

Article

“One Country, Two State Immunity Doctrines”: A Pluralistic Depiction of the Congo Case

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ABSTRACT

This article explores the space for a restrictive state immunity doctrine applicable in Hong Kong in light of its status as a special administrative region of China. After reviewing China’s longstanding position, its domestic legislation and its signature of the UNJISTP, it finds China’s policy shift from a conventional absolute state immunity doctrine to a restrictive one. Nonetheless, such a shift is not reflected in the Congo case. After examining the rulings of the CFI, CA and CFA, it argues that state immunity is a question of law to be interpreted by the courts. The competence to adopt a different state immunity doctrine may find its legal basis from “external affairs.” This position would neither prejudice China’s sovereignty nor run counter to Hong Kong’s status as a special administrative region. In fact, China and Hong Kong frequently adopt different state immunity doctrines; such practice is not inconsistent with public international law.

Keywords: *State Immunity, Act of State, Hong Kong Basic Law, Democratic Republic of the Congo v. FG Hemisphere Associates LLC, UNJISTP, One Country, Two Systems, Foreign Affairs, External Affairs, Kompetenz-Kompetenz*

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In June 2011, the Court of Final Appeal (CFA) of the Hong Kong Special Administrative Region (HKSAR) delivered a decision in *Democratic Republic of the Congo & Others v. FG Hemisphere Associates LLC*,¹ relating to the applicability of state immunity in commercial arbitration. During the proceedings, the Central People's Government of the People's Republic of China (CPG) presented three letters stating that China has long held a policy of absolute state immunity, that this extends to commercial arbitration, and that the Chinese judiciary is in no position to hear a case relating to a foreign state. In this case, the Court was called upon to answer three questions: whether state immunity falls within the scope of foreign affairs as prescribed in Article 13(1) of the Hong Kong Basic Law (HKBL)² and thus constituting an exclusive competence of the CPG; whether the HKSAR is in a position to maintain a policy of state immunity that differs from that of the CPG; whether state immunity falls within the scope of an "act of state" as provided in Article 19(3) of the HKBL—over which the courts of the HKSAR have no jurisdiction³—and whether the Court is therefore obliged to refer the interpretation of the HKBL to the Standing Committee of the National Peoples Congress (NPCSC). The Court answered the first and third questions affirmatively, and the second in the negative. This case has attracted great attention both from academics and legal practitioners. Firstly, people are concerned with determining whether the Court's decision to refer to the NPCSC for the interpretation of the HKBL would undermine the judicial independence of the HKSAR. Secondly, in adopting a policy of absolute immunity, and thus refusing to recognize and enforce foreign arbitral awards in which a state is the defendant, is the prosperity of arbitral services in the HKSAR menaced? Thirdly, by adopting, willingly or unwillingly, China's position on major issues of international law, might the already limited external policy space available to the HKSAR in the international scene be further reduced?

This case may also be situated in the broader context of 'China in the Africa' debates, which centre on the increasing influence of China in the African continent through economic, trade and investment activities, and the potentially adverse impacts thereof. Additionally, attention must be drawn to China's recent practices pertaining to state immunity, specifically, in external affairs, its signature of the United Nations Convention on Jurisdictional Immunities of States and Their Property (UNJISTP) in 2005, and

1. *Democratic Republic of the Congo v. FG Hemisphere Associates LLC*, [2011] H.K.E.C. 747 (C.F.A.) [hereinafter *Congo III*].

2. The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China, art. 13, § 1 (H.K.): "The Central People's Government shall be responsible for the foreign affairs relating to the Hong Kong Special Administrative Region." [hereinafter HKBL].

3. HKBL art. 19, § 3 (H.K.): "The courts of the Hong Kong Special Administrative Region shall have no jurisdiction over acts of state such as defence and foreign affairs".

domestically, its passage of the Law of the People's Republic of China on Judicial Immunity from Compulsory Measures concerning the Assets of Foreign Central Banks (the "Law on Judicial Immunity of Foreign Central Banks"), also in 2005.⁴ While these recent developments suggest that China's position toward state immunity has come to a crossroads and may shift from its persistent stance on absolute state immunity to a restrictive one, the *Congo* case nonetheless highlights China's hesitation in embracing restrictive state immunity and the conflicting interests involved.

In view of these issues, this article aims to explore China's laws and practices with respect to state immunity, and offers reflections on whether such an absolute state immunity policy suits China's needs in light of burgeoning Chinese foreign direct investments. Secondly, it will examine the legal and economic implications of China's state immunity policy for the HKSAR. It will also probe the scope of the "external affairs" competence enjoyed by the HKSAR and explore the possibilities of "one country, two state immunity doctrines." The discussion will extend to a general inquiry as to whether sub-state entities may enjoy state immunity under rules of public international law and national legislations.

This article is organized as follows. Section II will sketch the broader context of China's conventional approach toward state immunity, its signature of the UNJISTP, and its recent legislation on the Law on Judicial Immunity of Foreign Central Banks. Section III will introduce the procedural history of the *Congo* case, starting with the broader context of the debt crisis in African countries, the "China in Africa" debate, and decisions of the lower courts. Section IV will offer reflections on the validity of the substantive arguments advanced by the parties as well as the reasoning of the courts. Section V will conclude with a summary of the main findings and major arguments of this article.

I. CHINA'S PERSISTENT ADHERENCE TO ABSOLUTE STATE IMMUNITY AND RECENT PRACTICES

A. *Longstanding Position on Absolute State Immunity*

Due to bitter historical experience and resentment over the extraterritorial

4. Zhonghua Renmin Gongheguo Wai Guo Zhong Yang Yin Hang Cai Chan Si Fa Qiang Zhi Cuo Shi Huo Mian Fa (中華人民共和國外國中央銀行財產司法強制措施豁免法)[Law of the People's Republic of China on Judicial Immunity from Compulsory Measures Concerning the Property of Foreign Central Banks](promulgated by the Standing Comm. Nat'l People's Cong., Oct. 25, 2005, effective Oct. 25, 2005) 2005 STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. 544 (China). The original Chinese version, Oct. 25, 2005, http://www.gov.cn/flfg/2005-10/26/content_83865.htm. [hereinafter Law on Judicial Immunity of Foreign Central Banks]

application of foreign legislation, China has long embraced a doctrine of absolute state immunity. However, out of pragmatic need, China occasionally also signs multilateral conventions that waive absolute state immunity.⁵ For China, only through explicit consent and renunciation can a state be deprived of immunity.⁶ In the absence of a relevant agreement or convention, its default position is the absolute state immunity doctrine. In summarising the views of Chinese writers on absolute immunity, Dahai Qi writes that from China's perspective, state immunity is rooted in the principle of sovereign equality—a principle of international law—and covers all state actions unless the state concerned explicitly consents to waive immunity; Differences in state views on immunity should be resolved by negotiations and the conclusion of international agreements; If a foreign state infringes the right to state immunity enjoyed by China, that state will be held to have violated international law and therefore may be subject to countermeasures.⁷

In the courts of foreign states, China has consistently asserted that it enjoys absolute state immunity, regardless of the nature of the acts in question, public or commercial. Such a position might give rise to diplomatic tensions when a complaint is brought against China in the courts of a state that adopts a doctrine of restrictive immunity, for example, the United States. At the time of the proceedings of the famous *Jackson v. People's Republic of China*,⁸ a lawsuit brought about by US citizens against China with a view to pursuing the payment of bonds issued by the Chinese imperial Qing government for the purpose of the construction of the Hukuang Railway, China submitted an *Aide Memoire* to the US Department of State.⁹ According to China,

Sovereign immunity is an important principle of international law. It is based on the principle of sovereign equality of all states as confirmed by the Charter of the United Nations. As a sovereign state, China incontestably enjoys judicial immunity. It is in utter violation of the principle of international law of sovereign equality of all states and the U.N. Charter that a district court of the United States should exercise jurisdiction over a suit against a sovereign

5. Jin Huang & Jingsheng Ma, *Immunities of States and their Property: The Practice of the People's Republic of China*, 1 HAGUE YEARBOOK OF INTERNATIONAL LAW 163, 165 (1988); see also Sompong Sucharitkul, *Jurisdictional Immunities in Contemporary International Law from Asian Perspectives*, 4 CHINESE J. INT'L L. 1, 1-43 (2005).

6. Huang & Ma, *supra* note 5, at 165.

7. Dahai Qi, *State Immunity: China and Its Shifting Position*, 7 CHINESE J. INT'L L. 307, 315-16 (2008).

8. *Jackson v. People's Republic of China*, 596 F. Supp. 386 (N.D. Ala. 1984).

