RECENT DEVELOPMENTS

Democratic Republic of the Congo v. FG Hemisphere Associates LLC: Hong Kong Conforms with China by Repudiating the Common Law Commercial Exception to Sovereign Immunity

I. OVERVIEW

In the landmark noted case, Hong Kong's Court of Final Appeals curtailed the Region's jurisdiction to hear disputes and enforce awards against foreign states.[1] Energoinvest extended credit to the Democratic Republic of the Congo (Congo) in 1980 and 1986 to construct a hydroelectric facility and electric lines.[2] After the Congo defaulted on its repayment in 2001, Energoinvest secured two arbitration awards in France and Switzerland.[3] In 2004, Energoinvest assigned both awards plus accruing interest to FG Hemisphere Associates LLC (Hemisphere).[4] In an unrelated 2008 development agreement between China and the

1. Democratic Republic of the Congo v. FG Hemisphere Assocs. LLC, [2011] 1 H.K.C.F.A. 41 at [524] (C.F.A).

2. *See id.* at [185]-[186] ("Each contract contained an agreement for arbitration to be held in Paris and Zurich respectively under ICC Paris rules and applying Swiss law."). Pursuant to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (N.Y. Convention), the International Chamber of Commerce (ICC) Rule 28.6 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." *Id.* at [375].

3. The awards were granted on April 30, 2003, in the sums of $11.725 million USD and $18.43 million USD with interest on those amounts. *Id.* at [187].

4. *Id.* at [188].

Congo, the state-owned China Railway Group and its subsidiaries agreed to pay entry fees of $221 million USD for extensive mineral rights in the Congo.[5] Since the transaction would occur in Hong Kong, Hemisphere contended in an ex parte application that these pending entry fees represent an asset of the Congo within Hong Kong subject to enforcement of its arbitral awards.[6] In mid-2008, Justice Saw issued an interim injunction to prevent China's payment and granted Hemisphere leave to enforce the arbitral awards in Hong Kong.[7] China intervened in the suit through its Office of the Commissioner of the Ministry of Foreign Affairs (OCMFA), issuing a letter stating China's "consistent and principled position" of absolute immunity.[8]

In November 2008, the Court of First Instance (CFI) held that the Congo was immune from suit in Hong Kong because the entry fee transactions were not commercial, but were more characteristic of sovereign, inter-state arrangements.[9] In response to the CFI's comment on China's contradictory participation in the U.N. Convention on Immunities,[10] the OCMFA issued a second letter explaining China's signatory status in the restrictive immunity regime, stating that "until now China has not yet ratified the Convention, and the Convention . . . has no binding force on China."[11] The Court of Appeal of the Hong Kong

5. *Id.* at [190]-[193].

6. *Id.* at [194].

7. *Id.*

8. *Id.* at [197] (citing Letter from the OCMFA to the Constitutional and Mainland Affairs Bureau of the HKSAR Government (Nov. 20, 2008) (on file with Court of First Instance)) [hereinafter First OCMFA Letter] ("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.").

9. *Id.* at [198] (citing FG Hemisphere Assocs. LLC v. Democratic Republic of Congo, [2009] 1 H.K.L.R.D. 410, [89] (C.F.I.) (Reyes, J.)); *see also FG Hemisphere*, [2009] 1 H.K.L.R.D. 410, [71] (Reyes, J.) (adding his "provisional view" that restrictive immunity applies in Hong Kong).

10. *FG Hemisphere*, [2011] 1 H.K.C.F.A. 41 at [201] (citing *FG Hemisphere*, [2009] 1 H.K.L.R.D. 410 at [64]-[65], [81])). Justice Reyes was troubled that the Letter did not discuss China's September 2005 signing of the United Nations Convention on Jurisdictional Immunities of States and Their Property 2004, which adopts a restrictive approach to state immunity. Even though he noted that the U.N. Convention had not secured sufficient signatories to enter into force, Judge Reyes 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." *FG Hemisphere*, [2009] 1 H.K.L.R.D. 410 at [65].

11. *FG Hemisphere*, [2011] 1 H.K.C.F.A. 41 at [202] (citing Letter from the OCFMA to the Constitutional and Mainland Affairs Bureau of the HKSAR Government (May 21, 2009) (on file with Court of Appeal)) [hereinafter Second OCMFA Letter] ("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.'").

Special Administrative Region (Court of Appeal) reversed the CFI's decision in February 2010, holding that restrictive immunity still applies in Hong Kong under customary international law.[12] In response to the Court of Appeal's assertion that restrictive immunity in Hong Kong would not infringe upon or prejudice the sovereignty of China,[13] the OCMFA issued a third letter refuting the contention, stating, "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."[14] In June 2011, the Court of Final Appeal (CFA) provisionally *held* that, as a matter of foreign policy, Hong Kong must comply with China's doctrine of absolute immunity and referred the provisional judgment to China for interpretation.[15] *Democratic Republic of the Congo v. FG Hemisphere Associates LLC*, [2011] 1 H.K.C.F.A. 41 (C.F.A).

II. BACKGROUND

A. Absolute and Restrictive Immunity: The Commercial Exception

Scholars dispute whether concepts of equality among states, promotion of reciprocal relations, or territoriality predicate historical grants of sovereign immunity.[16] Traditional common law recognized the doctrine of absolute immunity, granting foreign states complete immunity from domestic proceedings.[17] The doctrine of restrictive

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12. *Id.* (citing FG Hemisphere Assocs. LLC v. Democratic Republic of Congo, [2010] 2 H.K.L.R.D. 66 at [253] (C.A.)).

13. *Id.* at [208].

14. *Id.* at [211] (quoting Letter from the OCMFA to the Constitutional and Mainland Affairs Bureau of the HKSAR Government (Aug. 25, 2010) (on file with Final Court of Appeal)) [hereinafter Third OCMFA Letter].

15. In August 2011, China affirmed the provisional holding in the noted case, including the Court of Final Appeal's interpretation of the Basic Law. Democratic Republic of the Congo v. FG Hemisphere Assocs. LLC, [2011] 1 H.K.F.C.A. 67, [7] (C.F.A.).

