FOCUS
THE *CONGO* CASE

Introduction

The Hong Kong Court of Final Appeal's (CFA) decision in *Democratic Republic of Congo v FG Hemisphere Associates LLC*,[1] arrived at on 8 June 2011 by a narrow majority of 3 to 2, is undoubtedly a landmark case in the legal history of the Hong Kong Special Administrative Region (HKSAR). For the first time, the CFA made use of the procedure in Art 158(3) of the Basic Law of the HKSAR to refer Basic Law provisions to the Standing Committee of the National People's Congress (SCNPC) for interpretation. The case was mainly decided as a matter of constitutional law, particularly the constitutional relationship between the HKSAR and the Central People's Government (CPG) in Beijing, but it also has significant ramifications as regards the application of international law in the HKSAR.

The commentaries in this Focus section on the *Congo* case explore different dimensions of the case. Benny Tai seeks to understand the decision from the political science perspective of a "constitutional game". PY Lo analyses both the majority and minority judgments in this case which he describes as "a watershed event", and explores the "gateway" it opens to "mainland Chinese legisprudence". PJ Yap questions whether it was necessary for the CFA in this case to make a reference to the SCNPC, and suggests that it was possible for the CFA majority to arrive at the same decision simply on the basis of the common law. Tony Carty is critical of the CFA's decision – both the majority and minority – insofar as it fails to take seriously the relevant issues of international law and of the relationship between international law and domestic law. Eric Cheung is critical of the manner in which the CPG's Office of the Commissioner of Foreign Affairs in Hong Kong intervened in this case, as well as some aspects of the CFA decision. Finally, Simon Young expresses concern about the broader implications of the CFA decision in the *Congo* case regarding immunity from responsibility for human rights violations and from other processes under international law.

In this author's opinion, the following three features of the *Congo* decision are particularly significant. First, the majority of the CFA judges in this case not only referred the relevant Basic Law provisions to the SCNPC for interpretation, but also expressed their own views on the substantive questions concerned and rendered a provisional judgment

[1] [2011] 4 HKC 151.

in favour of the appellants. Secondly, on the issues of the "one voice" doctrine (i.e. the court and the executive speaking in one voice on particular matters of foreign affairs) and the "act of state", the majority judgment went beyond the existing English common law and modified or adapted it to the circumstances and context of the HKSAR as part of the People's Republic of China (PRC). Thirdly, the majority judgment in effect decided that in the domain of foreign sovereign immunity, the judicial practice required by the Basic Law is closer to the system that prevailed in the United States before its enactment of the Foreign Sovereign Immunities Act 1976 than that in the United Kingdom under English common law before its enactment of the State Immunity Act 1978. These three aspects are elaborated below.

Not Merely Reference to the SCNPC

Under Art 158(3) of the Basic Law, the CFA is obliged to refer what the CFA has called an "excluded provision" of the Basic Law to the SCNPC for interpretation once what the CFA has called the "necessity condition" and "classification condition" are satisfied.[2] There is nothing in Art 158 which suggests that the CFA is required or invited to express its opinions on how the excluded provision should be interpreted. This means that it would have been perfectly open to the CFA in the present case to keep silent on, and to remain neutral on, the interpretive questions concerned, and to postpone any judgment on the case (and not to render any provisional judgment or make any "provisional orders"[3]) until and unless the SCNPC pronounces on how the relevant Basic Law provisions should be interpreted.

It is significant that the majority of the CFA in the *Congo* case chose not to adopt this option, but clearly expressed its views on the interpretive questions concerned and rendered a provisional judgment[4] on the application of the Basic Law and other relevant laws to the facts of the case. This manner of dealing with a reference under Art 158(3) of the Basic Law set a precedent for the CFA to follow in future references. Commenting on a passage on the application of article 158 of the Basic Law in the CFA's judgment in *Ng Ka Ling*,[5] the CFA in the *Congo*

[2] The terms "excluded provision", "necessity condition" and "classification condition" were first used by the CFA in the *Ng Ka Ling* case (1999) 2 HKCFAR 4.

[3] See paras 408 and 415 of the judgment.

[4] The majority judgment described its conclusions as "necessarily tentative and provisional": para 183 of the judgment. After the SCNPC issued its interpretation on 26 Aug 2011, the CFA issued a judgment on 8 Sept 2011 declaring the provisional judgment final.

[5] (1999) 2 HKCFAR 4.

case said that "[i]t was not intended to preclude this Court from expressing its view on a question of interpretation which it is bound to refer and does refer to the SCNPC. The language of Article 158(3) plainly permits this Court to express its view on the question. What Article 158(3) precludes is the making of a final judgment before a reference is made in a case where a reference is required."[6]

The advantage of this approach is that it enables the CFA's views on the interpretive questions referred to the SCNPC to be made known to and considered by the SCNPC as it proceeds to work out the answers to the questions. Indeed, if we examine the four questions which the CFA referred to the SCNPC in the *Congo* case,[7] we will see that they are actually simple questions each of which can be answered by a simple "yes" or "no", and the answers that the CFA majority would give to the questions are obvious from the majority judgment. By formulating the questions narrowly and precisely, and by making it clear how the CFA would have answered the questions itself, the CFA thus attempted to play a proactive or even guiding (in the sense of providing "guidance" to or mapping out the direction for the SCNPC) role in the interpretive process of Art 158(3) of the Basic Law.

