to add something of my own.

Introduction

418. FG Hemisphere Associates LLC (FG), the plaintiff/respondent, is a New York company. It purchased and is now the assignee of the benefit of debts owed by the Democratic Republic of the Congo (the Congo) in consequence of two ICC arbitration awards made against it.

419. On 15 May 2008 FG obtained leave to enforce these awards against money said to be payable in Hong Kong to the Congo by China Railway Group Limited (China Railway), the 5th defendant and its subsidiaries, the 2nd to 4th defendants.

420. The Congo and the other defendants, the Secretary for Justice intervening, applied to Reyes J to set aside the leave to enforce the awards and

associated injunctions. They succeeded before the judge but on appeal the Court of Appeal, by a majority, restored the leave and the supporting injunctions but remitted a factual issue on the nature of the transactions between the Congo and the other defendants back to the judge.

421. The defendants appeal to this Court with the Secretary for Justice continuing to intervene. The issues are of constitutional importance to the People's Republic of China (the PRC) and the Hong Kong Special Administrative Region (the HKSAR) as an integral part of the PRC under "the one country two systems" principle.

422. The issue to be decided is whether FG should have leave to enforce the arbitral awards. In particular, whether the law in Hong Kong recognises the restrictive principle of sovereign immunity and whether the Hong Kong courts have jurisdiction to apply this principle. It is necessary therefore to consider the effect and application of the Basic Law; the jurisdiction of the Court of Final Appeal; the Hong Kong common law on state immunity since the handover; the question whether the Hong Kong law recognises the restrictive principle on state immunity; and in any event, whether the Congo has waived its immunity, both in the arbitral proceedings and the applications to enforce them here in Hong Kong.

423. This Court also must consider the proper weight to be given to letters from the Ministry of Foreign Affairs pointing out that the consistent policy of the PRC is to recognise absolute state immunity (a matter of foreign policy), and that it is highly undesirable for the courts in one part of the PRC to hold otherwise. For the Court to uphold the restrictive principle would, the letters say, be damaging to the sovereignty of the PRC.

424. Finally, the Court is urged to seek a Certificate of the Chief Executive under Article 19 (3) and interpretations of Articles 13 and 19 under Article 158 of the Basic Law where necessary for the decision.

The background

425. Energoinvest, a Yugoslavian company, agreed to construct a hydro-electric facility and high tension electric lines in the Congo. To finance a substantial part of the work the Congo made credit agreements with Energoinvest through the Congo's Societe Nationale D'Electricite. These credit agreements contained ICC arbitration clauses.

426. The Congo defaulted on its repayment obligations following which Energoinvest pursued the Congo in two arbitrations, one in Switzerland and the other in France. On 30 April 2003 two final awards were made in favour of Energoinvest against the Congo and its company for US$11,725,000 and US$22,525,000 respectively plus interest. Neither award was challenged by the Congo.

427. On 16 November 2004 Energoinvest assigned to FG the entire benefit of the principal and interest payable by the Congo under the awards. FG is a New York company whose only asset is this assignment. It has already recovered US $3,336,757.75 in proceedings taken in other jurisdictions.

428. It seeks to recover the balance in these proceedings. The indebtedness to FG was then US $102,656,647.96. It will be much more now.

The Congo's Hong Kong assets

429. China Railway and its subsidiaries, the 2nd to 5th defendants, are wholly-owned by the Central People's Government (the CPG) and are Hong

Kong companies. These companies have made agreements to provide infrastructure to the Congo and its companies in return for extensive mineral rights. The agreements are a Cooperation Agreement and Joint Venture agreements. Under these agreements US $221,000,000 is said to be payable to the Congo as Entry Fees by the 2nd to 4th defendants.

430. On 15 May 2008 Saw J granted FG leave to enforce the arbitral awards here in Hong Kong and in support of the leave enjoined the 2nd to 4th defendants from paying and the Congo from receiving US $104,000,000 of the sum payable. The 5th defendant was joined in the action later.

The proceedings below

431. Saw J's order was later amended and the Congo's application to set aside the amended order was heard by Reyes J. On 12 December 2008 he set the orders aside on the grounds that the Congo as a sovereign state enjoyed immunity. He found that the relevant transactions were contained in the agreements between the 2nd to the 5th defendants and the Congo and these transactions were not commercial in nature. It was not necessary therefore for him to express any concluded view on the question whether after the handover the law on state immunity applicable in the Hong Kong courts was absolute or restrictive. The transaction did not fall within the variation to sovereign immunity recognised by the restrictive approach.

432. At the same time Reyes J ventured provisional views that when the UK State Immunity Act 1978 (the SIA) ceased to be applicable in Hong Kong at the handover the consequence was that the common law then became applicable. He left open the possibility (no more) that the restrictive approach was applicable.

433. On the submission that the effect of Articles 13 and 19 of the Basic Law deprived the Hong Kong courts of the power to adjudicate on any question of sovereign immunity he tentatively suggested that :

> "A court determining such a matter does not embark on an exercise involving 'foreign affairs relating to the HKSAR'. The Court is not conducting foreign affairs. Nor, to my mind, is the Court adjudicating upon any act of state."

434. The Court of Appeal allowed the FG's appeal by a majority. The main findings on state immunity were:

(1) That at common law state immunity as a rule of international law and part of the common law falls to be decided by the courts of the forum state.

(2) That on questions of fact relating to immunity the court will follow the guidance of the executive (under the Basic Law, the CPG or the Ministry of Foreign Affairs). Particularly the recognition as a sovereign state and the like.

(3) That questions of state immunity are questions of law for the court to decide. That under the Basic Law Hong Kong common law continued to be applied by the Hong Kong courts.

(4) That under Article 19 of the Basic Law no Act of State of the PRC relating to foreign policy was involved in the decision.

(5) That after the handover the common law of Hong Kong recognised the restrictive principle. The Congo was not therefore immune in relation to its commercial transactions.

Submissions of Counsel

435. We have had considerable assistance from the detailed submissions of counsel in the appeals. These submissions are summarised in earlier judgments and I do not repeat them here but I express my gratitude.

The Basic Law

436. The starting point for any consideration of the issues in this appeal is the Basic Law. When the PRC resumed sovereignty over Hong Kong on 1 July 1997 the Basic Law came into force. It is a national law which provides the constitutional law for Hong Kong as a Special Administrative Region of the PRC. It followed the Joint Declaration and was drafted with great care and detailed consultation through the Joint Liaison Group. It puts into practice the PRC's policy of „one country, two systems„ for its resumption of sovereignty over Hong Kong. It is a recognition that two very different systems, including applicable law and legal systems, would exist in the same nation. It provides a procedure for the harmonious resolution of problems which may arise from those differences.

437. The most relevant provisions (not set out in full) are as follows:

> CHAPTER I
> GENERAL PRINCIPLES
>
> **Article 2**
> The National People's Congress authorizes the Hong Kong Special Administrative Region to exercise a high degree of autonomy and enjoy executive, legislative and independent judicial power, including that of final adjudication, in accordance with the provisions of this Law.
>
> **Article 8**
> The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region.
>
> CHAPTER II
> RELATIONSHIP BETWEEN THE CENTRAL AUTHORITIES AND THE HONG KONG SPECIAL ADMINISTRATIVE REGION
>
> **Article 13 (1)**
> The Central People's Government shall be responsible for the foreign affairs relating to the Hong Kong Special Administrative Region.