16. The traditional view that foreign state immunity is a fundamental state right is echoed in the maxim *par in parem non habet imperium*, meaning "an equal has no power over an equal." BLACK'S LAW DICTIONARY 1673 (7th ed. 1999), *quoted in* Lee M. Caplan, *State Immunity, Human Rights, and* Jus Cogens: *A Critique of the Normative Hierarchy Theory*, 97 AM. J. INT'L L. 741, 748, 755 (2003) ("[R]espect for the coequal status of a foreign sovereign state serves typically as the primary motivation for granting immunity privileges."). *But see* Hersch Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 BRIT. Y.B. INT'L L. 220, 229 (1952) ("[T]he governing . . . principle is not the immunity of the foreign state but the full jurisdiction of the territorial state . . . .").

17. The Schooner Exchange v. McFaddon, 11 U.S. (7 Cranch) 116, 136 (1812); Cia Naviera Vascongado v. S.S. Cristina, [1938] A.C. 485 (H.L.) 490, 497-98 (Eng.); *see* MALCOLM N. SHAW, INTERNATIONAL LAW 331, 494 (4th ed. 1997) ("The relatively uncomplicated role of the

immunity, on the other hand, excludes a foreign state's private or commercial acts from immunity protection.[18] Common law courts began distinguishing between sovereign public and private acts because "the sovereign, in effect, descends from his throne when operating as a merchant and thereby subjects himself to the local laws of the forum state."[19] Courts reasoned further that the doctrine of restrictive immunity facilitates fairness in commercial dealings without affronting the dignity of the state.[20] Common law courts recognize that each country "delimits for itself the bounds of and exceptions to sovereign immunity."[21] In general, western democracies embraced the shift in the customary international law toward restrictive immunity while many developing nations and former communist states retain absolute immunity.[22] Following British lead, Hong Kong common law adopted the commercial exception to sovereign immunity in the 1970s.[23]

Since its establishment in 1949, the People's Republic of China has consistently and regularly objected to the restrictive immunity doctrine.[24]

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sovereign and of government in the eighteenth and nineteenth centuries logically gave rise to the concept of absolute immunity . . . .").

18. Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 487 (1983).

19. Caplan, *supra* note 16, at 754; *see also FG Hemisphere*, [2011] 1 H.K.C.F.A. 41 at [221] (quoting I Congreso del Partido, [1981] 1 A.C. 244, 262 (Eng.)) ("[Restrictive immunity] 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.").

20. *See, e.g.*, *I Congreso del Partido*, 1 A.C. 244 at 262D-E (reasoning that requiring a state to honor arbitral awards does not threaten the dignity of that state or interfere with its sovereign functions).

21. Trendtex Trading Corp. v. Cent. Bank of Nigeria, [1977] Q.B. 529 (D.C.) 552 (Eng.).

22. Robert S. Pé, *Sovereign Immunity in Hong Kong: The Absolute Doctrine Versus the Restrictive Doctrine*, 4 DISP. RESOL. INT'L 109, 109-10 (2010); *see also* Caplan, *supra* note 16, at 749 ("The restrictive view was antithetical to the prevailing socialist philosophy, which held that politics and trade were inseparable aspects of the socialist state; in essence, a socialist state acted qua state in all its dealings.").

23. *Trendtex*, [1977] Q.B. 529 at 555. The U.K. Parliament codified restrictive immunity in the State Immunity Act (SIA) of 1978, made applicable to Hong Kong through the State Immunity (Overseas Territories) Order 1979. *State Immunity Act*, NAT'L ARCHIVES, *available at* http://www.legislation.gov.uk/ukpga/1978/33/enacted (last visited Apr. 12, 2012) (granting immunity to sovereign states with exceptions for commercial transactions or situations where the state waived its immunity); *State Immunity (Overseas Territories) Order 1979*, NAT'L ARCHIVES, *available at* http://www.legislation.gov.uk/uksi/1979/458/body/made?view=plain (last visited Apr. 12, 2012).

24. *See* Jackson v. People's Republic of China, 550 F. Supp. 869, 873 (N.D. Ala. 1982); Jackson v. People's Republic of China, 794 F.2d 1490, 1494 (11th Cir. 1986); Morris v. People's Republic of China, 478 F. Supp. 2d 561, 563 (S.D.N.Y. 2007); *see also FG Hemisphere*, [2011] 1

As most countries' regimes transitioned to restrictive immunity, China continued to grant absolute immunity to impleaded States with the expectation of reciprocal treatment in foreign venues.[25] But in 2005, China signed the United Nations Convention on Jurisdictional Immunities of States and Their Property (U.N. Convention), which adopted a restrictive approach to state immunity.[26] China explained its signatory status as an effort to facilitate harmonious international relations, reminding critics that "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 . . . ."[27] Since signing the U.N. Convention, China continues to assert absolute immunity.[28]

States can grant immunity as a matter of comity and reciprocity, granting impleaded states the same immunity that the forum state would enjoy before the impleaded state.[29] Alternate mechanisms such as treaties, specialized international tribunals, and contractual waivers can also delimit the scope of immunity.[30] Additionally, states also often use arbitration clauses to circumvent "subjection to a foreign State court which may appear as an affront to its sovereignty."[31] Arbitration clauses are generally accepted as an implied waiver of immunity under

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H.K.C.F.A. 41 at [259] (stating China's stance on state immunity as a policy determination for the executive, with no national laws regulating the matter).

25. *FG Hemisphere*, [2011] 1 H.K.C.F.A. 41 at [211] ("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.").

26. United Nations Convention on Jurisdictional Immunities of States and Their Property of 2004, G.A. Res. 59/38, Annex, U.N. Doc. A/RES/59/49 (Dec. 2, 2004), *available at* http://untreaty.un.org/ilc/texts/instruments/english/conventions/4_1_2004.pdf (last visited Apr. 12, 2012).

27. *FG Hemisphere*, [2011] 1 H.K.C.F.A. 41 at [46].