9. People's Republic of China: *Aide Memoire* of the Ministry of Foreign Affairs, reproduced in 22 ILM. 75, 81 (1983).

state as a defendant, make a judgement by default and even threaten to execute the judgement. The Chinese Government firmly rejects this practice of imposing U.S. domestic law on China to the detriment of China's sovereignty and national dignity. Should the U.S. side, in defiance of international law, execute the abovementioned judgement and attach China's property in the United States, the Chinese Government reserves the right to take measures accordingly.¹⁰

This statement is in line with Qi's observation that China regards state immunity as a principle of international law, based on the principle of sovereignty equality as enshrined in the UN Charter. As a sovereign, China enjoys absolute state immunity. To subject China to the jurisdiction of US courts would thus constitute a violation of international law and provoke countermeasures. Similar positions have been reiterated by China in recent complaints before the courts of the United States. In response to a claim for product liability, negligence and breach of warranty due to the improper manufacture of a semi-automatic rifle made in China that jammed and killed the claimants' son, in *Walters v. People's Republic of China*,¹¹ China submitted a letter to the US State Department expressing its view that as a sovereign, it is immune from any attempt to constrain its funds.¹² Conventionally, China has been consistent in maintaining its position on absolute immunity in courts of foreign states. However, in sharp contrast, China has signed the UNJISTP, the main objective of which is to narrow the scope of state immunity.

B. *UN Convention on Jurisdictional Immunities of States and Their Property*

In stark contrast to China's persistent position favouring absolute immunity, China participated in negotiations on the UNJISTP, and signed the Convention in 2005, but has not yet ratified it. In commenting on the draft articles of the UNJISTP, the Chinese representative remarked that, whereas the legal text was imperfect and not as satisfactory as expected, the delegation nonetheless invited all delegations to show a constructive and cooperative spirit to ensure the adoption of the draft articles. The Chinese representative further pronounced:

Under the influence of the economic globalization and with growing economic cooperation and exchanges among countries, practice indicates

10. *Id.* ¶ 3.

11. *Walters v. People's Republic of China*, 672 F. Supp. 2d 573 (S.D.N.Y. 2009).

12. *Id.* at 574.

that conflicts of legal regimes governing jurisdictional immunities will be more acute, resulting in an increasing number of legal problems. Therefore the formulation of an international convention on this issue is in the interest of the international community and will facilitate states to regulate and unify their behavior in relation to jurisdictional immunities and to avoid and minimize legal conflicts. It will also have a positive impact on maintaining harmony and stability in international relations.¹³

From the perspective of the Chinese representative, an international convention regulating jurisdictional immunities would contribute to uniform regulation and reduce potential legal conflicts, and was thus in the interests of the international community. Indeed, the Chinese representative underlined the importance of harmony and stability in international relations. While the endorsement of a more restrictive approach to state immunity departed from China's adherence to absolute state immunity, the reference to harmony and stability in international relations could still be rooted in China's attachment to the concept of "all sovereignty being equal".

As for the Convention, it has not yet obtained sufficient support—in the form of thirty instruments of ratification or acceptance—to come into effect. In terms of the substantive obligations set out by the UNJISTP, the Convention codifies state immunity by declaring that "[a] State enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another State subject to the provisions of the present Convention".¹⁴ In addition to the state and its various organs of government, the UNJISTP then defines a state as covering, *inter alia*, "constituent units of a federal State or political subdivisions of the State, which are entitled to perform acts in the exercise of sovereign authority, and are acting in that capacity".¹⁵ According to the commentary of the International Law Commission (ILC), the term "state" refers not only to fully sovereign and independent states but also entities that are sometimes not really foreign and at other times not fully independent or only partially sovereign.¹⁶ An entity possessing partial sovereign authority may thus enjoy state immunity under the UNJISTP. As the object and purpose of the UNJISTP is "to identify those entities or persons entitled to invoke the immunity of the State where a State

13. Statement by Mr. Liu Zhenmin, Director-General of the Department of Treaty and Law, Ministry of Foreign Affairs of China, at the Sixth Committee of the 58th Session of the UN General Assembly, on Item 150: Convention on Jurisdictional Immunities of States and Their Property, Oct. 21, 2003, <http://www.china-un.org/eng/chinaandun/legalaffairs/sixthcommittee/t560853.htm>.

14. United Nations Convention on Jurisdictional Immunities of States and Their Property, art. 5, Dec. 2, 2004, G.A. Res. 59/38, U.N. Doc. A/RES/59/38 (Dec. 16, 2004), http://www.ciemex.cat/mercator/pdf/NU5938_EN.pdf[hereinafter UNJISTP].

15. UNJISTP, art 2.1(b) (ii).

16. United Nations Publication, *Draft Articles on Jurisdictional Immunities of States and Their Property, with Commentaries, 1991*, 2(2) YEARBOOK OF THE INTERNATIONAL LAW COMMISSION 13, 15, U.N. Doc. A/CN.4/SER.A/1991/Add.1 (Part 2).

can claim immunity and also to identify certain subdivisions or instrumentalities of a State that are entitled to invoke immunity when performing acts in the exercise of sovereign authority,”¹⁷ a “state” should be interpreted as covering all types or categories of entities and individuals fulfilling pertinent criteria of the exercise of sovereign authority and thus benefiting from state immunity. As the ILC clarifies, the French wording of the “sovereign authority” is “*prérogatives de la puissance publique*”. Members of the ILC have divergent opinions as to the English version, sovereign authority and governmental authority being proposed. Some members of the ILC view sovereign authority as normally associated with international legal personality; ‘governmental authority’ is thus a better translation of the French wording. Whatever positions they may take, the Members of the ILC do agree that “[a]utonomous regions of a State which are entitled, under internal law, to perform acts in the exercise of sovereign authority may also invoke sovereign immunity”¹⁸ in accordance with Article 2.1(b) (ii) of the UNJISTP.

Another element of the UNJISTP relevant to this article is that the Convention expressly articulates a restrictive state immunity according to which a State may not invoke immunity in proceedings relating to, *inter alia*, commercial transactions¹⁹ and arbitration agreements.²⁰ The major theme put forward by the UNJISTP is that a state cannot invoke immunity in a foreign jurisdiction when a proceeding arises from a commercial transaction in which a state engages with a foreign natural or juridical person.²¹ It also speaks of the effect of a written arbitration agreement between a state and a foreign natural or juridical person: unless provided otherwise, the state cannot invoke immunity from jurisdiction of a competent court in a proceeding pertaining to “(a) the validity, interpretation or application of the arbitration agreement; (b) the arbitration procedure; or (c) the confirmation or the setting aside of the award.”²²

C. *Domestic Legislation on Judicial Immunities of Foreign Central Banks*

In 2005, China adopted the Law on Judicial Immunity of Foreign Central Banks, a law comprising only four articles. The main objective of this Act is, in accordance with principle of reciprocity, to exempt the assets of a foreign central bank from judicial measures of constraint, including

17. *Id.* at 14.

18. *Id.* at 17.

19. UNJISTP, art. 10.

20. UNJISTP, art. 17.

21. UNJISTP, art. 10.1.

22. UNJISTP, art. 17.

pre-judgment attachment, injunction, and post-judgment execution, unless the pertinent foreign central bank or its government waives the immunity in writing, or the assets concerned are set aside precisely for the execution.²³ This Act serves to fill the legal *lacuna* in the HKSAR (and the Macau Special Administrative Region, the MASAR), since applicable law prior to the handover ceased to be effective when the territories returned to Chinese control.²⁴ The demand for a regulatory regime for the assets of foreign central banks is especially acute in the HKSAR given that it is a financial centre and attracts capital flows and other asset forms from foreign central banks. The Chinese government felt that HKSAR required a guarantee of immunity from judicial measures of constraint in order to maintain capital flows and other forms of investment by foreign central banks, and to enhance its status as a financial hub.

In fact, the passage of this Act is meant to respond to the wishes of the HKSAR. When China resumed sovereignty over the HKSAR, the United Kingdom's State Immunity Act (SIA) of 1978, which was extended to the British Hong Kong by virtue of the State Immunity (Overseas Territories) Order 1979, lost its force in the HKSAR. However, Chinese national legislation governing the immunity of foreign central banks was not in place when the handover occurred. Unfortunately, the HKSAR itself is not in a position to regulate such matters as the HKBL reserved competence over foreign affairs exclusively to the CPG. In view of this legal *lacuna*, foreign central banks were concerned about the status of their assets in the HKSAR, and this uncertainty had the potential to prejudice the interests of the HKSAR as an international financial centre. The HKSAR thus requested that the CPG pass an Act regulating judicial immunity of assets of foreign central banks, which resulted in the Law on Judicial Immunity of Foreign Central Banks.²⁵

From the outset, the HKSAR played a pivotal role in the initiation of the legislative process. This is evident from the objectives of this Act: to secure the confidence of foreign central banks in the HKSAR; and to strengthen the territory's role as an international financial centre. As the economic interests of the HKSAR with regards to the immunity of foreign central banks, and the national interests of China on the general issue of state immunity are not in conflict, and as the position taken in the Act, namely, immunity from judicial measures of constraint, is consistent with China's traditional approach, the CPG had little difficulty in passing the legislation to meet the regulatory demand from the HKSAR, however unsatisfactorily.

23. Law on Judicial Immunity of Foreign Central Banks, art. 1.

24. Qi, *supra* note 7, at 316.

25. Lijiang Zhu, *State Immunity from Measures of Constraints for the Property of Foreign Central Banks: The Chinese Perspective*, 6 CHINESE J. INT'L L. 67, 73-74 (2007).