Article 18
The laws in force in the Hong Kong Special Administrative Region shall be this Law, the laws previously in force in Hong Kong as provided for in Article 8 of this Law, and the laws enacted by the legislature of the Region.

National laws shall not be applied in the Hong Kong Special Administrative Region except for those listed in Annex III to this Law. The laws listed therein shall be applied locally by way of promulgation or legislation by the Region.

The Standing Committee of the National People's Congress may add to or delete from the list of laws in Annex III after consulting its Committee for the Basic Law of the Hong Kong Special Administrative Region and the government of the Region. Laws listed in Annex III to this Law shall be confined to those relating to defence and foreign affairs as well as other matters outside the limits of the autonomy of the Region as specified by this Law.

Article 19
The Hong Kong Special Administrative Region shall be vested with independent judicial power, including that of final adjudication.

The courts of the Hong Kong Special Administrative Region shall have jurisdiction over all cases in the Region, except that the restrictions on their jurisdiction imposed by the legal system and principles previously in force in Hong Kong shall be maintained.

The courts of the Hong Kong Special Administrative Region shall have no jurisdiction over acts of state such as defence and foreign affairs. The courts of the Region shall obtain a certificate from the Chief Executive on questions of fact concerning acts of state such as defence and foreign affairs whenever such questions arise in the adjudication of cases. This certificate shall be binding on the courts. Before issuing such a certificate, the Chief Executive shall obtain a certifying document from the Central People's Government.

CHAPTER IV
Section 4: The Judiciary

Article 82
The power of final adjudication of the Hong Kong Special Administrative Region shall be vested in the Court of Final Appeal of the Region, which may as required invite judges from other common law jurisdictions to sit on the Court of Final Appeal.

Article 83
The structure, powers and functions of the courts of the Hong Kong Special Administrative Region at all levels shall be prescribed by law.

Article 84
The courts of the Hong Kong Special Administrative Region shall adjudicate cases in accordance with the laws applicable in the Region as prescribed in Article 18 of this Law and may refer to precedents of other common law jurisdictions.

Article 85
The courts of the Hong Kong Special Administrative Region shall exercise judicial power independently, free from any interference. Members of the judiciary shall be immune from legal action in the performance of their judicial functions.

CHAPTER VIII
INTERPRETATION AND AMENDMENT OF THE BASIC LAW

Article 158
The power of interpretation of this Law shall be vested in the Standing Committee of the National People's Congress.

The Standing Committee of the National People's Congress shall authorize the courts of the Hong Kong Special Administrative Region to interpret on their own, in adjudicating cases, the provisions of this Law which are within the limits of the autonomy of the Region.

The courts of the Hong Kong Special Administrative Region may also interpret other provisions of this Law in adjudicating cases. However, if the courts of the Region, in adjudicating cases, need to interpret the provisions of this Law concerning affairs which are the responsibility of the Central People's Government, or concerning the relationship between the Central Authorities and the Region, and if such interpretation will affect the judgments on the cases, the courts of the Region shall, before making their final judgments which are not appealable, seek an interpretation of the relevant provisions from the Standing Committee of the National People's Congress through the Court of Final Appeal of the Region. When the Standing Committee makes an interpretation of the provisions concerned, the courts of the Region, in applying those provisions, shall follow the interpretation of the Standing Committee. However, judgments previously rendered shall not be affected.

CHAPTER IX
SUPPLIMENTARY PROVISIONS

Article 160
Upon the establishment of the Hong Kong Special Administrative Region, the laws previously in force in Hong Kong shall be adopted as laws of the Region except for those which the Standing Committee of the National People's Congress declares to be in contravention of this Law. If any laws are later discovered to be in contravention of this Law, they shall be amended or cease to have force *in accordance with the procedure as prescribed by this Law. (Emphasis added).*

> Documents, certificates, contracts, and rights and obligations valid under the laws previously in force in Hong Kong shall continue to be valid and the recognized and protected by the Hong Kong Special Administrative Region, provided that they do not contravene this Law.

The Basic Law discussed

438. Constitutionally this law is unique. Focusing on the legal and judicial systems it must be read in the context to which I have already alluded.

439. In March 1990 Ji Pengfei, the Chairman of the Drafting Committee, when explaining the draft spoke of the guiding principle of drafting as „one country two systems„ being the fundamental policy of the Chinese Government for bringing about the country's reunification. He said,

> „ ... the laws previously in force in Hong Kong will remain basically the same; Hong Kong's status as an international financial centre and free port will be maintained; ...„.

He later continued:

> "The draft vests the courts of the Special Administrative Region with independent judicial power, including that of final adjudication. This is certainly a very special situation wherein courts in a local administrative region enjoy the power of final adjudication. Nevertheless, in view of the fact that Hong Kong will practice social and legal systems different from the mainland's, this provision is necessary. Under the current judicial system and principles, the Hong Kong authorities have never exercised jurisdiction over acts of state such as defence and foreign affairs. *While preserving the above principle*, the draft stipulates that the courts of Hong Kong Special Administrative Region shall obtain a certificate from the Chief Executive on questions of fact concerning acts of state such as defence and foreign affairs whenever such questions arise in the adjudication of cases. This certificate shall be binding on the courts. However, before issuing such a certificate, the Chief Executive shall obtain a certifying document from the Central People's Government. This stipulation not only appropriately solves the question of jurisdiction over acts of state, but also guarantees that the courts of the Region can conduct their functions in a normal way." (*emphasis added*)

440. The clear intention, successfully achieved, was that the laws applicable and the legal system would continue in Hong Kong with only in those adjustments necessary because of the change of sovereignty. The continuance of the common law was recognised as a major contributor to the

maintenance of business and commercial confidence as well as confidence in the independence of the judiciary and the rule of law.

441. In Article 84 there is constitutional approval of *stare decisis* with the citing of foreign common law authorities. This underlines an intention that the common law in Hong Kong should continue to apply and develop assisted by foreign, as well as local, precedent. It goes without saying that such development has to be in accord with the Basic Law, applicable statute law and the circumstances of Hong Kong.

442. Ji Pengfei's reference to the fact that Hong Kong had never exercised jurisdiction over acts of state such as defence and foreign affairs in colonial times indicates that the same jurisdiction as was previously exercised should continue but with a necessary new procedure in Article 19(3) for determining a question of fact concerning such an act of state.

443. Significantly, there is no suggestion that the jurisdiction of the Court in relation to such acts of state was to be varied in any way after the handover, nor is there any provision in the Basic Law to that effect.

Article 13

444. With this background and in this context I turn to Article 13. This is in Chapter II of the Basic Law which deals with the relationship between the Central Authorities and the Hong Kong Special Administrative Region. We have heard detailed submissions to the effect that within the meaning of the Article the HKSAR includes the courts, and that in defining the Central People's Government as responsible for the foreign affairs relating to the HKSAR the Hong Kong courts have no jurisdiction to deal with foreign affairs. Then, more

to the point, that foreign affairs include the law relating to state immunity. I hope I do no injustice to these submissions by summarising them in this way.

445. In this context these three letters placed before us from the Ministry of Foreign Affairs are heavily relied upon as matters for our consideration. I will return to consider these later in this judgment.