28. *See* Second OCMFA Letter, *supra* note 11. Hong Kong courts held that that the Chinese government and its state entities enjoy absolute crown immunity before Hong Kong courts. Intraline Resources SBN BHD v. The Owners of the Ship or Vessel Hua Tian Long, [2010] H.C.A.J. 59, [125] (C.A.).

29. Under principles of international comity, "domestic courts generally should exercise restraint whenever their actions will cause violation of another nation's law." 48 C.J.S. *International Law* § 34 (2004).

30. China defends its adherence to absolute immunity by its frequent utilization of these methods. *See, e.g.*, *FG Hemisphere*, [2011] 1 H.K.C.F.A. 41 at [263] (citing the United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 3, 397 (1982)).

31. Pé, *supra* note 22, at 110 (quoting W. LAURENCE CRAIG, WILLIAM PARK & JAN PAULSSON, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION 661 (3d ed. 2000)).

customary international law[32] because requiring a state to honor an arbitral award related to its commercial acts neither threatens the dignity of that state nor interferes with its sovereign functions.[33] Although not mentioned in the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (N.Y. Convention), a nonsignatory state may be immune from arbitral enforcement proceedings on grounds of sovereign immunity.[34]

B. The Handover: "One Country, Two Systems"

Hong Kong's handover from the United Kingdom to China on July 1, 1997, sealed its status as "an inalienable part" of China.[35] The founding principle "one country, two systems" aimed to facilitate the coexistence of different economic systems within one country: China's socialist system and Hong Kong's capitalist system.[36] The handover was designed to reunite Hong Kong with China, but "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."[37] Characterized by political centralization, China had the difficult task of accommodating Hong Kong, "an entity governed by the common law with its emphasis on precedent, due process, an independent judiciary,

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32. HAZEL FOX, THE LAW OF STATE IMMUNITY 261 (2d ed. 2008). *But see* Duff Dev. Co. v. Gov't of Kelantan, [1924] A.C. 797 (H.L.) 829 (Eng.) (holding that the submission of a dispute to arbitration did not constitute an implied submission to the jurisdiction of the United Kingdom's courts).

33. *See FG Hemisphere*, [2011] 1 H.K.C.F.A. 41 at [160] (citing *I Congreso*, 1 A.C. 244 at 262D-E); *id.* at [161] (citing *The Altair*, [2008] 2 Lloyd's Rep. 90, [57]).

34. The Democratic Republic of the Congo is not a signatory to the N.Y. Convention. *See FG Hemisphere*, [2011] 1 H.K.C.F.A. 41 at [375] (imposing an obligation only upon state signatories to recognize and enforce foreign arbitral awards). *But see Duff Dev. Co.*, [1924] A.C. 797 at 829 (holding that submission of a dispute to arbitration did not constitute an implied submission to the jurisdiction of the United Kingdom's courts).

35. China's National People's Congress established the Hong Kong Special Administrative Region (HKSAR) pursuant to the Chinese Constitution. QINDING XIANFA DAGANG art. 31 (1982) (China) ("The state may establish special administrative regions when necessary."). After protracted negotiations, the United Kingdom and China agreed in a Joint Declaration that China would "resume the exercise of sovereignty over Hong Kong with effect from 1 July 1997." Joint Declaration on the Question of Hong Kong art. 1, China-U.K., Dec. 19, 1984, 1399 U.N.T.S. 61.

36. Deng Xiaoping, *Our Basic Position on the Question of Hong Kong* (1984), *reprinted in* DENG XIAOPING ON "ONE COUNTRY, TWO SYSTEMS" 13-18 (2004).

37. Ji Peng Fei, Chairman of the Basic Law Drafting Committee, Speech to the Third Session of the Seventh National People's Congress (Mar. 28, 1990), *available at* www.hku.hk/law/conlawhk/sourcebook/10018.htm (last visited Apr. 12, 2012); *see also* HKSAR v. Ng Kung Siu, [1999] 2 H.K.C.F.A.R. 442, 447, 460-61 (recognizing national reunification and territorial integrity as important themes underlying China's recovery of Hong Kong).

and judicial review."[38] The Basic Law, Hong Kong's mini-constitution, codified the terms of the framework for this structure which lacked any guiding precedent.[39]

Hong Kong retained prehandover common law except for any laws that "contravene" the Basic Law.[40] Chief Justice Chan stated "the intention of the Basic Law is clear. There is to be no change in our laws and legal system . . . . Continuity is the key to stability. Any disruption will be disastrous."[41] Hong Kong's courts similarly adopted a common law approach to the interpretation of the Basic Law, considering the language of its articles in the light of its context and purpose.[42] Posthandover courts had the "'responsibility and, indeed, the duty' to develop the common law of Hong Kong 'so as to meet the changing needs of the society in which [they] function.'"[43]

China authorized 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 the Law."[44] Hong Kong's courts displayed progressive judicial independence from China after the handover.[45] For example, the

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38. Lorenz Langer, *The Elusive Aim of Universal Suffrage: Constitutional Developments in Hong Kong*, 5 INT'L J. CONST. L. 419, 441 (2007). As the High Court's Chief Judge cautioned, "Even one moment of legal vacuum may lead to chaos. Everything relating to the laws and the legal system . . . has to continue to be in force. The existing system must already be in place on 1st July 1997." Hong Kong v. Ma Wai Kwan, [1997] 1 H.K.L.R.D 761, 774D (C.A.) (Chan, J.) (referring to Basic Law art. 160).

39. The Basic Law was promulgated on April 4, 1990, in its Chinese version, which, in cases of conflict, prevails over the official English version adopted on June 28, 1990, by the Standing Committee of the National People's Congress. XIANGGANG JIBEN FA art. 1 (H.K.); *see also* Langer, *supra* note 38, at 427.

40. XIANGGANG JIBEN FA art. 8 (H.K.); *see also id.* art. 84 (recognizing the right to refer to the precedents of other common law jurisdictions).

41. *Ma Wai Kwan*, [1997] H.K.L.R.D. 761 at 774D-E.

42. Dir. of Immigration v. Chong Fung Yuen, [2001] 4 H.K.C.F.A.R. 211, 223-224 (C.F.A.); RV v. Dir. of Immigration, [2008] 4 H.K.L.R.D. 529, 544 (C.F.A.) (recognizing that the Basic Law aims to provide for continuity between the pre-handover and present judicial systems).