II. PROCEDURAL HISTORY AND SUBSTANTIVE ARGUMENTS OF THE CONGO CASE

A. *The Broader Context of the Congo Case*

1. *Debt Crisis of African Countries and the Vulture Funds*

The debt crisis of African countries is anything but new.²⁶ With a view to cancelling, or reducing the external debts of African and other highly-indebted countries to a sustainable level, the International Monetary Fund (IMF) and the World Bank in 1996 launched a Heavily Indebted Poor Countries (HIPC) Debt Initiative to provide these HIPCs with debt relief and low-interest loans. This initiative identified 40 qualifying countries, of which 29 were in Sub-Saharan Africa. As the creditors of these highly indebted countries were not limited to foreign states or international financial institutions, the debt owed by these highly-indebted countries to foreign countries might be cancelled, reduced or rewritten, but the debt possessed by private entities, such as private financial institutions or enterprises could be channelled into the international market and give rise to a market in distressed debt funds, alternatively known as vulture funds. The holders of these distressed debt funds could thereafter seek compensation for the debts owed them by going after assets of these highly indebted countries held in other parts of the world. Naturally, the HKSAR, an international financial hub, was deemed to be a good venue for holders of vulture funds.

The Democratic Republic of the Congo (DRC), one of the 40 countries covered by the HIPC Debt Initiative, entered into a construction agreement with a Yugoslav (as it then was) enterprise registered in Sarajevo in the 1980s. This company, Energoinvest, was to build a hydroelectric facility and high-tension transmission lines. A credit agreement containing arbitration clauses was concluded, which directed Energoinvest to finance the project through a Congolese state-owned intermediary: Société Nationale d'Electricité²⁷ When the DRC defaulted, Energoinvest invoked the arbitral clauses and successfully obtained two arbitral awards against the DRC, in Switzerland and France respectively. However, due to the difficulty and high costs involved in enforcing arbitral awards, Energoinvest transferred the right to collect these two arbitral awards to FG Hemisphere, a company located in New York that specialises in emerging market and distressed assets; and FG Hemisphere's sole asset was its right to collect on these two

26. See generally, PERCY S. MISTRY, *AFRICAN DEBT REVISITED: PROCRASTINATION OR PROGRESS?* (1992).

27. *FG Hemisphere Associates LLC v. Democratic Republic of the Congo*, [2010] H.K.E.C. 194 (C.A.), ¶ 3 [hereinafter *Congo II*].

awards.²⁸

2. *The China in Africa Debate*

China's footprint in Africa is now wide and deep enough to arouse concerns in western countries. China has been repeatedly accused of buying Africa by cutting deals to purchase natural resources while ignoring human rights, environmental protection and labour standards. In its engagements with African countries, China maintains a policy of non-interference, which means that in providing aid or carrying out development cooperation projects, China will not impose any conditions. This "no strings attached" approach, based on the equality, independence and dignity of states, corresponds with China's preference for absolute state immunity on the grounds of *par in parem non habet imperium* (equals cannot exercise authority over one another).

A significant characteristic of Chinese trade and economic activities in African countries is that Chinese enterprises are responsible for the implementation of the development cooperation projects between China and its African counterpart, which are normally funded by Chinese banks, notably, China's Export and Import Bank, whereas the fruits of cooperation projects—mostly raw materials—are exported to China for industrial use. In contrast to western countries' emphasis on good governance in African countries, Chinese trade, economic, or aid activities are largely concerned with infrastructure construction. These arrangements also characterise the cooperation agreement between the DRC and China, and the subsequent joint venture agreement between certain Congolese entities, including Gecomines, a DRC state mining company, and a consortium of Chinese enterprises including China Railway and Sinohydro, which resulted in the *Congo* case.

In the DRC-China project, China's main objective is to exploit the mining resources of the DRC. To this end, a joint venture company, the full obligations of which are incumbent upon China, was created. In return, Gecomines is obliged to transfer certain mining rights to the joint venture company. Whereas both Chinese and Congolese Parties are responsible for a certain portion of capital contribution, it is stipulated that the Congolese Party should be provided with a loan from China Railway and its subsidiaries.²⁹ Further, the Chinese Parties should also pay 350 million US dollars in entry fees to the DRC and Gecomines for the right to exploit the

28. *Congo II*, ¶¶ 5-6.

29. *FG Hemisphere Associates LLC v. Democratic Republic of the Congo*, [2008] H.K.E.C. 2119 (C.F.I.), ¶¶ 21-22 [hereinafter *Congo I*].

mining resources.³⁰ The associated entry fees attracted FG Hemisphere to the HKSAR, as China Railway is listed on the Hong Kong Stock Exchange and its subsidiaries are incorporated in the HKSAR. FG Hemisphere, eyeing the entry fees payable to the Congolese Party, applied for leave to enforce the arbitral awards, sought an injunction preventing the payment of the entry fees to the DRC and requested an equitable execution thereof.³¹

B. *Court of First Instance*

In May 2008, FG Hemisphere applied for, and was granted, an order to enforce the arbitral award resulting from a judgment rendered by the court of the HKSAR. The order was then challenged by the DRC in the Court of First Instance (CFI) on the grounds that the court of the HKSAR has no jurisdiction as the DRC is a foreign sovereign enjoying state immunity, and the court of the HKSAR is not the appropriate forum to determine the issue of state immunity.³² The Department of Justice, invoking public interest, intervened in the proceedings of this case while the CPG, via the Office of the Commissioner of the Ministry of Foreign Affairs of the People's Republic of China in the HKSAR (OCMFA) submitted a letter stating that the consistent and principled position of China on state immunity is absolute immunity.³³

The order for leave was subsequently set aside by the CFI. According to the CFI, irrespective of absolute or restrictive state immunity applicable in the HKSAR, the CFI has no jurisdiction over the present case as the subject matter before the court is not commercial in nature for four reasons. Firstly, the joint venture agreement is under the umbrella cooperation agreement between the DRC and China and is to be implemented through their state own enterprises.³⁴ Secondly, in consideration of the right to exploit the mining resources, China is obliged to build extensive infrastructure which is 'no more nor less than the development of the whole of the DRC'.³⁵ Thirdly, the terms pertaining to special taxes, custom privileges, and visa and work permits as contained in the joint venture agreement falls within the competence of the sovereign alone.³⁶ Fourthly, the entry fees stand as a license to exploit the mining resources in the DRC; the levy of such entry

30. *Congo I*, ¶ 23.

31. *Congo II*, ¶ 9.

32. *Congo I*, ¶ 7.

33. *Congo I*, ¶ 31.

34. *Congo I*, ¶¶ 85-86.

35. *Congo I*, ¶ 88.

36. *Congo I*, ¶ 90.

fees is a task only the state can exact.³⁷ Based on these four reasons, the CFI concluded that, as the subject matter before the court is not a commercial transaction, it is not necessary to decide whether restrictive or absolute state immunity is applicable in the HKSAR.³⁸

C. *Court of Appeal*

The case was then appealed and heard in the Court of Appeal (CA), which, by a two-to-one majority, found in favour of FG Hemisphere. Three pertinent issues were before the CA: the scope of the “act of state” as prescribed in Article 19 of the HKBL; law on state immunity upon and after the handover in the HKSAR; and the state immunity waiver.

In defining the scope of “act of state,” the CA identified two directions of its application. Accordingly, a forum court is precluded from questioning the validity of executive and legislative acts of a foreign state in the exercise of state public authority, or the legitimacy of the acts of a forum state performed in relations with a foreign state or in the exercise of sovereign power.³⁹ Nonetheless the issue before the CA was whether a party is immune from its jurisdiction. The court was not asked to adjudicate the validity of any legislative or executive acts of the DRC; nor was it called upon to determine the legitimacy of the acts of the CPG in the conduct of foreign relations.⁴⁰ Consequently, the subject matter before the court did not fall within the scope of an “act of state”; the court of the HKSAR should have jurisdiction over it. As regards the applicability of the law on state immunity in the HKSAR, the CA had to decide whether restrictive state immunity has obtained the status of customary international law (CIL) and, by way of incorporation, become a part of the common law in the HKSAR. If so, when the SIA ceased to be applicable in the HKSAR upon the handover, would the common law be revived and could it be thus relied upon? The CA had to further inquire whether the common law, if revived and applicable, runs counter to the law of the CPG or local legislation in the HKSAR. In assessing these questions, in great detail and sophisticated reasoning, the CA arrived at the conclusion that upon the handover, common law recognized restrictive state immunity⁴¹ and such restrictive state immunity is not inconsistent with the law and policy of the CPG.⁴²

To reach its decision, the CA firstly pointed to the doctrine of

37. *Congo I*, ¶ 91.

38. *Congo I*, ¶¶ 43, 70, 96.

39. *Congo II*, ¶¶ 37-38.

40. *Congo II*, ¶ 39.

41. *Congo II*, ¶ 78.