446. The Hong Kong courts have no jurisdiction to deal with foreign affairs and had no such jurisdiction before the handover. There was no suggestion, either during the drafting of the Basic Law, or at the time of its passing, or since until this case, that in Article 13 the words „foreign affairs„ could apply to local law such as the law relating to state immunity applicable in the Hong Kong courts.

447. The Hong Kong courts never had jurisdiction over foreign affairs. Yet, as is shown in cases decided long before the handover, issues of state immunity, including the restrictive principle, were considered and ruled upon up to the Privy Council without any suggestion that jurisdiction had been exceeded. Nor has it been suggested in the course of argument here that state immunity is outside the jurisdiction of the courts – only that restrictive immunity cannot be applied.

448. There is an inconsistency in the argument that immunity is a matter of foreign affairs, outwith the court's jurisdiction under Article 13, and yet the Court must apply absolute immunity. In such circumstances the court would have no jurisdiction to entertain or rule upon any question of state immunity, absolute or restrictive. To my knowledge such a radical change has never been contemplated or debated.

449. Article 160 is in point and, with the other provisions, it was considered in *HKSAR and Ma Wai Kwan* [1997] 1 HKLRD 761 decided within a few days of the handover. With reference to Article 160 P. Chan, Chief Judge (as he then was) presiding over the Court of Appeal said at 774D:

> "In my view, the intention of the Basic Law is clear. There is to be no change in our laws and legal system (except those which contravene the Basic Law). These are the very fabric of our society. Continuity is the key to stability. Any disruption will be disastrous. Even one moment of legal vacuum may lead to chaos. Everything relating to the laws and the legal system, except those provisions which contravene the Basic Law, has to continue to be in force. The existing system must already be in place on 1 July 1997. That must be the intention of the Basic Law."

450. The other members of the court (Nazareth VP, as he then was, and myself) agreed. No submission I have heard in this appeal has given me reason to doubt that this is correct.

451. Whereas Article 160 emphasises continuity it also refers to Article 18 Annex III. With a national legal system and a regional legal system which are so uniquely different a link is necessary to provide a procedure for harmoniously resolving any differences. Articles 18 and 160 provide the link.

452. Article 18 Annex III is significant. It applies to Mainland law on defence and foreign affairs and must be read together with other provisions dealing with these matters. A procedure is provided whereby Mainland law may be made applicable to Hong Kong. By way of example, using this procedure Mainland law on diplomatic immunity was made applicable to Hong Kong. However, there was no Mainland law on sovereign state immunity and nor has one been passed since. One of the main tenets of the „one country, two systems„ policy was (and is) that quite different, and in some respects incompatible, law would be applicable in Hong Kong compared with that in the mainland.

453. In 1979 the English State Immunity Act 1978 had been made applicable to Hong Kong by Order in Council. This ceased to apply on 1 July 1997 and was not replaced by any local or national law. Such was the care taken in the drafting process that the effect could not have been overlooked. I will return to consider the consequences later. But in this context the trite point may be made that the Hong Kong courts are courts of law. They have neither the duty, the jurisdiction, nor the power to decide cases other than according to the applicable Law.

454. Suffice it to say that for these reasons I am satisfied that Article 13 refers to the executive responsibility for foreign affairs as between the CPG and the HKSAR. It was never intended to, and nor does it, define the jurisdiction of the Hong Kong courts which is beyond its scope. It continues the responsibilities for conducting and managing foreign affairs. It has no relevance to the law of state immunity. On this I agree with Lord Pannick's submissions for FG.

Article 19 considered

455. This brings me to Article 19 which excludes the jurisdiction of the Hong Kong regional courts over acts of state such as foreign affairs. When considered in the context of the jurisdiction previously exercised this Article successfully achieves the intention that the courts should have the same jurisdiction with similar restrictions as before the handover. See Article 19(2).

456. I am persuaded that this was the intention by the whole approach to implementing the „one country, two systems„ described by Ji Pengfei. The courts never exercised jurisdiction over acts of state such as foreign affairs and

when a question of fact arose relating to such an act of state the matter had to be referred - then to the UK government.

457. After the handover a new procedure was necessary for a referral on such facts. This is provided by Article 19 (3).

458. This Article provides for the jurisdiction of the Hong Kong courts to continue as before the handover including the exclusion of jurisdiction „over acts of state such as defence and foreign affairs„.

459. The same exclusion of the jurisdiction of this court appears in the same language as Article 19 (3) in section 4(2) of the Hong Kong Court of Final Appeal Ordinance, Cap. 484. This confirms my view that the intention and true meaning of both provisions was consistent with the common law doctrine of „acts of state„.

460. This leaves several relevant questions to which I will return but first I turn to the letters now before the court from the local Office of the Commissioner of the Ministry of Foreign Affairs (OCMFA).

The Letters

461. The first letter, dated 20 November 2008, was put before the judge and the body of it reads:

> "Regarding the issue of state immunity involved in the case *FG Hemisphere Associates LLC v. Democratic Republic of the Congo and Ors* (HCMP 928/2008) before the Court of First Instance of the High Court of the Hong Kong Special Administrative Region, the Office of the Commissioner of the Ministry of Foreign Affairs of the People's Republic of the China in the Hong Kong Special Administrative Region, having been duly authorized, makes the following statement as regards the principled position of the Central People's Government :

> The consistent and principled position of China is that a state and its property shall, in foreign courts, enjoy absolute immunity, including absolute immunity from jurisdiction and from execution, and has never applied the so-called principle or theory of 'restrictive immunity'. The courts in China have no jurisdiction over, nor in practice have they ever entertained, any case in which a foreign state or government is sued as a defendant or any claim involving the property of any foreign state or government, irrespective of the nature or purpose of the relevant act of the foreign state or government and also irrespective of the nature, purpose or use of the relevant property of the foreign state or government. At the same time, China has never accepted any foreign courts having jurisdiction over cases in which the State or Government of China is sued as a defendant, or over cases involving the property of the State or Government of China. This principled position held by the Government of China is unequivocal and consistent."

462. The second letter, dated 21 May 2009, was before the Court of Appeal. It seeks to answer Reyes J's opinion that in signing the United Nations Convention on Jurisdiction and Immunities of States and their Property 2004, which recognises the theory of restrictive immunity, the Government of China was not entirely consistent in it approach to immunity.

> "The Office of the Commissioner of the Ministry of Foreign Affairs in the Hong Kong Special Administrative Region refers to the letter (2008) Wai Shu Zi No. 118, which states that the consistent and principled position of China is that a state and its property shall, in foreign courts, enjoy absolute immunity, including absolute immunity from jurisdiction and from execution.
>
> Having been duly authorized, the Office of the Commissioner of the Ministry of Foreign Affairs in the Hong Kong Special Administrative Region makes the following statement as regards the signature of China of the *United Nations Convention on Jurisdictional Immunities of States and Their Property* (hereinafter referred to as the "Convention"):
>
> 1. China considers that the issue of state immunity is an important issue which affects relations between states. The long-term divergence of the international community on the issue of state immunity and the conflicting practices of states have had adverse impacts on international intercourse. The adoption of an international convention on this issue would assist in balancing and regulating the practices of states, and will have positive impacts on protecting the harmony and stability of international relations.
>
> 2. In the spirit of consultation, compromise and cooperation, China has participated in the negotiations on the adoption of the Convention. Although the final text of the Convention was not as satisfactory as China expected, but as a product of compromise by all sides, it is the result of the

> coordination efforts made by all sides. Therefore, China supported the adoption of the Convention by the United Nations General Assembly.
>
> 3. China signed the Convention on 14 September 2005, to express China's support of the above coordination efforts made by the international community. However, until now China has not yet ratified the Convention, and the Convention itself has not yet entered into force. Therefore, the Convention has no binding force on China, and moreover it cannot be the basis of assessing China's principled position on relevant issues.
>
> 4. After signature of the Convention, the position of China in maintaining absolute immunity has not been changed, and has never applied or recognized the so-called principle or theory of "restrictive immunity" (annexed are materials on China's handling of the Morris case)."