43. Oliver Jones, *In Defence of Crown Liability*, HONG KONG LAW 41, 41-47 (2011) (quoting Hong Kong v. Hung Chan Wa, [2006] 9 H.K.C.F.A.R. 614, [33] (C.F.A.)), *available at* http://law.lexis.com/webcenters/hk/Hong-King-Lawyer-/In-defence/of-crown-liability.

44. XIANGGANG JIBEN FA art. 2 (H.K.); *see id.* art. 85 ("The courts of the Hong Kong Special Administrative Region shall exercise judicial power independently, free from any interference."). Mr. Ji Peng Fei, the Chairman of the Basic Law Drafting Committee, commented, "This is certainly a very special situation wherein courts of a local administrative region enjoy the power of final adjudication." Democratic Republic of the Congo v. FG Hemisphere Assocs. LLC, [2011] 1 H.K.C.F.A. 41, [39] (C.F.A.).

45. *FG Hemisphere*, [2011] 1 H.K.C.F.A. 41 at [61] (citing JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW 251-52 (2d ed. 2006) ("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

CFA declared that Hong Kong's courts have the duty to review Chinese legislative acts for consistency with the Basic Law, asserting authority to strike them down if necessary.[46]

Article 158 of the Basic Law vests the power of interpretation of the Basic Law in Hong Kong's courts, but there are "excluded provisions" which may require an interpretation from China's Standing Committee of the National People's Congress (SCNPC).[47] Hong Kong's duty to refer a Basic Law provision to the SCNPC for interpretation arises if two conditions are met:

(i) that there is in question a Basic Law provision which is an "excluded provision" [meaning] affairs which are the responsibility of [China] or concerns the relationship between the [Chinese] Central Authorities and Hong Kong; and
(ii) that the court needs to interpret that provision and the interpretation will affect its judgment.[48]

In other words, Hong Kong's judiciary has the power to determine whether an issue requires China's guidance.[49] Though the SCNPC has issued several interpretations before, Hong Kong's judiciary had never referred a question to China for a binding decision.[50]

The Basic Law requires that China first seek proper consultation and consideration of Hong Kong's circumstances and needs before

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Court of Final Appeal has also had to apply human rights treaties and has consistently given a progressive interpretation to them.")).

46. Ng Ka Ling v. Dir. of Immigration, [1999] 2 H.K.C.F.A.R. 4 at [21] (C.F.A.); Langer, *supra* note 38, at 442 (quoting Hongshi Wen, *Interpretation of Law by the Standing Committee of the National People's Congress*, *in* HONG KONG'S CONSTITUTIONAL DEBATE: CONFLICT OVER INTERPRETATION 184-92 (Johannes Chan et al. eds., 2000) ("This muscular approach soon led to strong criticism by the Central Authorities, with mainland legal scholars as its vanguard. They claimed that by exercising constitutional jurisdiction, the CFA had tried to assume 'the nature of a sovereign power,' extending 'its jurisdiction to Beijing.' Such an approach was 'ridiculous,' as China was a unitary country; sovereignty, the scholars maintained, was inalienable and could only be exercised by the CPG.")).

47. XIANGGANG JIBEN FA art. 158(3) (H.K.).

48. *Ng Ka Ling*, [1999] 2 H.K.C.F.A.R. 4 at [89] (holding that it is the court's duty to decide whether, in adjudicating a case, an interpretation had to be sought from the SCNPC under article 158(3) of the Basic Law).

49. *See id.*

50. *FG Hemisphere*, [2011] 1 H.K.C.F.A. 41 at [60] (citing Sec'y of State for Foreign and Commonwealth Affairs, *Six-Monthly Report on Hong Kong Presented to Parliament by the Secretary of State for Foreign and Commonwealth Affairs*, COMMAND PAPERS 8052 (2011)); *see also* CRAWFORD, *supra* note 45, at 251-52 ("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.").

applying its national laws or international agreements to the Region.[51] China retained exclusive control over matters of foreign affairs or defense.[52] The U.K.'s Sovereign Immunity Act applied restrictive immunity to Hong Kong before the handover, but it ceased to have effect after the handover on July 1, 1997.[53] The Hong Kong Legislative Council (Legco) and Sino-British Joint Liaison Group (JLG) failed to localize posthandover legislation on immunity, primarily due to China's sovereignty concerns.[54] China never codified a national law on immunity, so "[t]he common law, which in a constitutional context includes judicially developed equity, covers everything which is not covered by statute. It knows no gaps . . . ."[55] As described above, Hong Kong common law has recognized the commercial exception to state immunity since the 1970s.[56]

C. Foreign Policy and Executive Acts of State

States diverge in opinion on the source of sovereign immunity and therefore authorize differing branches of government to determine its applicable state immunity doctrine.[57] Many common law judiciaries continue to determine the bounds of state immunity as a matter of law, with some treatises asserting that "state immunity is a rule of law not one

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51. Eric T.M. Cheung, *Undermining Our Judicial Independence and Autonomy*, 41 H.K. L. J. 411, 417 (2011) (citing XIANGGANG JIBEN FA art. 153 (H.K.)).

52. *See* XIANGGANG JIBEN FA art. 19 (H.K.). Hong Kong similarly lacked jurisdiction over matters of foreign affairs and defense under British rule. *FG Hemisphere*, [2011] 1 H.K.C.F.A. 41 at [347].

53. Hong Kong Act, 1985, c.15 (Eng.) ("As from 1st July 1997 Her Majesty shall no longer have sovereignty or jurisdiction over any part of Hong Kong.").

54. Oliver Jones, *Let the Mainland Speak: A Positivist Take on the* Congo Case, 41 H.K. L. J. 177, 183 (2011). The JGL "was a consultation or discussion group between Beijing and London that aimed to deal on an ongoing basis with issues relating to the handover." *Id.*; *see also FG Hemisphere*, [2011] 1 H.K.C.F.A. 41 at [371] ("On March 3, 1997, it was reported that the state immunity proposal was still outstanding. Then in a paper prepared for a Lego Constitutional Affairs Panel meeting to be held on June 16, 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.'" (quoting Legco reports)).