42. *Congo II*, ¶ 80.

incorporation by virtue of which CIL is channelled into, and constitutes a part of, common law. According to the CA, as the CIL changes, common law changes correspondently without any act of the parliament.⁴³ The CA then inquired whether a restrictive state immunity has obtained the status of CIL and, by incorporation, has thus become part of common law. With a comprehensive survey of pertinent jurisprudence on state immunity, the CA found that the common law of Hong Kong, as of 30 June 1997, recognized the doctrine of restrictive immunity.⁴⁴

The next question for the CA is then to determine whether the common law has changed since the handover, or whether the new constitutional order of the HKSAR permits a different doctrine of state immunity other than that of the CPG.⁴⁵ The CA firstly highlighted the fact that no local legislation was enacted to replace the SIA, to alter the common law on restrictive state immunity, or to give effect of the law and policy maintained by the CPG on state immunity.⁴⁶ The CA then emphasized that a doctrine of restrictive state immunity is more in line with the principle of equal justice;⁴⁷ at the same time, it found that to give the leave to the plaintiff, or grant the injunction, would not infringe China's sovereignty.⁴⁸ After taking into account the recent moves by the CPG toward restrictive state immunity, the CA concluding that "it is not unreasonable to suppose that were it intended that the courts of Hong Kong should apply the Central executive's preferred theory of sovereignty immunity, that intention would be given effect by legislation."⁴⁹ Based on the above reasoning, the CA thus ruled that the applicable state immunity doctrine in the HKSAR is a restrictive one.

The CA finally addressed the question of whether or not an agreement to arbitrate constitutes a waiver of immunity. According to the CA, arbitral proceedings have to be distinguished from the recognizing or executing of an arbitral award. While the agreement to arbitrate may be read as a waiver to the supervisory court of the arbitration, it does not amount to a waiver from jurisdiction or execution in a forum other than the seat of the arbitral award.⁵⁰

43. *Congo II*, ¶ 54.

44. *Congo II*, ¶ 83.

45. *Congo II*, ¶ 117.

46. *Congo II*, ¶ 80.

47. *Congo II*, ¶ 81.

48. *Congo II*, ¶ 89.

49. *Congo II*, ¶ 121.

50. *Congo II*, ¶ 177.

D. *Court of Final Appeal*

The case finally came before the CFA. The parties disputed whether the HKSAR may maintain a doctrine different from that of the CPG; whether the doctrine on state immunity applicable to the HKSAR after the handover is an absolute or restrictive one; and whether the present case falls within the scope of Article 158(3) of the HKBL and the CFA is thus obliged to refer to the NPCSC for interpretation of the HKBL.⁵¹ By a three-to-two majority, the CFA ruled that the case before it relates to the responsibilities of the CPG and decided to seek an interpretation from the NPCSC on the applicable doctrine of state immunity in the HKSAR.⁵²

In the words of the CFA, the fundamental question before the CFA was “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 practiced by the PRC.”⁵³ The CFA answered the question in the negative, finding that to answer otherwise would be incompatible with the status of Hong Kong as a special administrative region of China and the specific provisions of the HKBL. The CFA thus rejected the possibility of ‘one country, two state immunity doctrines’.⁵⁴ The CFA further opined that the question of which organ is competent to decide which state immunity doctrine should be adopted depends on constitutional allocation of powers in different legal systems.⁵⁵ In the case of the HKSAR, as a special administrative region of a unitary state it lacks the very attribute of sovereignty, and so it is not possible for it to adopt or maintain a different doctrine of state immunity.⁵⁶

The CFA relied upon three instruments to reject the argument that the CPG had envisaged common law embracing restrictive state immunity doctrine to be carried on in the HKSAR and in fact tolerated this possibility by not enacting central or local legislation. The pertinent legal instruments are: Decision on the Treatment of the Laws Previously in Force in Hong

51. HKBL art. 158, § 3 (H.K.): “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.”

52. *Congo III*, ¶ 407.

53. *Congo III*, ¶ 225.

54. *Congo III*, ¶ 226.

55. *Congo III*, ¶ 233.

56. *Congo III*, ¶¶ 265-68.

Kong in Accordance with Article 160 of the Basic Law (the 1997 Decision); Interpretation and General Clauses Ordinance; and Legislative Council (Legco) Papers. The 1997 Decision and Section 2A of the Interpretation and General Clauses Ordinance make it clear that upon handover, all law previously in force should not contravene the HKBL and should be brought into conformity with the status of Hong Kong as a special administrative region. Besides, in interpreting provisions relating to foreign affairs, special attention should be given to ensuring their consistency with the rights and obligations of China under international law.⁵⁷ The Legco Papers reveal that the absence of localised state immunity legislation is a result of failed negotiations between China and the United Kingdom rather than a chance omission. They detail how the United Kingdom put forward a proposal to localise a state immunity legislation embracing a restrictive doctrine within the Sino-British Joint Liaison Group, without success.⁵⁸ Relying upon the Legco Papers, the CFA thus concluded that the idea of “one country, two state immunity doctrines” is not permissible under the existent constitutional setting of the HKSAR.⁵⁹

Finally, the CFA applied the tests put forward in *Na Kg Ling*⁶⁰ to determine whether the CFA is obliged to refer to the NPCSC for the interpretation of the HKBL. The first test is the classification condition dictating that the CFA is to determine whether the present case concerns affairs that are the responsibility of the CPG, or the relationship between the CPG and the HKSAR. If so, the CFA is obliged to decide whether it is necessary to seek an interpretation from the NPCSC to help the CFA to adjudicate the case.⁶¹ The CFA then concluded that, as the case before the CFA was related to Article 13 and 19, regulating foreign affairs and “acts of state” respectively, the classification condition was satisfied. Further, since the subject matter was subject to dispute, as can be seen by the conflicting views expressed in the CA, it was thus necessary for the CFA to seek an interpretation from the NPCSC in accordance with Article 158(3) of the HKBL.⁶²

Four questions were subsequently proposed by the CFA to the NPCSC: whether the scope of foreign affairs as prescribed in Article 13(1) of the HKBL, which the CPG has power to interpret, extends to state immunity policy; if so, whether the HKSAR is in a position to depart from the law and policy maintained by the CPG; whether state immunity policy falls with the

57. *Congo III*, ¶ 315.

58. *Congo III*, ¶ 371.

59. *Congo III*, ¶ 372.

60. *Ng Ka Ling v. Director of Immigration*, [1999] 1 H.K.L.R.D. 315 (C.F.A.).

61. *Congo III*, ¶ 396.

62. *Congo III*, ¶¶ 397-406.

scope of “act of state” as provided in Article 19(3) of the HKBL; and finally whether common law on state immunity applicable to the HKSAR prior to the handover is subject to modification or adaption to ensure its compatibility with law and policy on state immunity as determined by the CPG.⁶³

E. *The Interpretation of the NPCSC*

On 26 August 2011, the NPCSC delivered an unsurprising interpretation.⁶⁴ According to the NPCSC, as state immunity policy falls within the realm of foreign affairs of the state—a competence to be exercised by the State Council in accordance with Article 89(9) of Chinese Constitution—and as Article 13(1) of the HKBL reserves the competence of foreign affairs to the CPG, the NPCSC has the power to interpret such matters as state immunity policy.⁶⁵ Secondly, as Article 19(3) of the HKBL strips the courts of the HKSAR of the jurisdiction over “act of state,” the scope of which state immunity falls into, the HKSAR must not depart from the law and policy as determined by the CPG in that regard.⁶⁶ Thirdly, given that state immunity concerns the question as to whether the courts of a state can exercise jurisdiction over a foreign state or its properties, and whether the foreign state concerned can claim immunity in the forum court, it relates directly to foreign relations and rights and obligations of a state under international law. Therefore, state immunity falls within the scope of “act of state” as provided in Article 19(3) of the HKBL.⁶⁷ Fourthly, the HKSAR, being a local region of China, should give effect to the laws and policies as determined by the CPG on state immunity. Common law, as previously practiced in Hong Kong, may be maintained only to the extent that it is not incompatible with the laws and policies of the CPG on state immunity.⁶⁸

63. *Congo III*, ¶ 407.

64. Interpretation of Paragraph 1, Article 13 and Article 19 of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China by the Standing Committee of the National People’s Congress, adopted by the Standing Committee of the Eleventh National People’s Congress at its 22nd Session on 26 August 2011, An unofficial English version is *available at* (Dec. 22, 2011), http://www.basiclaw.gov.hk/en/materials/doc/2011_08_26_e.pdf [hereinafter Interpretation].

65. Interpretation, ¶ 1.

66. Interpretation, ¶ 2.

67. Interpretation, ¶ 3.

68. Interpretation, ¶ 4.

III. LEGAL AND POLITICAL IMPLICATION OF THE *CONGO* CASEA. *Immediate Consequence of the NPCSC's Interpretation*

According to the HKBL, when the NPCSC delivers an interpretation, the courts in the HKSAR should follow the decision of the NPCSC.⁶⁹ The direct legal effect of the interpretations of the NPCSC was that the CFA was to be bound by these interpretations. Therefore, the consequence of this decision would be that the CFA would pronounce that HKSAR adopts the same state immunity doctrine as the CPG, namely, absolute state immunity doctrine. By a judgment delivered on 8 September 2011, the CFA declared the provisional judgment before the referral to be final as it is consistent with the interpretation handed down by the NPCSC.⁷⁰ This position would prevent a foreign state from being sued, or its assets seized in the HKSAR. Therefore, the application to seek leave to enforce a foreign arbitral award, to which a foreign state is a party, through a judgment of the court of the HKSAR, or to seize the assets of a foreign state based on the arbitral award cannot be granted.