463. The third letter, dated 25 August 2010, is for our consideration. This in turn seeks to answer the view expressed in the Court of Appeal that the application of restrictive immunity in the instant case did not have a bearing on the sovereignty of the PRC:

> "The Office of the Commissioner of the Ministry of Foreign Affairs in the Hong Kong Special Administrative Region refers to the letter (2008) Wai Shu Zi No. 118 and the letter (2009) Wai Shu Zi No. 37, which state that the consistent and principled position of China is that a state and its property shall, in foreign courts, enjoy absolute immunity, including absolute immunity from jurisdiction and from execution. Also, while China has signed the *United Nations Convention on Jurisdictional Immunities of States and Their Property* (hereinafter referred to as the "Convention") on 14 September 2005, China has not ratified the Convention and the Convention is not yet applicable to China. Therefore, the above-mentioned position has not changed, and China has never applied or recognized the so-called principle or theory of "restrictive immunity".
>
> The Office of the Commissioner of the Ministry of Foreign Affairs in the Hong Kong Special Administrative Region notes that the two above-mentioned letters had been adduced to the High Court of the Hong Kong Special Administrative Region by the Secretary for Justice of the Government of the Hong Kong Special Administrative Region, and also notes with concern the majority judgment delivered by the Court of Appeal of the High Court in the case *FG Hemisphere Associates LLC v. Democratic Republic of the Congo and Others* (CACV 373/2008 and CACV 43/2009) on 10 February 2010. The judgment held that there was no evidence suggesting that the sovereignty of China would be prejudiced if the common law as applied in the Hong Kong Special Administrative Region incorporated the principle of "restrictive immunity"; in practice, the application of the principle of "restrictive immunity" by the courts of the SAR would neither prejudice the sovereignty of China nor place China in a position of being in breach of international obligations under the Convention; there was also no mention in the

above-mentioned two letters of the Office of the Commissioner of the Ministry of Foreign Affairs in the Hong Kong Special Administrative Region that the application of the principle of "restrictive immunity" in the Hong Kong Special Administrative Region would prejudice the sovereignty of China.

Given the inconsistencies between the above understanding as stated in the judgment of the Court of Appeal of the High Court of the Hong Kong Special Administrative Region and the actual situation, the Office of the Commissioner of the Ministry of Foreign Affairs in the Hong Kong Special Administrative Region, having been duly authorized, further makes the following statement as regards the issue of state immunity:

1. The Office of the Commissioner of the Ministry of Foreign Affairs in the Hong Kong Special Administrative Region has clearly indicated in the letter (2009) Wai Shu Zi No. 37 that the issue of state immunity is an important issue which affects relations between states. Therefore, the application in the Hong Kong Special Administrative Region of a principle of state immunity that is not consistent with the position of China would obviously prejudice the sovereignty of China.

2. In fact, the regime of state immunity is an important aspect of relations between states as well as the handling of external relations by a state, and is an important component of the foreign affairs of the state. Each state adopts a regime of state immunity that is consistent with its own interests, in light of its national circumstances as well as foreign policy.

3. The Office of the Commissioner of the Ministry of Foreign Affairs in the Hong Kong Special Administrative Region has also stated clearly in the above-mentioned two letters that, regarding the issue of state immunity, the consistent position of China is that a state and its property shall, in foreign courts, enjoy absolute immunity, including absolute immunity from jurisdiction and from execution. The courts in China have no jurisdiction over any case in which a foreign state is sued as a defendant or any claim involving the property of any foreign state. China also does not accept any foreign courts having jurisdiction over cases in which the State of China is sued as a defendant, or over cases involving the property of the State of China. The regime of state immunity concerns the foreign policy and overall interests of the state, and the above-mentioned state immunity regime adopted by China uniformly applies to the whole state, including the Hong Kong Special Administrative Region.

4. Before 30 June 1997, the United Kingdom extended the State Immunity Act 1978 to Hong Kong. That Act involved matters of foreign affairs and the so-called principle or theory of "restrictive immunity" reflected therein was inconsistent with the consistent position of China in maintaining absolute immunity. Furthermore, from 1 July 1997, the Central People's Government would be responsible for the foreign affairs relating to the Hong Kong Special Administrative Region. Therefore, the above-mentioned State Immunity Act of the United Kingdom was not localized as were most other British laws that previously applied in Hong Kong when the issue of localization of Hong Kong laws was being dealt with during the transitional period. The principle of

"restrictive immunity" which was reflected in the Act no longer applied in the Hong Kong Special Administrative Region upon the resumption of the exercise of sovereignty by China over Hong Kong. At that time, the representatives of the Central People's Government also made it clear in the Sino-British Joint Liaison Group that the uniform regime of state immunity of China would be applicable in the Hong Kong Special Administrative Region from 1 July 1997.

5. If the Hong Kong Special Administrative Region were to adopt a regime of state immunity which is inconsistent with the position of the state, it will undoubtedly prejudice the sovereignty of China and have a long-term impact and serious prejudice to the overall interests of China:

   (1) The issue of state immunity obviously involves the understanding and application of the principle of state sovereignty by China, and concerns relations between states. If the position of the Hong Kong Special Administrative Region on this issue were not consistent with that of the state, the overall power and capacity of the Central People's Government in uniformly conducting foreign affairs would be subjected to substantial interference, which would not be consistent with the status of the Hong Kong Special Administrative Region as a local administrative region.

   (2) The consistent position of China in maintaining absolute immunity on the issue of state immunity has already been widely acknowledged by the international community. Being an inalienable part of China, if the Hong Kong Special Administrative Region were to adopt the principle of "restrictive immunity", the consistent position of China in maintaining absolute immunity would be open to question.

   (3) The Central People's Government is responsible for the foreign affairs relating to the Hong Kong Special Administrative Region, which entails that in the area of foreign affairs, the international rights and obligations concerned would be assumed by the Central People's Government. If the courts of the Hong Kong Special Administrative Region were to apply its jurisdiction over foreign states and their property by adopting the principle of "restrictive immunity", it would be possible for the state concerned to make representations to the Central People's Government, and accordingly the Central People's Government may have to assume state responsibility, thus prejudicing the friendly relations between China and the state concerned. As a matter of fact, since the inception of the case *FG Hemisphere Associates LLC v. Democratic Republic of the Congo and Others*, the Government of the Democratic Republic of the Congo has repeatedly made representations to the Central People's Government through the diplomatic channel.