55. *FG Hemisphere*, [2011] 1 H.K.C.F.A. 41 at [495] (Mortimer, J., dissenting).

56. *See* Trendtex Trading Corp. v. Cent. Bank of Nigeria, [1977] Q.B. 529 (D.C.) 555 (Eng.).

57. There is a divide between "civil law countries [which] deem state immunity generally to be a principle of customary international law that must be applied domestically by national courts . . . [while] common law countries place more emphasis on regulating state immunity through domestic legislation, not customary international law." *See* Caplan, *supra* note 16, at 762; *see also FG Hemisphere*, [2011] 1 H.K.C.F.A. 41 at [233].

of executive discretion."[58] The U.K. executive never declared state immunity as a matter of policy.[59] China, on the other hand, asserts that the determination is a matter of foreign policy for the executive.[60]

Article 19(3) of the Basic Law precludes the Hong Kong judiciary from exercising jurisdiction over "acts of state such as defence and foreign affairs."[61] Hong Kong courts must obtain a certificate on "questions of fact concerning acts of state" from its Chief Executive (CE) who is appointed by China.[62] The CE then obtains a certifying document from China's Central People's Government (CPG) before issuing the binding certificate to Hong Kong.[63] "Acts of state" are defined as "facts, circumstances, and events which lie at the root of foreign affairs . . . and facts which are peculiarly within the cognisance of the Executive."[64] Requiring executive guidance on acts of state guarantees "that the courts of the Region can conduct their functions in the normal way," mirroring Hong Kong's pre-handover procedure.[65]

Before the handover, Hong Kong deferred to the U.K.'s Secretary of State for Foreign and Commonwealth Affairs for statements of fact regarding foreign affairs.[66] Common law policy requires that the judiciary and executive speak with "one voice" on acts of state or foreign affairs.[67] The practice seeks to "avoid[] major, and possibly

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58. FOX, *supra* note 32, at 13; *see, e.g.*, Harbhajan Singh Dhalla v. Union of India, (1987) 9 S.C.R. 114 (India); Gov't of Canada v. Emp't Appeals Tribunal, [1992] 2 I.R. 484 (Ir.).

59. *FG Hemisphere*, [2011] 1 H.K.C.F.A. 41 at [485] (Mortimer, J., dissenting) ("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.").

60. *Id.* at [211]. In China's view, 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. *Id.* at [279].

61. XIANGGANG JIBEN FA art. 19(3) (H.K.).

62. *Id.*

63. *Id.*

64. *FG Hemisphere*, [2011] 1 H.K.C.F.A. 41 at [295] (quoting F.A. MANN, FOREIGN AFFAIRS IN ENGLISH COURTS 23 (1986)).

65. *See id.* at [39]; *see also id.* at [298] ("[T]he 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.").

66. 1 OPPENHEIM'S INTERNATIONAL LAW 1046-47 (Robert Jennings & Arthur Watts eds., 9th ed. 1992).

67. Taylor v. Barclay, [1828] 2 Sim. 213, 221 (Eng.) ("[S]ound policy requires that the Courts of the King should act in unison with the Government of the King.").

internationally damaging, divergencies between decisions taken by national courts and the views of the government of the state on matters affecting international relations."[68] Common law judiciaries typically seek executive determination for questions of territory or recognition of another's sovereignty.[69]

III. THE COURT'S DECISION

In the noted case, the CFA adopted the doctrine of absolute immunity as "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."[70] In a 3-2 decision, the majority declared that Hong Kong would no longer recognize the commercial exception to immunity, reasoning that Hong Kong cannot adhere to a doctrine of state immunity that conflicts with China's. The CFA then referred the question of immunity to China for its binding interpretation.[71]

The majority states the central issue as "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?"[72] Allocating immunity determinations to either the executive, legislative, or judicial branches is a matter for each country to decide according to its constitutional allocation of powers and its perception of its own foreign policy interests.[73] The majority determined that recognition or nonrecognition of a commercial exception to absolute state immunity is an "act of state,"[74] and accepted China's OCMFA letters as "authoritative statements of facts within the peculiar cognizance of the executive organ of government having charge of the nation's foreign policy."[75]

The majority concluded that Hong Kong's "municipal courts are simply not equipped to make such a judgment, lacking relevant

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68. 1 OPPENHEIM'S, *supra* note 66, at 1050-51 (citations omitted).

69. For examples of recognition cases, see Rio Tinto Zinc Corp. v. Westinghouse Electric Corp., [1978] A.C. 547 (Eng.); Duff Development Co. v. Kelantan, [1924] A.C. 797 (Eng.).

70. *FG Hemisphere*, [2011] 1 H.K.C.F.A. 41 at [226].

71. *Id.* at [183].

72. *Id.* at [233] (citing Third OCMFA Letter).

73. *Id.*

74. *See id.* at [327] ("[T]he 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."); *see also id.* at [265] ("[T]he 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.").

75. *Id.* at [363].

information and being ill-placed to gauge the full implications of adopting any specific policy on state immunity."[76] The court cites Hong Kong's status as a local administrative region as the reason 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."[77] If the executive branch can recognize the sovereignty of other states, the majority "fail[ed] to see why it should not equally be for the executive to determine what exceptions may exist to the grant of such immunity."[78] For the first time, the court found a duty to refer questions of interpretation of the Basic Law articles 13(1) and 19 to China's SCNPC as matter exceeding its discretion.[79]

The majority conceded that under common law, the rule of restrictive immunity retained effect in posthandover Hong Kong.[80] But, upon a statutory parsing of the Basic Law, the 1997 Decision and the Interpretation and General Clauses Ordinance, the court reasoned that "the [common law] commercial exception, being a doctrine inconsistent with that adhered to by the PRC, can no longer be maintained."[81] Any

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76. *Id.* at [281]. The majority notes that it is difficult to differentiate between commercial and sovereign acts. *Id.* at [283].

77. *Id.* at [268].

78. *Id.* at [241]; *see also id.* at [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.").