The status of China as a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), the application of which was extended to the HKSAR by virtue of a declaration by China in June 1997, may not ease the difficulties faced by the winning party in relation to state immunity. While it may be argued that the agreement to have a state arbitrate constitutes an implied waiver of immunity with regards to enforcement proceedings, in particular given the absence of an explicit reservation of such a waiver, the success of such argument depends on municipal state immunity laws.⁷¹ The Arbitration Ordinance (Cap. 609), in Section 86 sets out the grounds for not enforcing an arbitral award, including the argument that enforcement of such arbitral award would be contrary to the public policy.⁷² Section 89 of the Arbitration Ordinance, regulating the enforcement of Convention Awards in particular, contains the same provision empowering the court to decline to grant leave to enforce a Convention award.⁷³ State immunity may be asserted in the

69. HKBL art. 158 § 3 (H.K.): "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."

70. Democratic Republic of the Congo v. FG Hemisphere Associates LLC, [2011] H.K.E.C. 1213 (C.F.A.), ¶ 7.

71. Andrea K. Bjorklund, *State Immunity and the Enforcement of Investor-State Arbitral Awards*, in INTERNATIONAL INVESTMENT LAW FOR THE 21ST CENTURY: ESSAYS IN HONOUR OF CHRISTOPH SCHREUER 302, 309 (Christina Binder et al. eds., 2009).

72. Arbitration Ordinance, (2011) Cap. 609, § 86(2) (b) (H.K.).

73. *Id.* § 89(3) (b) (H.K.).

courts of the HKSAR on the basis of this public policy exception. Further, the New York Convention makes clear that Convention awards are to be recognized as binding and enforced in accordance with the rules of procedure of the individual Contracting Parties.⁷⁴ The New York Convention thus leaves great discretion to the Contracting Parties, who may continue to maintain the state immunity exception in recognizing and enforcing Convention awards.

While the *Congo* case deals with a foreign arbitral award, it may also threaten domestic arbitral awards. Specifically, when one of the parties is a State entity, agrees to arbitration in the HKSAR, and proves to be both the losing party and unwilling to pay the award, it may invoke state immunity during the enforcement proceedings. This raises a question to be resolved by municipal law. Therefore, in enforcing the domestic arbitral awards, the winning party may well encounter the same difficulty with respect to state immunity.

B. *HKSAR's Interests in Arbitration Services and China's Interests in Outbound FDI*

Another policy implication the CFA failed to take into account is the impact of strict state immunity upon legal and arbitration services in the HKSAR. As an international financial centre, the HKSAR has striven to develop into a centre for the resolution of commercial disputes, where arbitration services play an important role. While the adoption of absolute state immunity does not preclude the possibility of an arbitral proceeding involving a foreign state being held in the HKSAR, the possibility that an individual or legal person might win a judgment and yet be faced with procedural obstacles when seeking to enforce the arbitral award due to the doctrine of absolute state immunity must be taken under consideration. This consideration may discourage parties from pursuing arbitral proceedings in the HKSAR, and thus undermine the prosperity of the territory's arbitration services.

With respect to China, the growth of private interests compels a shift from absolute state immunity to restrictive state immunity,⁷⁵ strict state immunity is not in the interest of China in view of the huge amount of outbound foreign direct investment. In practice, China has participated in arbitral tribunals of the International Centre for Settlement of Investment Disputes (ICSID) through the acceptance of jurisdiction contained in bilateral investment agreements. This coincides with the development of

74. Bjorklund, *supra* note 71, at 308.

75. Qi, *supra* note 7, at 327-30.

China as a capital exporting country in need of an investor-state arbitration mechanism to protect Chinese investors and investments in foreign states. Indeed, the inclusion of such a mechanism, in the form of investor-state arbitration, has become a conventional aspect of Chinese bilateral investment treaties since 1998.⁷⁶

C. *Danger of Prejudicing the Sovereignty of China*

FG Hemisphere referred to the following passage by Lord Wilberforce in *I Congreso del Partido*, and argued that a restrictive state immunity doctrine would not prejudice the sovereignty of China. According to Lord Wilberforce,

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.⁷⁷

The CFA rejects this argument, saying that FG Hemisphere misdirected the focus as the passage related to the sovereignty of the impleaded foreign states that act in the marketplace through commercial transactions whereas what was at stake before the CFA related to the sovereignty of China. In reaching its determination of the threat of prejudicing the sovereignty of China, the CFA relied heavily on the third letter of the OCMFA, from which, according to the CFA, the CA had not benefitted.⁷⁸ Taking a closer look at the reasoning, one easily finds that the CFA simply referred to the arguments produced by the OCMFA as the sole basis for its determination of the threat to China's sovereignty. In so doing, the CFA merely endorsed the decision of the CPG without critically assessing the existence of such a threat.

The OCMFA stated that the adoption of a divergent policy on state immunity by the HKSAR would interfere with the power and capacity of the CPG; undermine China's consistent claim to absolute immunity in international law; make China responsible for the HKSAR's impleading foreign states; expose China to the danger of being impleaded in foreign states; and hamper normal intercourse and cooperation between China and such foreign states.⁷⁹ These concerns appear unfounded.

76. Wei Shen, *The Good, the Bad or the Ugly? A Critique of the Decision on the Jurisdiction and Competence in Tza Yap Shum v. The Republic of Peru*, 10 CHINESE J. INT'L L. 55, 56 (2011).

77. *I Congreso Del Partido*, [1983] 1 A.C. 244, 262.

78. *Congo III*, ¶ 290.

79. *Id.*

The first two arguments of the OCMFA relate to the distribution of competence between the HKSAR and the CPG. In ascertaining the validity of such an argument, one has to bear in mind that both “one country” and “two systems” are cornerstones of the unique regime of “One Country, Two Systems.” One should not compromise the other. As a consequence, one has to resist the temptation to construe foreign affairs in an over-lenient manner, in particular in light of the designation of external affairs, a competence prescribed in the HKBL for the HKSAR to exercise. State immunity may be well interpreted as the external affairs of the HKSAR rather than the foreign affairs of the CPG. A different state immunity policy maintained by the HKSAR does not necessarily lead to the interference of the power of the CPG, which may feel free to maintain its absolute state immunity without undermining its consistency.

The third and fourth arguments concern the responsibilities that result from the impleading of a foreign state and the possibility of being impleaded in a foreign state. Here, the passage by Lord Wilberforce in *I Congreso del Partido* is of greater importance than the CFA apparently appreciated. Since the claim is based on commercial transactions which constitute neither a threat to the dignity of that state nor any interference with its sovereign function, it would not give rise to any violation of international law for which the CPG could be held responsible. The threat of China being impleaded in foreign states is also irrelevant given that the issue would be decided in accordance with the laws and policies of that foreign state, which has little to do with the state immunity policy adopted in the HKSAR. Further, being impleaded in foreign courts would not threaten the dignity of China, nor interfere with China’s sovereign functions as China descends to the level of the marketplace when engaging in commercial transactions with foreign natural or legal persons. Therefore, the third and fourth concerns about prejudicing China’s sovereignty are not sustainable.

The fifth argument is based on normal intercourse and cooperation in international trade and economic activities, and is even weaker as it is restrictive state immunity, instead of absolute state immunity that facilitates international commercial transactions. The reason is simple: economic actors cannot afford to enter into contracts with a state that claims immunity from binding legal obligations.

Overall, the CFA’s reasoning on the threat to China’s sovereignty is unconvincing. In contrast, Justice Kemal Bokhary has advanced an interesting analogy by referring to the *Chen Li Hung* case⁸⁰ in which the CFA recognized the legal effects of a Taiwanese bankruptcy order. Justice Bokhary firstly underlined the fact that it was not unusual for the courts to be

80. *Chen Li Hung & Others v. Ting Lei Miao & Others*, [2000] 1 H.K.L.R.D. 252 (C.F.A.).

called upon to examine a dispute involving a foreign element. He then stated that since the recognition of an order given by a Taiwanese court would not prejudice the sovereignty of the CPG, much less would be the adoption of a restrictive state immunity in the HKSAR and the subjection of Congo to the jurisdiction of the courts in the HKSAR.⁸¹ According to this line of argument, there are no grounds for the CFA's assertion that the adoption of a restrictive state immunity doctrine differing from that of the CPG, in the HKSAR, would pose a threat to China's sovereignty. This is particularly true with respect to the recognition and enforcement of arbitral awards, as the state concerned has already voluntarily agreed to arbitration. Subjecting that state concerned to the jurisdiction of the HKSAR thus constitutes "neither a threat to the dignity of that state, nor any interference with its sovereign functions" and would not impose any new international responsibilities on China as there is no violation of international law.