   (4) The consistent principled position of China to maintain absolute immunity on the issue of state immunity is not only based on the fundamental international law principle of "sovereign equality among nations", but also for the sake of protecting the security and interests of China and its property abroad. If the principle of "restrictive immunity", which is not consistent with the principled position of the state on absolute immunity,

> were to be adopted in the Hong Kong Special Administrative Region, the states concerned may possibly adopt reciprocal measures to China and its property (which are not limited to the Hong Kong Special Administrative Region and its property), thus threatening the interests and security of the property of China abroad, as well as hampering the normal intercourse and co-operation in such areas as economy and trade between China and the states concerned.
>
> (5) The international community has been supporting the economic development of impoverished states and the improvement of the livelihood in these states through debt relief initiatives and assistance schemes. Supporting the economic development of developing states has also been one of the foreign policies of China. In recent years, certain foreign companies have acquired the debts of impoverished African states and profited from claiming those debts through judicial proceedings, thus adding to the financial burden of these impoverished states and hampering the efforts of the international community in assisting these states. Such practice is inequitable and some states have even enacted legislation to impose restrictions on the same. If the Hong Kong Special Administrative Region were to adopt a regime of state immunity that is not consistent with that of the state and thereby facilitate the pursuance of the above-mentioned practice, it would be contradictory to the above-mentioned foreign policy of China and tarnish the international image of China."

464. These letters are self-explanatory. They clearly set out the 'principled position' of the PRC on absolute sovereign immunity. The PRC does not recognise or apply „restrictive immunity„ and if any part of the PRC, such as an HKSAR court, were to apply „restrictive immunity„ it would, the letters say, have a serious adverse effect upon the PRC's foreign relations and sovereignty. Finally, to allow companies which have purchased debt to recover against poor debtor states is, the letters say, contrary to Chinese foreign policy and would tarnish its international image.

465. It is not suggested by Mr Yu SC, for the Secretary of Justice, that the Court is in any way bound by the contents of these letters. He agrees that Stock VP's approach (in paragraph 87 of his judgment in the Court of Appeal) is appropriate. The Vice President said:

> "87. The communication now before us is directed at the applicable theory rather than at a specific claim for immunity but it seems to me nonetheless that in the present setting this Court must have close regard to the PRC's attitude to the

> doctrines of absolute and restrictive immunity, a duty emphasised further by the fact represented by art. 13 of the Basic Law that „the Central People's Government shall be responsible for the foreign affairs relating to the Hong Kong Special Administrative Region„. That said, the executive does not in this case seek to dictate a result but rather to draw the Court's attention to its policy, for the Court to take into account."

466. For my part I am prepared to accept the facts stated in the letters without reservation. They demonstrate with considerable force a difference between the "two systems". They set out the PRC's policy, principled positions and opinions. They do not suggest the existence of any Mainland law, still less any Mainland law applicable to Hong Kong, on state immunity. It is accepted that there is none.

467. Nevertheless, it is submitted by Mr Yu SC as well as the defendants that as state immunity is a matter which affects the sovereignty of China the common law requires that the courts should speak with the same voice as the executive -- in this matter the CPG.

The "same voice" submission considered

468. In brief the submission on the "same voice" point is that we should hold that the Congo is entitled to absolute immunity on the basis either, that this is the common law, or that immunity is an act of state upon which the court accepts the executive's statement, or that the Basic Law excludes the court's jurisdiction from applying the restrictive principle. I have considered the last submission and will not return to it.

469. It is said that the OCMFA letters indicate the content of any certificate from the Chief Executive under Article 19 (3). Whereas I am prepared to accept this *de bene esse,* if the court is to act upon them, the constitutional procedure in Article 19 (3) must be followed.

470. In his submissions that on state immunity common law courts prior to the handover accepted the executive opinion or policy so as to „speak with one voice„ Mr Yu places particular reliance upon *Rio Tinto Zinc Corporation and Westinghouse Electric Corporation* [1978] AC 547.

471. This case deals with an application for letters rogatory to obtain evidence in an anti-trust case in the United States from witnesses in England. The request was under the Evidence (Proceedings in Other Jurisdictions) Act 1975.

472. At 615G -- 616G Lord Wilberforce having decided that the request did not comply with section 1(b) nor section 5 of the act continued,

> „The case is therefore not within section 5, and the procedure is an attempt to get the evidence in spite of that fact. Thirdly, the evidence is sought for the purpose of an anti-trust investigation into the activities of companies not subject to the jurisdiction of the United States. I think that in such circumstances the courts would properly, in accordance with accepted principle refused to give effect to the request on the grounds that the procedure of the Act of 1975 was being used for a purpose for which it was never intended and that the attempt to extend the grand jury investigation extra-territorially into the activities of the RTZ companies was an infringement of the United Kingdom sovereignty.„

473. Lord Wilberforce then noted the intervention in the case by the Attorney General. In summary the Attorney General said that the execution of the letters rogatory was being sought for the purposes of the exercise by the United States courts of extra territorial jurisdiction in penal matters which in the view of Her Majesty's Government was prejudicial to the sovereignty of the United Kingdom.

474. Lord Wilberforce continued:

> „My Lords, I think that there is no doubt that, in deciding whether to give effect to letters rogatory, the courts are entitled to have regard to any possible prejudice to the sovereignty of the United Kingdom – that is expressly provided for in article 12

> (b) of the Hague Convention. Equally, that in a matter affecting the sovereignty of the United Kingdom, the courts are entitled to take account of the declared policy of Her Majesty's Government, is in my opinion beyond doubt. Indeed, this follows as the counterpart of the action which the United States Government has taken.„

475. Then, at 617B:

> „The intervention of Her Majesty's Attorney-General establishes that quite apart from the present case, over a number of years and in a number of cases, the policy of Her Majesty's Government has been against recognition of United States investigatory jurisdiction extra-territorially against United Kingdom companies. The courts should in such matters speak with the same voice as the executive (see The Fagernes [1927] P 311): they have, as I have stated, no difficulty in doing so.„

476. In his speech at 650H to 651A Lord Fraser referred to prejudice to the sovereignty of the United Kingdom and said:

> „Nevertheless I can hardly conceive that if any British court, or your Lordships' House sitting in its judicial capacity, was informed by Her Majesty's Government that they considered the sovereignty of the United Kingdom would be prejudiced by execution of a letter of request in a particular case it would not be its duty to act upon the expression of the Government's view and to refuse to give effect to the letter. The principle that ought to guide the court in such a case is that a conflict is not to be contemplated between the courts and the Executive on such a matter: see The Fagernes... „

477. This same principle had been expressed many times before. The earliest was probably in *Taylor v. Barclay* [1828] 2 Sim 213 at 221 per Shadwell VC. In more recent times in *The Gagara* [1919] P 95 at 104 per Bankes LJ where the question was the UK government's recognition of an entity as the de facto government of Estonia. In *The Arantzazu Mendi* [1939] AC 256 at 264 per Lord Atkin, the recognition of the Spanish National Government was the issue and he said that information from the UK government was the only way in which the court could inform itself of the material fact whether the party sought to be impeached was a sovereign state.

478. Lord Atkin repeated the principle in *Carl Zeiss Stiftung v. Rayner* [1967]1 AC 853 at 961. Here the question was the UK's recognition of the German Democratic Republic.