79. The question sought by the CFA is 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. Article 19(3) of the Basic Law provides that the courts of the HKSAR shall have no jurisdiction over acts of state such as defense and foreign affairs. The interpretive question sought is 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." *Id.* at [407].

80. *Id.* at [222] ("[O]n 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.").

81. *Id.* at [336] (listing ordinances, items of subsidiary legislation, and particular legislative provisions previously in force in Hong Kong that contravene the Basic Law). On February 23, 1997, the SCNPC 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 was formally adopted at the Twenty Fourth Session of the Standing Committee of the Either National People's Congress, substantially reproduced in the Interpretation and General Clauses Ordinance, § 2A Cap. 1.

> [P]rovisions relating to foreign affairs in respect of the Hong Kong Special Administrative Region which are inconsistent with any national law applied in the [HKSAR] shall be construed subject to that national law and shall be so construed as to

inconsistent policy on state immunity "would embarrass and prejudice the State in its conduct of foreign affairs."[82] To illustrate, the court cites Hong Kong's inability to assert state immunity in foreign courts, instead relying on China to assert absolute immunity for the Region.[83] Inconsistent immunity regimes also present the risk that states dealing with Hong Kong could "adopt reciprocal measures to China 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."[84]

Presented as a side issue, the court refutes Hemisphere's contention that the Congo impliedly waived immunity by agreeing to arbitrate under the ICC pursuant to the N.Y. Convention.[85] The majority characterized arbitration agreements as mere contractual obligations, rather than submission to another state's jurisdiction.[86] Henceforth, impleaded states in Hong Kong will be immune from enforcement proceedings unless they intentionally (1) waive jurisdictional immunity and (2) waive immunity from execution against its assets.[87] To ensure the waiver is intentional, it must be made before the court as "an unequivocal submission to the jurisdiction of the forum State at the time when the forum State's jurisdiction is invoked against the impleaded State."[88]

Justices Bokhary and Mortimer vigorously dissent, urging for judicial independence and retention of Hong Kong's unique "one country, two systems." Both argue that the immunity issue falls into the latter "systems" category, allowing for judicial procedures distinct from those

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> be consistent with the international rights and obligations of the Central People's Government of the People's Republic of China . . . .

Id. at [315].

82. *Id.* at [269] (citing 1 OPPENHEIM'S, *supra* note 66, at 1050-51). The majority deferred to China's assertion that "the overall power and capacity of the Central People's Government in uniformly conducting foreign affairs would be subjected to substantial interference," and obviously prejudice the sovereignty of China. *Id.* at [211] (citing Third OCMFA Letter, *supra* note 14). The majority accepts China's conclusions that divergent approaches to immunity would (1) interfere with China's capacity to uniformly conduct foreign affairs, (2) undermine China's consistent claim to absolute immunity in international law, (3) render China responsible for impleaded states, (4) expose China to the risk of being impleaded and its property attached, and (5) hamper trade. *See id.* at [290] (citing Third OCMFA Letter, *supra* note 14).

83. *Id.* at [334].

84. *Id.* at [211] (quoting Third OCMFA Letter, *supra* note 14). For an explanation of reciprocal state immunity, see Lauterpacht, *supra* note 16, at 229.

85. *See id.* at [377].

86. *Id.*

87. *Id.* at [379].

88. *Id.* at [392].

of mainland Chinese courts.[89] Justice Mortimer stressed that "[t]he 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."[90] Because Hong Kong developed a judicial common law doctrine of restrictive immunity before the handover, immunity determinations must fall outside the ambit of foreign affairs over which China has exclusive control.[91] Justice Bokhary agreed that "[u]nder 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."[92]

IV. ANALYSIS

The decision in the noted case weakened Hong Kong's systematic autonomy. In an uncharacteristic display of judicial dependence on China, the majority acceded to China's assertion that immunity determinations are a matter of foreign affairs outside of Hong Kong's discretion.[93] The majority is unduly influenced by China's intervention in the noted case, citing the OCMFA letters as authority throughout the decision instead of common law precedent.[94] The letters are not binding. As noted in the Court of Appeal's decision, "the [Chinese] 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."[95] The majority

89. *Id.* at [525] (Mortimer, J., dissenting).

90. *Id.* at [440].

91. *Id.* at [442]-[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.").

92. *Id.* at [123].

93. *Id.* at [226].

94. *See* Pé, *supra* note 22, at 119 ("[T]he fact that the first instance judge and a majority of the Court of Appeal decided that the 2008 Ministry of China in Hong Kong Letter did not have any binding effect, clearly showed the Hong Kong courts to be exercising judicial independence."). The majority even embraces China's assertion that other means for resolving disputes involving foreign states "may quite properly be regarded as preferable to allowing domestic courts to implead foreign States." *FG Hemisphere*, [2011] 1 H.K.C.F.A. 41 at [282].

95. FG Hemisphere Assocs. LLC v. Democratic Republic of Congo, [2010] H.K.L.R.D. 66 at [465] (C.A.). The majority draws a failed analogy to a recognition case where the court deferred to executive letters. *FG Hemisphere*, [2011] 1 H.K.C.F.A. 41 at [246] (quoting Rio Tinto Zinc Corp. v. Westinghouse Electric Corp, [1978] A.C. 547, 650-61 (Eng.) ("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

fails to question China's claims of prejudice and interference with "the overall power and capacity of the Central People's Government in uniformly conducting foreign affairs."[96] As noted by the CFI, this claim rings hollow due to China's own participation in the U.N. Convention, which adopted restrictive immunity.[97]

In response to compelling arguments that China would not be prejudiced by Hong Kong's commercial exception,[98] the court merely cites its inability to question China's foreign policy "which obviously differs from many other countries' foreign policy."[99] But China's foreign policy regarding immunity (as displayed in the OCMFA letters) is a maze of contradictory arguments.[100] The decision appears to create a safe haven for sovereign commercial assets in Hong Kong, likely granting further protection to China's rapidly-expanding development agreements with Africa.[101] State parties such as the Congo are notorious for hiding behind corporate structures, playing "an elaborate game of 'cat and mouse' . . . in the courts throughout the world."[102] In its final letter to the court, China itself admits that Hong Kong's continued recognition of the commercial exception jeopardizes Chinese investment in countries like the Congo.[103]

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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.")).