Finally, it is to be reminded that China has concluded the UNJISTP. Although China has not yet ratified it and the convention has not obtained sufficient support for it to come into effect, the act of signature has already demonstrated China's intention to move toward a restrictive state immunity doctrine. In view of this, the adoption of a restrictive state immunity doctrine by the HKSAR would not prejudice the sovereignty of the CPG.

D. *Struggle between Common Law and Positivist Approach, Judicial and Legislative Interpretation*

In comparing the reasoning of the CA and CFA, one may find that the interpretative approaches relied upon by these two courts may lead to different conclusions than those they promulgated. Namely, the CA relied heavily upon the transformation of CIL, which by virtue of incorporation constitutes part of the common law applicable in the HKSAR. The CA then conducted a comprehensive survey of jurisprudence with a view to justify the claim that restrictive state immunity doctrine prevails, if not having attained the status of CIL. In criticising the decision of the CA, Jones argues that in identifying CIL, the role of a court is "to be a siphon, rather than a catalyst or trailblazer."⁸² He further writes that such an idea is of a "somewhat alien mindset for HK judges, who have been exhorted on the highest authority to develop the common law so as [to] meet the changing needs of society."⁸³

However, the enthusiasm for the common law for which Jones blames

81. *Congo III*, ¶¶ 127-28.

82. Oliver Jones, *Let the Mainland Speak: A Positivist Take on the Congo Case*, 41 H.K.L.J. 177, 197 (2011).

83. *Id.*

the CA is not shared by the CFA, which relied heavily on the 1997 Decision, Interpretation and General Clauses Ordinance, and the Legco Papers. While the CFA also referenced relevant jurisprudence, greater weight was placed on the unusual constitutional setting of the HKSAR, pronounced by the pertinent provisions of the HKBL. To the CFA, the plain language of Articles 13(1) and 19(3) of the HKBL leaves no space for the courts of the HKSAR to address the subject of state immunity. The root of the divergence of CA and CFA may be seen as an example of the conflicts between common law and positivist law approaches.

The conflicts resulting from interpretative approaches may be exacerbated if the legislative interpretation of the NPCSC is taken into consideration, in particular in light of the NPCSC's preference for, and reliance on, original legislative intent. Doubts may arise as to whether the legislative interpretation of the NPCSC, and the judicial interpretation of the courts, may coexist in the HKSAR. The next question to explore is then whether it is feasible to attempt to harmonise the NPCSC's legislative interpretation with common law doctrine, or the common law approach of the courts of the HKSAR, with an interpretation that places greater emphasis on legislative intent.⁸⁴ For courts in the HKSAR, legislative intent is generally ascertained from the language as expressed by the legal text. By contrast, legislative intent may well be taken as the implicit intent of the legislature, which the NPCSC would be in the best position to define. While the validity of the argument that, with an unlimited power to interpret the HKBL, the NPCSC may alter the fundamental framework of the HKSAR⁸⁵ remains to be falsified, one is safe to say that, in the *Congo* case, the CFA has made greater efforts in ascertaining the original legislative intent and gave greater weight to this. In view of the incoming tide of Chinese "legis-prudence" triggered by the *Congo* case,⁸⁶ the worry that the common law legal system may not long survive after the handover seems to have some basis in fact.⁸⁷

E. *The Line between Foreign Affairs and External Affairs*

Professor Yash Ghai, in his seminal book on Hong Kong's New Constitutional Order considers the relationship between foreign affairs and

84. Simon N. M. Young, *Legislative History, Original Intent, and the Interpretation of the Basic Law*, in INTERPRETING HONG KONG'S BASIC LAW: THE STRUGGLE FOR COHERENCE 15, 18 (Hualing Fu et al. eds., 2007).

85. Yash Ghai, *The Political Economy of Interpretation*, in Fu et al. eds., *supra* note 84, 115, 138.

86. P. Y. Lo, *The Gateway Opens Wide*, 41 H.K.L.J. 385, 390 (2011).

87. Ann D. Jordan, *Lost in the Translation: Two Legal Cultures, the Common Law Judiciary and the Basic Law of the Hong Kong Special Administrative Region*, 30 CORNELL INT'L L.J. 335, 335 (1997).

external affairs. According to Article 13 of the HKBL, responsibility for foreign affairs is the exclusive reserve of the CPG⁸⁸ whereas the HKSAR may be authorized to pursue relevant matters in external affairs on its own, in accordance with the HKBL.⁸⁹ However, the HKBL provides little hint as to the definition of foreign affairs and external affairs though it regulates external affairs in Chapter VII. The distinction between foreign affairs and external affairs is then linked to “acts of state,” over which the courts of the HKSAR have no jurisdiction. The HKBL refers to foreign affairs and defence as examples of “acts of state”. Thus, the definition of foreign affairs firstly impacts the distribution of competence between the CPG and the HKSAR, and then the jurisdiction of the courts of the HKSAR. Therefore, in answering whether the HKSAR may embrace restrictive state immunity, a doctrine different from that endorsed by China, one has to carefully delineate the line between foreign affairs and external affairs.

In that regard, Article 151 of the HKBL is telling, for the HKSAR may, using the name of Hong Kong, China, “maintain and develop relations and conclude and implement agreements with foreign states and regions and relevant international organizations in the appropriate fields, including the economic, trade, financial and monetary, shipping, communications, tourism, cultural and sports fields”. The key to distinguishing foreign affairs reserved solely for the CPG and external affairs that may be pursued by the HKSAR lies in the interpretation of the term of “in the appropriate fields.” Professor Ghai seems to be correct in pointing out that foreign affairs is a broader concept pertaining to quintessentially matters of state and international diplomacy whereas external affairs may be more concerned with trade, economic and cultural affairs.⁹⁰ This position can also find support from the authentic Chinese legal text. ‘Wai-jiao [外交]’ is used for foreign affairs whereas ‘dui-wai [對外]’ is used for external affairs. The Chinese legal text demonstrates the strong sovereign implication of foreign affairs, which is reserved only to a sovereign in its relations with another sovereign. That being said, in practice, the HKSAR’s exercise of external competence may also cover issues not strictly economic in nature, such as judicial cooperation, extradition, and diplomatic and consular relations.⁹¹ Therefore, both the HKBL and the practice of the HKSAR indicate that not all of subject matters relating in the conduct of relations with a foreign state fall within the scope of foreign affairs and thus are the sole responsibility of the CPG.

88. HKBL art. 13, § 1 (H.K.).

89. HKBL art. 13, § 3 (H.K.).

90. YASH GHAI, HONG KONG’S NEW CONSTITUTIONAL ORDER: THE RESUMPTION OF CHINESE SOVEREIGNTY AND THE BASIC LAW 413 (1997).

91. *Id.* at 434-40.

In view of the above, the major flaw in the reasoning of the CFA is that it was too quick to conclude that state immunity policy constitutes an element of foreign affairs without further exploring the possibility of defining it as part of external affairs, a competence over which the HKSAR may exercise. In this connection, Justice Bokhary, in his dissenting opinion, made an insightful distinction between the recognition of a foreign state and the immunity enjoyed by a foreign state, if recognized.⁹² The recognition of a state is a matter of fact for the executive, in particular the CPG, to decide whereas the state immunity is a question of law on which the judiciary of the HKSAR should be empowered to adjudicate,⁹³ a position also shared with some other authors such as Albert Hung Yee Chen, a leading scholar in Hong Kong University. In commenting on this case, he argues that under English common law and the law of colonial Hong Kong, whether a foreign state enjoys state immunity is purely a question of law to be decided by the courts, which may incorporate CIL without seeking the views of the executive. The majority decision to refer the matter to the CPG for a determination of state immunity policy is “original and innovative” from the perspective of English common law.⁹⁴ While it is true that state immunity implicates the conduct of relations between sovereign states, it does not necessarily suggest that state immunity falls within the scope of “act of state.” Under English common law, it is established judicial practice that, in the absence of legislation, it is for the courts to decide the nature and extent of the immunity accorded to a foreign state.⁹⁵

The CFA’s quick reasoning resulted from its over-emphasis on the status of the HKSAR as a special administrative region of a unitary state. This led the CFA to decide the case before it based, mainly, on “municipal law and constitutional principle” with little regard for the idea of international law.⁹⁶ In addition, the CFA compromised the ‘Two Systems’ with a view to upholding ‘One Country’. Specifically, as argued above, the CFA failed to take account of China’s burgeoning outbound foreign direct investment and the policy impact on arbitration services in the HKSAR in adopting absolute state immunity, and ought to have examined closely whether the adoption of a restrictive immunity policy in the HKSAR might prejudice the sovereignty of China. It also failed to take into account the practice of the HKSAR in the international plane.

92. *Congo III*, ¶ 114.

93. *Id.*

94. Albert H. Y. Chen, *The Congo Case—Introduction*, 41 H.K.L.J. 369, 373 (2011).

95. Po Jen Yap, *Democratic Republic of the Congo v. FG Hemisphere: Why Absolute Immunity Should Apply but a Reference Was Unnecessary*, 41 H.K.L.J. 393, 395 (2011).