479. The opinion of the executive was sought in a number of other cases cited. These include *Buttes Gas and Oil Co v. Hammer (No 3)* [1982] AC 888; *Duff Development Co Ltd. v. Government of Kelantan* [1924] AC 797; *Engelke v. Musmann* [1928] AC 433. These cases also were "recognition" cases.

480. Reference was also made to the 'same voice' principle in the Court of Appeal in *British Airways v. Laker Airways* [1984] 1QB 142.

481. Prof. Mann in his *Foreign Affairs in English Courts (1986)* at p11 describes Lord Wilberforce's words 'the courts in such matters should speak with the same voice' as,

> "a frequently employed, yet treacherous phrase."

As he explains in footnote 44,

> "The difficulty arises from the words 'in such matters'. What matters?"

482. Prof. Mann puts his finger on an important consideration. The words can be seriously misleading if taken too literally. The decided cases must be examined on the question. What matters?

483. Some of the cases cited are „recognition„ cases where the court needs to be informed of matters which are non-justiciable. Such questions are whether an entity is recognised as a sovereign state; whether a purported government is recognised de jure or de facto; whether there exists a state of war; whether a person has diplomatic status and like questions of fact.

484. Others such as the *Westinghouse* case is where the executive intervenes to express a view on whether an act of a foreign state violates the sovereignty of the state within which the court is sitting -- the US anti-trust legislation is an example. With respect these decisions are of far cry from the present case. These matters are fact specific in the sense of the fact as recognised by the executive.

485. No English court has ever accepted an executive opinion on the application of the law of state immunity, still less on whether the applicable law is absolute or restrictive. The cases show that absolute immunity and restrictive immunity were at all times regarded as questions of law for the court and not as matters for the opinion or policy of the executive. However this was not always the position in the United States Courts.

The United States Cases

486. It is pointed out that before the statutory recognition of the restrictive theory of immunity by the Foreign Sovereign Immunities Act 1976 the US courts often accepted and applied the State Department's opinion on whether or not to grant immunity. This it is said, with some point, shows common law courts applying state policy on questions of state immunity.

487. The chequered history of these decisions is set out by Justice Stevens in *Samantar v. Yousuf* 130 S.Ct. 2278 (2010) at II [1] to [4]. He described how following the decision in *The Schooner Exchange* 11 US 116 (1812) a two-step procedure developed for resolving a foreign States claim to immunity. Under that procedure the diplomatic representative of the sovereign state could request a 'suggestion of immunity' from the State Department. If the request was granted, the district court surrendered its jurisdiction. But in the absence of recognition of immunity by the State Department a district court had

the authority to decide for itself whether all the requisites for such immunity existed. Justice Stevens continues to describe how prior to 1952 the State Department followed a general practice of requesting immunity in all actions against friendly sovereigns, but in that year the department announced its adoption of the „restrictive„ theory and he refers to the well-known Tate Letter which set out the policy. Then, after describing the restrictive theory, he continued:

> „This change threw 'immunity determinations into some disarray', because "political considerations sometimes led the Department to file 'suggestions of immunity in cases where immunity would not have been available under the restrictive theory'...." Congress responded to the inconsistent application of sovereign immunity by enacting the FSIA in 1976."

488. It is interesting to note that Justice Stevens commenced his examination of the history by pointing out that:

> „The doctrine of foreign sovereign immunity developed as a matter of common law long before the FSIA was enacted in 1976.„

489. The US has now resolved the problem but the history itself demonstrates the undesirability of a common law jurisdiction adopting the former US practice. Indeed, before the FSIA was passed the Hong Kong Full Court in *The Philippine Admiral* [1974] HKLR 111 at 137 Huggins J commented upon the US courts openly accepting directions from the executive on the public policy of the state on questions of immunity. He said:

> „Public policy is as unruly a horse as it was in 1824 and it is perhaps not surprising that in some jurisdictions (e.g. In the United States of America) the courts openly accept directions from the Executive as to what is the public policy of the state in relations to questions of immunity: see **Republic of Mexico v. Hoffman.** This is a course which never seems to have been adopted in the British courts, which have been content in each case to decide, with such guidance as could be gleaned from previous cases, whether or not it was politic to grant immunity. The guidance has not always pointed clearly in one direction and I confess to having approached a decision in this case with great hesitation.„

490. The appeal in this case came before the Privy Council and is reported in [1977] AC 373. Lord Cross gave the advice and at 399D-E also commented upon the US practice:

> „It was not suggested by counsel on either side that their Lordships should seek the help of the Foreign and Commonwealth Office in deciding this appeal by ascertaining which theory of sovereign immunity it favours. But it is not perhaps wholly irrelevant to observe that the later American case of *Rich v. Naviera Vacuba* S.A. (1961) 197 F. Supp. 710 suggests that if the courts consult the executive on such questions what may begin by guidance as to the principles to be applied may end in cases being decided irrespective of any principle in accordance with the view of the executive as to what is politically expedient.„

491. The US experience and the manner in which it became necessary to depart from the practice of accepting and acting upon the executive's decision on immunity is salutary to other common law jurisdictions. It militates against the arguments put forward by the Secretary for Justice.

492. Before leaving this matter it is to be noted that 20 years before the handover in *Alfred Dunhill of London Inc. v. Republic of Cuba 425 US 682 (1976),* the US Supreme Court accepted the restrictive theory of state immunity as „generally accepted as the prevailing law in this country„. And „we do not believe that the *Dunhill* case raises an act of state question because the case involves an act which is commercial, and not public, in nature„. In a further passage the court noted that „we are in no sense compelled to recognise as an act of state the purely commercial conduct of foreign governments in order to avoid embarrassing conflicts with the Executive Branch.„ This was the view of the United States Supreme Court of the common law before the passing of the FSIA.

493. In my judgment the US cases regarded as a whole and with their history do not in any way support the contention that on the law of state immunity the courts must speak with the same voice as the executive.

The Law on State Immunity applicable in Hong Kong on 1 July 1997

494. This brings me to the question of what was the applicable law on state immunity in Hong Kong on the 1 July 1997? From 1979 the State Immunity Act 1978 had been applied to Hong Kong. This act recognised restrictive immunity for truly commercial transactions by sovereign states. It ceased to apply after the handover. As I have said it was not replaced by either local ordinance or by any national law made applicable under Article 18 Annex III.

495. Mr Yu SC was inclined to suggest that in these circumstances there was no applicable law on state immunity in Hong Kong after the handover. With respect this is plainly wrong. The common law does not recognise such a circumstance. See *McLoughlin v. O'Brien and others* [1983] 1 AC 410 per Lord Scarman at 429:

> „The common law, which in a constitutional context includes judicially developed equity, covers everything which is not covered by statute. It knows no gaps: there can be no 'casus omissus'."

496. When the statute law ceased to apply on 1 July 1997 the common law became applicable as it had been before 1979. There was no other applicable law. Nor does it follow that since 1979 the common law on state immunity had remained "set in stone". Under the principle of *stare decisis* common law is continuously developing and is applicable in Hong Kong subject, of course, to the Basic Law, statute law and local circumstance. I have noted already that this is provided in Article 84 which specifically recognises the right to refer to the precedents of other common law jurisdictions.