96. *FG Hemisphere*, [2011] 1 H.K.C.F.A. 41 at [211].

97. *See* FG Hemisphere Assocs. LLC v. Democratic Republic of Congo, [2009] H.K.L.R.D. 410 at [64]-[65], [81].

98. Lord Pannick, arguing for Hemisphere, claimed that China's assertion of prejudice through retaliatory measures was "unrealistic" because Hong Kong's recognition of the commercial exception "would not put the PRC in breach of any treaty of other international obligations." *FG Hemisphere*, [2011] 1 H.K.C.F.A. 41 at [289]. Furthermore, Pannick argued, "[T]here is no actual example of any such retaliation." *Id.*

99. *Id.* at [280], [211] (citing Third OCMFA Letter, *supra* note 14) ("Supporting the economic development of developing states has also been one of the foreign policies of China.").

100. China denigrates the use of vulture funds. Third OCMFA Letter, *supra* note 14 ("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. . . ."); *see also* Second OCMFA Letter, *supra* note 11 (stating that it adopted the U.N. Convention's restrictive immunity regime to facilitate trade). *But see* Third OCMFA Letter, *supra* note 14 (asserting that vulture fund plaintiffs like Hemisphere threaten China's financial stake in developing countries and that reciprocal claims of restrictive immunity would hamper trade).

101. *See* Darius Chan, *Has Hong Kong Conceded an Own Goal Against Singapore?*, SINGAPORE LAW WATCH (2011).

102. Walker Int'l v. Republique Populaire du Congo, [2005] E.W.H.C. 2813, [16] (Eng.).

103. *FG Hemisphere*, [2011] 1 H.K.C.F.A. 41 at [290] (citing Third OCMFA Letter, *supra* note 14) (stating that a divergent approach to immunity "would hamper . . . [the] economy and trade between China and its foreign trading and investment partners, as illustrated by the present

By unflinchingly accepting China's foreign policy arguments, the majority failed to recognize Hong Kong's unique position of autonomy. Instead, the majority endorsed the Court of Appeal's dissenting judgment: "When it comes to foreign affairs of which state immunity is one aspect, there is simply no room for 'two systems' at all."[104] To illustrate this point, the court erroneously compares Hong Kong's judiciary to other countries, stating, "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."[105] However, Hong Kong's unprecedented and unique "one country, two systems" principle guaranteed the judiciary's ability to function in the pre-handover "normal way," which left state immunity determinations to the judiciary. The decision in the noted case severs the continuity of pre-handover common law within the present judicial system.[106] The decision "must be regarded as a watershed event. The judicial system of [Hong Kong] and the legal system of mainland China [will] become conjoined."[107] While only affecting enforcement against state assets located in Hong Kong, the decision portends "the 'incoming tide' of mainland Chinese legis-prudence flowing towards the now open gateway."[108]

The court's application of the Basic Law failed on several grounds.[109] First, the court should have harnessed Article 22(1) of the Basic Law that prohibits Chinese interference in affairs within Hong Kong's sphere of autonomy.[110] In addition, the majority erroneously states, "There can be little doubt that if a national state immunity law were to come into existence, it would be applied to the HKSAR."[111] But the Basic Law requires that China consult with Hong Kong before applying any national laws or international agreements to the Region.[112] For example, China's bilateral treaties with hundreds of other countries

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case, where the plaintiff seeks to implead the [Congo] and attach funds originating from China earmarked for the development scheme negotiated between the PRC and the [Congo].").

104. *FG Hemisphere*, [2010] 2 H.K.L.R.D. 66 at [226] (Yeung J., dissenting).

105. *FG Hemisphere*, [2011] 1 H.K.C.F.A. 41 at [321].

106. *See id.* at [76] ("The Basic Law . . . aims to provide continuity between the pre-handover and present judicial systems.").

107. P.Y. Lo, *The Gateway Opens Wide*, 41 H.K. L. J. 385, 391 (2011).

108. *Id.*

109. *See* Jones, *supra* note 43.

110. The court briefly cites article 22(1) of the Basic Law but does not rely on it. *FG Hemisphere*, [2011] 1 H.K.C.F.A. 41 at [317].

111. *Id.* at [370].

112. XIANGGANG JIBEN FA arts. 18, 158.

contain waivers of absolute immunity, but these international agreements do not apply to Hong Kong pursuant to article 153.[113] As a result of the decision in the noted case, these countries will enjoy absolute immunity in Hong Kong for any commercial activities, but must submit to the jurisdiction of Chinese courts for these same commercial activities.[114] This is hardly consistent with the "one state, one immunity" concept espoused by the majority.[115]

The court diminished its own judicial autonomy and authority by concluding that it had a duty to refer "questions of fact" to China for interpretation.[116] It failed to correctly apply the two-prong test set forth in *Ng Ka Ling v. Director of Immigration* that requires that the question be (1) related to foreign affairs or concerning the relationship between China and Hong Kong and (2) necessary to the judgment on the case.[117] First, the majority erroneously interpreted the determination of immunity as an "act of state" that falls within China's control as a matter of foreign affairs, relying on the common law "one voice" principle.[118] But determining the applicable immunity doctrine does not require executive guidance under the "one voice" principle, which common law courts invoked for territory or recognition cases.[119] Second, the necessity condition is only met if the "interpretation will affect the judgment on the case."[120] Here, the majority has a thorough understanding of China's position on immunity as illustrated by their constant reference to the OCMFA letters. The judgment already comports with Chinese policy, so China's interpretation will not affect the outcome. The questionable referral might be a proactive attempt to minimize damage to Hong Kong's autonomy, which could suffer even greater damage if China independently denounced the CFA's judgment and failure to refer the immunity question to them.[121]

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113. Cheung, *supra* note 51, at 416-17 (citing XIANGGANG JIBEN FA art. 153 (H.K.)).

114. *Id.*

115. *Id.* (citing *FG Hemisphere*, [2011] 1 H.K.C.F.A. 41 at [333], [338]).