96. Tony Carty, *Why Are Hong Kong Judges Keeping a Distance from International Law, and with What Consequences? Reflections on the CFA Decision in DRC v. FG Hemisphere*, 41 H.K.L.J. 401, 405 (2011).

The HKSAR, even after its return to China, has continued to conclude bilateral investment treaties (BITs) with other sovereign states; BITs which contain arbitration clauses providing that any dispute between an investor of one Contracting Party and the other Contracting Party may be submitted to arbitration.⁹⁷ While the dispute settlement mechanisms contained in BITs concluded by the HKSAR do not address directly the issue of state immunity,⁹⁸ eventually this issue will be confronted at the enforcement stage of investor-state arbitral awards. Moving away from the investment aspect, the HKSAR, being a customs territory “possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for” in the General Agreement on Tariffs and Trade (GATT), has participated in the GATT since the British era, and continues to participate in the World Trade Organization (WTO) with China’s certification of the continuing status of the HKSAR as a separate customs territory.⁹⁹ The CFA’s broad interpretation of foreign affairs may narrow or eliminate entirely the scope of external affairs, which may, in effect, deny the HKSAR its legal capacity to act in the realm of international economic relations.

F. *The Underlying Kompetenz-Kompetenz Issue*

The debate as to whether the courts of the HKSAR are competent to define the scope of “act of state,” and subsequently to pronounce a state immunity doctrine different from that of China is embedded in the controversial *kompetenz-kompetenz* issue. The HKBL firstly assigns the competence to interpret the HKBL to the NPCSC of the CPG;¹⁰⁰ it then directs the NPCSC to authorize the courts of the HKSAR, in adjudicating cases, to interpret relevant provisions of the HKBL within the limits of the autonomy of the HKSAR on its own;¹⁰¹ finally, it directs courts of the HKSAR, in particular the CFA, to seek interpretations from the NPCSC if the case before them relates to the responsibility of the CPG, or concerns the relationship between the CPG and the HKSAR, and if such an interpretation will affect the judgments on the case.¹⁰²

The HKBL makes it clear that the NPCSC has the power to interpret the

97. See, e.g., Agreement between the Government of the Kingdom of Thailand and the Government of the Hong Kong Special Administrative Region of the People’s Republic of China for the Promotion and Protection of Investments, Nov. 19, 2005, art. 8.

98. Huaqun Zeng, *Initiative and Implication of Hong Kong’s Bilateral Investment Treaties*, 11 J. WORLD INV. & T. 669, 688-91 (2011).

99. Chien-Huei Wu, *A New Landscape in the WTO: Economic Integration among China, Taiwan, Hong Kong and Macau*, in 3 EUROPEAN YEARBOOK OF INTERNATIONAL ECONOMIC LAW 241, 244-45 (Herrmann C. & Terhechte J. P. eds., 2012).

100. HKBL art. 158, § 1 (H.K.).

101. HKBL art. 158, § 2 (H.K.).

102. HKBL art. 158, § 3 (H.K.).

HKBL, in particular where those subject matters relate to the responsibilities of the CPG, or concerning the relationship between the CPG and the HKSAR. It seems clear that the NPCSC enjoys the competence to determine the delimitation of competence between the CPG and the HKSAR. However, even in the area of foreign affairs, there are procedural safeguards in the HKBL to ensure that the CPG would not apply law and treaties to the HKSAR without proper consultation and consideration of the needs and circumstances of the HKSAR.¹⁰³ It is thus open to question whether the CPG may interpret the HKBL in such a way as to reshape the fundamental allocation of competence between the CPG and the HKSAR; indeed, this is the ultimate question to be examined. An even greater threat to the autonomy of the HKSAR comes from the intervention of the OCMFA in pronouncing the positions of the CPG in the judicial proceedings. Whereas the NPCSC is competent to interpret the HKBL, there is no role for other organs of the CPG. In intervening in the *Congo* case by stating the consistent policy of the CPC, and dictating a particular decision, the OCMFA has effectively substituted itself for the NPCSC and exercised an interpretative competence to which it is not entitled. If the OCMFA is allowed to freely intervene in the judicial proceedings in the HKSAR and to make pronouncements to which the courts of the HKSAR is bound to give great weight—as the CFA did in this case—the judicial authority and autonomy of the HKSAR will be subject to interference by not only the NPCSC but also other state organs of the CPG. To the best, the submission of the OCMFA can only be deemed as *amicus curiae* belief, which the CFA is free to take into account but is not bound to. Unfortunately, the CFA seemed to endorse too much weight on the OCMFA's letters and thus endangered the judicial independence of HKSAR's judiciary.

This worry is not without foundation. After examining the practices of legislative interpretation by the NPCSC and judicial interpretations of the courts of the HKSAR, Professor Ghai concludes that the fundamental framework of the HKBL has been substantially altered.¹⁰⁴ While this conclusion may seem to be bold, one has to critically reflect on whether there is a limit on legislative interpretation by the NPCSC or interventions by the OCMFA. In this line, one has to take into due account of the fact that the HKBL is not only a national law of China, but also serves as a mini-constitution of the HKSAR. Further, although Chinese scholars tend not to agree, there is a strong argument that the authority of the HKBL stems not only from Chinese legislature, but also from Sino-British Joint Declaration. Rewriting the HKBL in the form of legislative interpretation by

103. Eric T. M. Cheung, *Undermining Our Judicial Independence and Autonomy*, 41 H.K.L.J. 411, 417 (2011).

104. Ghai, *supra* note 85, at 138.

the NPCSC or policy statements of the OCMFA would thus undermine the authority from which the HKBL is derived and threaten the constitutional order of the HKBL.

G. *In Search of Space for “One Country, Two State Immunities Doctrines”*

In 1997, Professor Roda Mushkat, a prominent scholar and advocate of the idea of “one country, two international legal personalities,” wrote of state immunity issues that while she recognized the doctrinal conflicts between HKSAR judges and their Chinese counterparts, she expected that restrictive immunity doctrine as incorporated in the common law to continue to apply.¹⁰⁵ She then rebutted the contention that the courts in the HKSAR had no jurisdiction over state immunity because the HKSAR excludes foreign affairs and defence from the jurisdiction of the courts. She argued that such a contention was manifestly inconsistent with the idea of “independent judicial power” as enshrined in the Sino-British Joint Declaration and the HKBL.¹⁰⁶

Unfortunately, Mushkat’s expectations turned out to be but a desperate hope. The CFA in the *Congo* case explicitly denied the possibility of following a “one country, two state immunity doctrines” path, and held that it had no jurisdiction over the state immunity issue. The CFA firstly defined “state immunity” as an element of foreign affairs as set out in Article 13(1) of the HKBL and then framed it as an “act of state” over which the courts of the HKSAR have no jurisdiction.

In order to appreciate the relevance of the “act of state” doctrine in this case, one has to reflect on the objective of this doctrine. As the CA correctly pointed out, a forum court, for the reasons of separation of powers, is barred from questioning externally the validity of executive and legislative acts of a foreign state in the exercise of state public authority for the sake of international comity, or internally the legitimacy of the acts of forum state performed in relations with a foreign state or in the exercise of sovereign power.¹⁰⁷ Such concerns are not involved in the determination of state immunity policy. A closer look at absolute state immunity and restrictive state immunity would reveal that the difference between them lies in the exception to commercial transactions, which falls under the competence of the HKSAR. This particular exception in fact creates space for “one country, two state immunity” doctrines.

105. RODA MUSHKAT, ONE COUNTRY, TWO INTERNATIONAL LEGAL PERSONALITIES: THE CASE OF HONG KONG 66 (1997). On the international legal personality of the H.K.S.A.R., see also Zhichao Sun, *International Legal Personality of the Hong Kong Special Administrative Region*, 7 CHINESE J. INT’L L. 339, 339-52 (2008).

106. MUSHKAT, *supra* note 105, at 67.

107. *Congo II*, ¶¶ 37-38.

In practice, Hong Kong, since its return to China, has continued to negotiate and sign BITs with external trading partners. At the same time, China is also pursuing BITs. But Hong Kong-BITs are not applicable to China, and China-BITs will not be applied to the HKSAR. Both China and the HKSAR can waive the state immunity independently by accepting the compulsory investor-state arbitration clause. Thus, those BITs concluded by either China or Hong Kong, may include investor-state arbitration clauses. For example, China concluded a BIT with Thailand in 1985 that contains only a state-to-state dispute settlement mechanism.¹⁰⁸ In contrast, the Hong Kong-Thailand BIT concluded in 2005 includes an investor-state arbitral procedure. In accepting investor-state arbitration, at least at the litigation stage, the HKSAR may depart from the position taken by China on state immunity. “One country, two state immunity doctrines” is thus not unusual in the actual practice of China and the HKSAR.