497. Nevertheless, with this background it is of some relevance to consider the Hong Kong common law at the time of the handover. I have

already indicated, the Basic Law was drafted with consummate care and wide consultation. This is evident from the Joint Declaration, the activities of the Joint Liaison Group and Ji Pengfei's explanation to the NPC on 28 March 1990. Careful consideration must have been given as to whether the SIA should be replaced by any local or national law. The decision was taken not to replace it. The proper inference must be that the decision was taken that the common law on state immunity should apply there being no other. More importantly the Basic Law so provides.

Are absolute immunity and restrictive immunity questions of law for the court?

498. In common law there is no doubt. Two centuries ago in *The Schooner Exchange* Marshall CJ said as much at 133:

> „The question has been considered with an earnest solicitude, that the decision may conform to those principles of national and municipal law by which it ought to be regulated.„

499. Likewise 70 years ago in *The Cristina* [1938] AC 485 at 502 Lord Wright speaking of sovereign immunity said:

> „This is sometimes said to flow from international comity or courtesy, but may now more properly be regarded as a rule of international law, accepted among the community of nations. It is binding on the municipal Courts of this country in the sense and to the extent that it has been received and enforced by these Courts.„

500. Thereafter it is clear beyond a peradventure from the decided cases that at common law state immunity (and any variation) is a matter of law for the decision of the court. It is not an act of state nor a matter of state policy. Of course, state immunity may be the subject of statute law which the court must apply.

501. I have considered and rejected the submissions that there being no national law on the subject the Hong Kong common law must equate with national policy. This is in spite of recognising that the principled and consistent approach by the CPG is that in the PRC (of which the HKSAR is an integral part) absolute immunity from suit and execution is accorded to sovereign states.

Restrictive Immunity in Hong Kong

502. There is little difficulty in determining the common law applicable in Hong Kong at the time of the handover.

503. For many years judges had recognised the anomaly, and possibly the associated injustice, of granting absolute immunity to a sovereign or a sovereign state when undertaking purely commercial transactions. Even as early as *The Schooner Exchange* in 1812 the District Attorney advanced in argument:

> „So, if a sovereign descent from the throne and become a merchant, he submits to the laws of the country. If he contract private debts, his private funds are liable. So, if he charter a vessel, the cargo is liable for the freight.„

504. The earliest Hong Kong case cited is *Midland Investment Co Ltd. v. The Bank of Communications* [1956] HKLR 42. Gregg J decided that a state whose property was not dedicated or destined to public use, is not entitled to immunity in respect of that property. He said at 48:

> "it is necessary for the foreign sovereign, if he wishes to discharge the onus of satisfying the court that he is entitled to sovereign immunity, in a case like the present, to produce satisfactory evidence that the property seized is dedicated or destined to public use. This has not been done in the present case."

505. Two decades later, 18 years before the handover and long before the SIA was applied to Hong Kong in 1979 it was decided in *The Philippine Admiral* by the Hong Kong Full Court and by the Privy Council on appeal that only restrictive immunity applied in actions *in rem*. This was a common law decision.

506. Huggins J gave the first judgment of the Full Court in *The Philippine Admiral* [1974] HKLR 111. Having reviewed most of the earlier cases which have been put before us and some academic observations on international law he concluded:

> „On the bases both of international practice and of the balance of persuasive authority in the dicta in the English cases I have come to the conclusion that immunity should not be granted in respect of vessels not destined for public use. We are not bound to hold that immunity should be granted.„

507. The appeal was dismissed by the Privy Council whose decision was binding on the Hong Kong courts and reported in [1977] AC 373. Having exhaustively reviewed earlier authorities the Board applied the restrictive theory and held at 403 D:

> „Throughout her life the Philippine Admiral has been operated as an ordinary merchant ship earning freight by carrying cargoes and their Lordships agree with the judges in both courts below that the fact that Liberation was subject with regard to her to the provisions of the Reparations Law and the contract with the commission does not mean that she was not to be treated as an ordinary trading ship for the purposes of the doctrine of sovereign immunity when these proceedings started and also when the claim to stay them was made.„

508. And at 403H:

> „Here on the other hand one has use for commercial purposes for many years while the government was the owner and no reason whatever to suppose that such user is going to change after the government has retaken possession from Liberation. In the result therefore their Lordships are of the opinion that the appeal should be dismissed...„

509. The point was developed further in *Trendtex Trading Corporation v. Central Bank of Nigeria* [1977] 1 QB 529 at 552 H, Lord Denning said:

> „Each country delimits for itself the bounds of sovereign immunity. Each creates for itself the exceptions from it. It is, I think, for the courts of this country to define the rule as best they can, seeking guidance from the decisions of the courts of other countries, from the jurists who have studied the problem, from treaties and conventions and, above all, defining the rule in terms which are consonant with justice rather than adverse to it. That is what the Privy Council did in The Philippine Admiral [1977] AC 373: see especially at PP. 402 -- 403; and we may properly do the same.„

510. Then in 1983 the House of Lords decided the *I Congreso del Partido* [1983] 1 AC 244. Lord Wilberforce makes it clear that questions of sovereign immunity are questions of law for the court as well as the relevant exception under the „restrictive theory„. He was ascertaining the position in English common law as to state immunity in 1973-75. He explained at 262 C-E:

> „The relevant exception, or limitation, which has been engrafted upon the principle of immunity of states, under the so-called „restrictive theory„ arises from the willingness of states to enter into commercial, or other private law, transactions with individuals. It appears to have two main foundations: (a) It is necessary in the interest of justice to individuals having such transactions with states to allow them to bring such transactions before the courts. (b) To require a state to answer a claim based upon such transactions does not involve a challenge to or inquiry into any act of sovereignty or governmental acts of that state. It is, in accepted phrases, neither a threat to the dignity of that state, nor any interference with its sovereign functions.„

511. Here Lord Wilberforce puts forward the common law approach. By its nature the restrictive theory does not apply to the governmental functions of sovereign states which are absolutely immune. It applies solely to non-sovereign functions – commercial transactions.

512. After reviewing the earlier cases including the leading United States cases each of their Lordships held that absolute immunity did not apply where a state was involved in commercial transactions and approved the restrictive theory. This also is a decision on the common law which would be followed in the Hong Kong courts.

513. Finally for this purpose, the House of Lords unanimously affirmed the restrictive theory and the decision in *the I Congreso del Partido* in *Holland v. Lampen-Wolfe* [2000] 1 WLR 1573.

514. The consequence is that if the common law on state immunity is applicable in the Hong Kong courts since the handover under the Basic Law the courts are obliged to apply the restrictive theory to any transactions by a sovereign state which are truly commercial in nature.

Is it necessary for the Court of Final Appeal to seek an interpretation under Article 158 of the Basic Law from the Standing Committee and/or a Certificate from the Chief Executive under Article 19?

515. At the beginning of the hearing Mr Barlow SC who appears for the Congo asked the court to determine whether to seek an interpretation of Articles 13 and 19 from the Standing Committee under Article 158. Also, whether a Certificate from the Chief Executive should be obtained in respect of the contents of the three letters from the OCMFA.

516. By a 2nd notice of motion the remaining defendants ask for the court's decision whether to seek an interpretation of Article 13 under Article 158. During the course of argument there were submissions which extended this request to an interpretation of Article 19 as well.