116. Benny Y.T. Tai, *The Constitutional Game of Article 158(3) of the Basic Law*, 41 H.K. L. J. 377, 380 (2011) ("On the one hand, the CFA will not be making the final ruling on all legal issues in the case. That will hurt the CFA's judicial authority. On the other hand, the final interpretation of the relevant provisions of the Basic Law will be given by the SCNPC, which is not a judicial body. That will hurt the CFA's judicial autonomy.").

117. *See* Ng Ka Ling v. Dir. of Immigration, [1999] 2 H.K.C.F.A.R. 4 at [89] (C.F.A.).

118. XIANGGANG JIBEN FA art. 19(3) (H.K.); *see, e.g.*, *FG Hemisphere*, 1 H.K.C.F.A. 41 at [233] (citing Duff Dev. Co. v. Gov't of Kelantan, [1924] A.C. 797 (H.L.) 829 (Eng.)).

119. 1 OPPENHEIM'S, *supra* note 66, at 1050-51.

120. *See Ng Ka Ling*, [1999] 2 H.K.C.F.A.R. 41 at [89].

121. Tai, *supra* note 116, at 383 ("If the CFA considers that such an interpretation by the SCNPC is probable and the damage which will result is higher than initiating the reference

The decision in the noted case undermines Hong Kong's appeal as a pro-enforcement jurisdiction where its "rule of law and freedom of information have supported its status as a financial center."[122] Now, parties dealing with sovereign governments "run[] the risk of not being able to seek the judicial assistance of the Hong Kong courts in aid of an arbitration against a state party seated in Hong Kong."[123] In response, individuals conducting business with foreign states in Hong Kong must make extensive credit inquiries. If the state's recoverable assets are located in Hong Kong, there is a high risk of nonrecovery especially when dealing with credit risks like the Congo.[124]

V. CONCLUSION

The decision in the noted case does not comport with the "one country, two systems" principle, but promulgates a bright-line rule of absolute immunity that could be praised for simultaneously appeasing China and facilitating judicial economy.[125] But the court fundamentally erred by requiring waivers to be made "in the face of the court."[126] The court should have *enabled* pre-dispute waivers of immunity and arbitration agreements to counterbalance Hong Kong's adoption of absolute immunity. "It 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."[127] Equally counterintuitive is that plaintiffs such as Hemisphere must now hope that

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procedure itself, seeking an interpretation from the SCNPC is a rational decision by the CFA under the constitutional game analytical framework.").

122. Debra Mao, *Hong Kong Top Court Blocks U.S. Fund's Bid to Seize Congo's China Assets*, BLOOMBERG, June 8, 2011, *available at* http://www.bloomberg.com/news/2011-06-08/hong-kong-top-court-blocks-u-s-fund-s-congo-china-suit-citing-immunity.html.

123. *See* Chan, *supra* note 101, at 3-4 ("Practitioners dealing with State counterparties should be slow to adopt a Hong Kong court jurisdiction clause since a State enjoys absolute immunity in Hong Kong.").

124. HERBERT SMITH ET AL., HONG KONG DISPUTE RESOLUTION BRIEFING 5 (2011) ("[I]n many cases the counterparty will have assets in other jurisdictions, many of which may adopt a restrictive immunity regime or a more permissive approach to express waivers, in which case enforcement in Hong Kong may be unnecessary.").

125. Determining whether the commercial exception applies on a case-by-case basis is time-intensive and leads to uncertain outcomes.

126. *FG Hemisphere*, [2011] 1 H.K.C.F.A. 41 at [386] n.170 (quoting Mighell v. Sultan of Johore, [1894] 1 Q.B.D. 149 at 161 (Eng.)) ("[T]he 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.").

127. *FG Hemisphere*, [2011] 1 H.K.C.F.A. 41 at [164] (citing FOUCHARD, GAILLARD AND GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 391 (Emmanuel Gaillard & John Savage eds., 1999)).

a sovereign defendant will submit to both jurisdiction and execution of awards after a dispute arises.[128] By nullifying written waiver agreements made by sophisticated parties, the court undermined the capitalist principle *pacta sunt servanda*, meaning that agreements should be kept.[129] Even with Hong Kong's pro-arbitration legislation and newly improved Arbitration Ordinance,[130] enforcing arbitral awards against foreign states remains contingent on gaining access to the court.[131] Businesses may instead opt for pro-enforcement forums like Singapore to protect their investments.[132]

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128. The dissenting judge in the noted case pointed out that "[a]ny 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." *FG Hemisphere*, [2011] 1 H.K.C.F.A. 41 at [530] (Mortimer, J., dissenting).

129. *FG Hemisphere*, [2011] 1 H.K.C.F.A. 41 at [48].

130. The new ordinance is modeled on the UNICTRAL Model Law. Arbitration Ordinance Cap. 609 (June 1, 2011), *available at* http://www.legislation.gov.hk/blis_pdf.nsf/6799165D2FEE3FA94825755E0033E532/C05151C760F783AD482577D900541075/$FILE/CAP_609_e_b5.pdf; *see* Justin D'Agostino, *What Does Hong Kong's New Arbitration Ordinance Mean in Practice?*, KLUWER ARBITRATION BLOG (Jan. 14, 2011), *available at* http://kluwer.practicesource.com/blog/2011/what-does-hong-kong's-new-look-arbitration-ordinance-mean-in-practice/ ("One of the central themes underpinning the new legislation is the notion of minimal court intervention, with provisions of the new Arbitration Ordinance vesting as much power as possible with arbitral tribunals.").

131. One of the few provisions of the UNICTRAL Model Law that Hong Kong's new Arbitration Ordinance did not adopt was the enforcement provision. Therefore, arbitral awards are enforceable in the same manner as a court judgment: leave of the court is required. Arbitration Ordinance Cap. 609 § 44.

132. *See* Svenska Petroleum Exploration AB v. Gov't of the Republic of Lithuania, [2006] E.W.C.A. Civ. 1529 (Sing.) (prohibiting foreign states from claiming immunity against award enforcement proceedings related to commercial transactions).

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