The final issue to be resolved is whether the exercise of “one country, two state immunity doctrines” is permissible from the perspective of international law. Two dimensions are to be discussed here. The first question is whether, internally, international law prevents the courts of the HKSAR from pronouncing its position on state immunity doctrine. The answer for this should be “no.” In abstract terms, while international law does dictate the respect to be accorded to state immunity by a state, it says nothing about which organ within a state is to decide its state immunity policy. This issue is to be resolved by each state in accordance with its constitutional structure: in this case, the distribution of competence between the HKSAR and its central authority, China. In a concrete sense, state immunity is a matter of law to be interpreted by the courts, a fact unaffected by the status of the CFA as a court in a special administrative region of China since exception to absolute immunity in commercial matters may find its legal basis in the external affairs of the HKBL. The practice of “one country, two state immunity doctrines” is thus not incompatible with international law.

A more difficult question is whether, externally, the HKSAR may adopt a restrictive state immunity policy while China maintains an absolute one. Before answering this question, one has to recall the debates on the definitional element of state eligibility for state immunity: can the HKSAR, being a subdivision of China, claim state immunity in its own right? On this premise, one can then further explore the possibility for the HKSAR to adopt or maintain a different state immunity policy other than that of China.

For a subdivision to enjoy state immunity, two approaches are

108. Agreement between the Government of the Kingdom of Thailand and the Government of the People's Republic of China for the Promotion and Protection of Investments, Mar. 12, 1985, art. 9.

advanced: internal sovereignty and external sovereignty. The internal sovereignty approach focuses on the legitimate power emanating from and is exercised over a human community; external sovereignty emphasizes international independence and admission into the international society of states.¹⁰⁹ When opting for the first approach, courts are called upon to examine the constitutional structure of a foreign state with a view to ascertain whether the subdivision in question is exercising its legitimate public authority. In applying the latter approach, the courts are nevertheless dealing with sovereign powers under public international law.

With regards to the internal sovereignty approach, with the exception of defence and foreign affairs, the HKSAR retains a high degree of autonomy in a number of areas, including public finance, monetary affairs, trade, industry and commerce, education, labour and social services. Regarding external sovereignty, the HKSAR “may on its own, using the name ‘Hong Kong, China’ maintain and develop relations and conclude and implement agreements with foreign states and regions and relevant international organizations in the appropriate fields, including the economic, trade, financial and monetary, shipping, communications, tourism, cultural and sports fields.”¹¹⁰ The HKSAR may, using the same name of ‘Hong Kong, China’, participate in international organizations and conferences not limited to states.¹¹¹ In view of these provisions, it is thus safe to say that no matter whether one adopts an internal sovereignty approach, or an external sovereignty approach, the HKSAR can pass the tests.

However, the locus of debates on the eligibility of a subdivision of a state for state immunity, as Hans van Houtte observes, has gradually shifted from the two approaches based on internal and external sovereignty to state function. In determining whether a subdivision of a state is exercising state function, the courts have to ascertain whether the subdivision of a state in question is acting in a sovereign capacity. This is the approach adopted by the UNJISTP. Therefore, under the UNJISTP, for the HKSAR to successfully claim state immunity, the HKSAR has to exercise sovereign authority, with sovereign authority here referring to state function or *puissance publique*. In accordance with this state function approach, when the HKSAR is exercising its sovereign authority, it may enjoy state immunity in foreign courts.

Nonetheless, the question this article aims to address is not whether the HKSAR may claim state immunity in foreign courts but, rather, whether under public international law the HKSAR may adopt or maintain a different

109. Hans van Houtte, *The Faded Sovereignty of Federated States and Their Immunity from Jurisdiction*, 1 NOTRE DAME INT’L L.J. 1, 4 (1983). See also John Trone, *The Sovereign Immunity of the Member States of a Federation*, 11 INT’L TRADE & BUS. L. REV. 279, 279-86 (2008).

110. HKBL art. 151(H.K.).

111. HKBL art. 152, § 2 (H.K.).

state immunity policy from that of China. To be more precise, in view of the fact that China maintains an absolute state immunity doctrine, can the HKSAR legally adopt a restrictive state immunity doctrine from the perspective of international law? As clarified above, the HKSAR, as a subdivision of China, can claim state immunity in foreign courts in exercising sovereign authority. The other side of the same coin is that the HKSAR, as a subdivision of China, may consent to the exercise of jurisdiction through international agreements, contracts, or declarations. This is what the UNJISTP in Article 7 envisages.¹¹² Therefore, the adoption and maintenance of a restrictive state immunity policy by the HKSAR through international agreements, contracts or declarations does not run counter to the rules and principles of international law.

IV. CONCLUSION

This article has examined the *Congo* case adjudicated by the CFA within the usual constitutional setting of “One Country, Two Systems” and investigated how China’s law and policy on state immunity impacts the HKSAR. Internally, with a view to ensure the confidence of foreign central banks on their assets in the HKSAR and to contribute to the HKSAR’s status of international financial centre, China passed the Law on Judicial Immunity of Foreign Central Banks. Externally, China has maintained a longstanding position in favour of absolute state immunity while practical considerations would seem to encourage a position that leans toward restrictive state immunity, as suggested by its signature of the UNJISTP. However, in submitting letters to the CFI, CA and CFA, the OCMFA reiterated China’s adherence to absolute state immunity, a position not in the interests of China’s growing outbound foreign direct investment and the prosperity of arbitration service in the HKSAR.

In addressing the issue of state immunity doctrine applicable in the HKSAR, the CFI, CA and CFA have taken different approaches and positions. The CFI did not answer which doctrine of state immunity is to be applied in the HKSAR since it considered the case before it not commercial in nature. Therefore, there is no need to address whether the commercial exception to state immunity applies. In repealing the decision of the CFI, the CA found the subject matter commercial in nature and ruled that the

112. U.N.J.I.S.T.P., art. 7.1: “[a] State cannot invoke immunity from jurisdiction in a proceeding before a court of another State with regard to a matter or case if it has expressly consented to the exercise of jurisdiction by the court with regard to the matter or case: (a) by international agreement; (b) in a written contract; or (c) by a declaration before the court or by a written communication in a specific proceeding.”

HKSAR, upon its return back to China, recognized restrictive state immunity doctrine, a position neither conflicting its status as a special administrative region of China nor prejudicing China's sovereignty. However, this position is not supported by the CFA. In ascribing great weight to the OCMFA's letter, the CFA ruled that state immunity constitutes a part of foreign affairs and thus falls within the scope of "act of state" over which the court has no jurisdiction. This article argues that the CFA is too quick to jump to that conclusion.

This article argues that under English law, state immunity is to be interpreted by the courts. When it comes to the specific case of the HKSAR, a different state immunity policy may find its legal basis in external affairs, a competence the HKSAR enjoys. This article also argues that by characterising state immunity as foreign affairs, this will further restrict the limited space in which the HKSAR may be competent to act in the international scene. This article further argues that the maintenance of restrictive state immunity would not prejudice China's sovereignty and the unique constitutional setting of "One Country, Two Systems" can well sustain "one country, two state immunity doctrines." This article then points to the different interpretative approaches adopted by the NPCSC and the courts in the HKSAR and threat of the NPCSC's legislative interpretation to common law in the HKSAR. It cautions against the danger of the rewriting the HKBL through legislative interpretation of the HKBL and thus altering the fundamental framework of the HKSAR. By examining the BITs of China and the HKSAR with Thailand, this article found that different approaches toward investor-state arbitration are adopted by China and the HKSAR. Therefore, "one country, two state immunity doctrines" is in fact being practiced by China and the HKSAR. Finally, the proposition of "one country, two state immunity doctrines" does not contravene international law as international law does not prescribe which organ is competent to decide on state immunity doctrine. It is an issue to be resolved by a state in accordance with its constitutional design. Further, the HKSAR, as a subdivision of China, can claim state immunity when exercising sovereign authority, as confirmed by the UNJISTP. The same right enables the HKSAR to adopt and maintain a restrictive immunity policy by virtue of international agreements, contracts and declarations.

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「一國、兩國家豁免理論」： 剛果案的多元主義觀點

吳建輝

摘要

本文藉由 *Democratic Republic of the Congo v. FG Hemisphere Associates LLC* (剛果案) 一案之案例分析，探求香港特別行政區在一國兩制下，採取不同於中國之絕對國家豁免理論，而採取限制豁免理論之可能性。在此架構下，本文試圖形塑一國兩豁免理論之解釋空間。本文首先追溯中國對外在國家豁免之長期立場，以及其近來簽署聯合國國家及其財產管轄豁免公約以及通過外國中央銀行財產司法強制措施豁免法等之政策轉變。其次，本文以非洲之外債困境以及中國在非洲影響力劇增所產生之爭議為背景，勾勒剛果案之背景，進而分析在香港初審法院，上訴法院以及終審法院對於剛果案之不同見解，最後，並檢驗在中國全國人民代表大會常務委員會對於基本法之解釋文發表後，香港終審法院之回應。本文從不同法律與政策之角度，析論一國兩豁免理論並未減損中國之主權，且與國際法不相牴觸，並符合香港之普通法傳統。就政策面而言，此項立場除有利於香港之法律與仲裁服務發展，香港之對外關係，並有助於保障中國之對外投資。

關鍵詞： 國家豁免，國家行為，香港基本法，一國兩制，外交事務，對外事務，權限分配，剛果案，聯合國國家及其財產管轄豁免公約