517. In considering whether a referral is necessary under Article 158 this court set out its approach in *Ng Ka Ling v. Director of Immigration* (1999) 2 HKCFAR 4 at 30I – 31C Li CJ, giving the judgment of the court, said:

> "As far as the Court of Final Appeal is concerned, it has a duty to make a reference to the Standing Committee if two conditions are satisfied:
>
> (1) First, the provisions of the Basic Law in question: (a) concern affairs which are the responsibility of the Central People's Government; or (b) concern the relationship between the Central Authorities and the Region. That is, the excluded provisions. We shall refer to this as „the classification condition„.
>
> (2) Secondly, the Court of Final Appeal in adjudicating the case needs to interpret such provisions (that is the excluded provisions) and such interpretation will affect the judgment on the case. We shall refer to this as „the necessity conditions.„

> In our view, it is for the Court of Final Appeal and for it alone to decide, in adjudicating a case, whether both conditions are satisfied. It is for the Court, not the National People's Congress, to decide whether the classification condition is satisfied, that is, whether the provision is an excluded provision."

518. The question under Article 158 is whether in adjudicating this appeal there is a need to interpret any provisions of the Basic Law concerning affairs which are the responsibility of the CPG which will affect the judgment.

519. In the course of detailed submissions over 7 days there has been no suggestion that sovereign immunity was completely outside the court's jurisdiction. The focus has been that the court must grant absolute immunity.

520. As I have indicated, I am satisfied that Lord Pannick's submission that Article 13 concerns the respective responsibilities of the CPG and the HKSAR executive in relation to foreign affairs is correct. No interpretation of Article 13 will affect the judgment in this case.

521. The relevant jurisdiction of the court is dealt with in more precise but similar terms in Article 19 and it is upon Article 19 that I focus. But, if my earlier conclusions are correct as to the clear intent and meaning of Article 19 there is neither a fact concerning an act of state upon which a Certificate is required nor is there any provision of the Basic Law which will affect this judgment. I do not think the contrary to be arguable.

522. My conclusion is that no reference is necessary. Nor, is in a certificate under Article 19(3) required.

Conclusions

523. For the reasons given my conclusions are as follows:

(1) With exceptions not relevant to this appeal, the Basic Law provides for the continuance of the common law as it applied to Hong Kong before 1 July 1997 and provides for the common law to continue to develop through local and foreign precedent.

(2) Specifically, Article 13 applies to executive responsibility for the conduct and management of foreign affairs. The reference to foreign affairs does not exclude the court's jurisdiction over state immunity any more than the absence of jurisdiction over foreign affairs in colonial times.

(3) Article 19 excludes from the jurisdiction of the court acts of state such as foreign affairs. This continued the previous jurisdiction of the court which never previously had jurisdiction over acts of state law or foreign affairs. Article 19(3) provides the necessary procedure for ascertaining a question of fact concerning an act of state such as foreign affairs.

(4) At the time of the handover, and for many years before, the common law of Hong Kong had included the restrictive theory on sovereign immunity.

(5) That when the SIA ceased to apply to Hong Kong at the handover it was not replaced with any applicable local law or national statute law. The common law on sovereign immunity then applied.

(6) That the principle that the courts and the executive should „speak with the same voice„ does not apply to the law of sovereign immunity, in the absence of law to that effect.

(7) That the courts of Hong Kong, in the absence of any applicable statute law under Article 18 or otherwise, are obliged to apply the common law including the law of restrictive immunity.

(8) That in the circumstances, no reference under Article 158 for an interpretation of the Basic Law is required. Also, no certificate on a

question of fact concerning an act of state under Article 19(3) is necessary.

General

524. The consequence is that it is not open to the Hong Kong courts to act otherwise than in accordance with the applicable law which includes both absolute and restrictive state immunity. This does not permit the court to apply national policy or government opinion, save in limited circumstances when a fact concerning an act of state has to be ascertained. There is no discretion, no right and no power for the courts to do otherwise. If the courts failed to apply the law the rule of law and the integrity of the legal system as a whole would disintegrate. Careful regard though the court has had to the contents of the letters from the OCMFA the court has no power to act upon them.

525. This marks an obvious consequence of the 'two systems' part of the national policy. Different national laws will be applied to those which apply in the HKSAR. The courts will have different procedure and different jurisdictions. *Inter alia* the differences were provided for by the draughtsman of the Basic Law in Article 18 so that a Mainland law can be made applicable to Hong Kong where this is necessary.

Waiver

526. As I have already indicated I agree with Mr Justice Bokhary PJ's conclusions and reasoning including those on waiver. I add little.

527. The two clauses in the ICC arbitration credit agreements made by the Congo include consenting to the ICC's 1998 rules of arbitration, in particular rule 28.6, to which Mr Justice Bokhary PJ has referred.

528. The Congo cannot have been in any doubt as to its undertaking. It was aware that any award could be enforced in any New York Convention jurisdiction. It gave the undertaking in good faith and credit under the agreements would not have been forthcoming in its absence.

529. With the increased involvement of sovereign states in commercial transactions there has been increasing consensus that the rule that a waiver can only be made before the court, whether in the suit proceedings or the enforcement proceedings in spite of earlier agreements to submit is unjust to those with whom sovereign states make commercial contracts.

530. With the authority of the decided cases and respected academic opinion to which Mr Justice Bokhary PJ has alluded there is no good reason for maintaining the rule that a waiver of state immunity can only be made in the face of the court. This consensus in my opinion is of such persuasive force that the courts should no longer permit a state which has submitted itself to arbitration under the ICC rules to avoid its responsibilities by preventing enforcement of the award. Any state who submits itself to arbitration under the rules is well aware that any award can be enforced in any convention jurisdiction. Justice requires that in submitting to the rules a state is also submitting to the enforcement procedure.

531. For these reasons I also agree that even assuming that absolute immunity applies the Congo has waived its immunity from both suit and execution.

Order

532. For these reasons I would dismiss these appeals and order that costs be dealt with in the manner proposed by Mr Justice Bokhary PJ.

Mr Justice Bokhary PJ :

533. By a majority of three to two (with Mr Justice Chan PJ, Mr Justice Ribeiro PJ and Sir Anthony Mason NPJ in the majority and Mr Justice Mortimer NPJ and myself in the minority), these appeals are dealt with in the manner set out in the joint judgment of the majority.

(Kemal Bokhary)
Permanent Judge

(Patrick Chan)
Permanent Judge

(RAV Ribeiro)
Permanent Judge

(Barry Mortimer)
Non-Permanent Judge

(Sir Anthony Mason)
Non-Permanent Judge

Mr Barrie Barlow SC (instructed by Messrs Orrick, Herrington & Sutcliffe) for the 1st appellant, the Congo

Mr Gerard McCoy SC and Mr Richard Zimmern (instructed by Messrs DLA Piper Hong Kong) for the 2nd to 5th appellants, the CR subsidiaries and the CR parent

Mr Benjamin Yu SC, Professor Vaughan Lowe QC, Ms Teresa Cheng SC and Mr Adrian Lai (instructed by the Department of Justice) for the 6th appellant, the Intervener

Lord Pannick QC, Professor Dan Sarooshi and Ms Zabrina Lau (instructed by Messrs Sidley Austin) for the respondent, FG