On the other hand, this approach is not without possible disadvantages and risks. As the CFA has decided in *Chong Fung Yuen*,[8] the HKSAR courts adopt the common law approach to the interpretation of the Basic Law. This does not mean that the SCNPC is bound to adopt the same approach. The Basic Law is, after all, a product of "one country, two systems"; it was enacted by the National People's Congress of the PRC, and is both a Chinese law and a Hong Kong law. The possible advantage of the CFA referring an "excluded provision" to the SCNPC for interpretation under Art 158(3) while keeping silent on, and remaining "neutral" on, how the provision should be interpreted is that the Hong Kong court would not assume any responsibility for the interpretation of the provision. Even if the SCNPC interprets it in a manner contrary to how a Hong Kong court would interpret it, the responsibility is entirely borne by the SCNPC. On the other hand, if the CFA does go ahead – as it did in the *Congo* case – to express its views on how an "excluded provision" should be interpreted, the resources of the common law – which have been developed in England without any regard to the needs of "one country, two systems" – may not be adequate for this purpose. This brings us to our second point.

[6] Para 398 of the judgment.
[7] See para 407 of the judgment.
[8] (2001) 4 HKCFAR 211.

Going Beyond the English Common Law

In the *Congo* case, the CFA majority had to stretch – or to go beyond – the existing English common law in order to reach its provisional judgment that the HKSAR should follow the PRC's policy or doctrine of "absolute" immunity for foreign sovereigns. There are two crucial points in the majority judgment at which this was done. The first relates to the scope of the "one voice" doctrine. The second relates to the concept of an "act of state".

On the first point, the majority judgment said:

> "The policy that the courts and the executive should 'speak with one voice' dates back to the nineteenth century. … Most commonly, the guidance sought by the courts from the executive relates to a party's claim to the status of a sovereign or the territorial limits of a State's jurisdiction. Lord Pannick QC submits that the 'one voice principle' is limited to such questions, but we do not see why that should be so. If in principle it is accepted (as Lord Pannick QC accepts) that it is for the executive branch of government to determine whether a particular claimant is a sovereign State upon whom the forum State should confer immunity, we fail to see why it should not equally be *for the executive to determine what exceptions may exist to the grant of such immunity*."[9]

It is noteworthy that there is nothing in English case law (in contrast with American case law, which will be discussed in the next section) that supports the proposition that the court and the executive should speak with one voice on the question of whether a foreign sovereign (that is recognised by the executive as a foreign sovereign) is entitled to sovereign immunity in proceedings before the court. As stressed by the majority of the Court of Appeal and the minority of the CFA in the present case, under English law and the law of colonial Hong Kong before the enactment of the State Immunity Act 1978, the question of whether a foreign sovereign enjoyed immunity in proceedings before the English or Hong Kong court had been regarded as purely a question of law – governed by the common law, and also partly by the incorporation of customary international law into the common law – to be exclusively determined by the court without seeking the views of the executive. It was on this basis that the common law evolved from the original doctrine of "absolute immunity" to the subsequent doctrine of "restrictive immunity".

[9] Paras 240–241 of the judgment. Emphasis supplied.

On the second point, which relates to the concept of an "act of state" which is referred to in Art 19(3) of the Basic Law, the majority judgment first pointed out that Art 19(3) "can be read as consistent with the common law doctrine of act of state".[10] Then it said:

> "The scope of the common law act of state doctrine is imprecise, … These common law decisions dealing with acts of state in the field of foreign affairs are in substance consistent with Article 19(3). Is the act by the CPG of determining the *policy of state immunity* applicable to the HKSAR properly viewed as an act of state coming within the concept of 'acts of state such as defence and foreign affairs' in Article 19(3)? In our view, the provisional answer, consistent with the common law and our interpretation of Article 19(3), is 'Yes'. It involves the CPG's determination of the PRC's policy in its dealings with foreign States with regard to state immunity. … It would follow that FGH's submission that determination of such rule is a matter for the HKSAR courts and not the CPG must be rejected. It is a matter over which the HKSAR courts lack jurisdiction."[11]

Here, it is again noteworthy that there is nothing in the existing English case law which supports the proposition – which in this author's opinion is indeed original and innovative from the perspective of English common law – that the executive's determination of the content or scope of the legal rule on foreign sovereign immunity is an act of state and that the rule so enunciated by the executive is binding on the court. The CFA majority was completely on uncharted waters when they developed this proposition. As pointed out by the minority in the CFA and the majority in the Court of Appeal in the present case, in English common law, whether a foreign sovereign enjoyed sovereign immunity in a particular case had been treated as a question of law to be answered exclusively by the courts, and there was no room for the executive to enunciate any rule or policy on this matter. There was thus no room for any act of state on the part of the executive as far as questions of sovereign immunity were concerned.

The majority judgment in the present case therefore raises the interesting and important question of whether, and, if so, how, the CPG – which (in contrast with the NPC or SCNPC) under the Basic Law does not enjoy any law-making power with regard to the HKSAR[12] – may

[10] Para 345.

[11] Paras 348, 352 and 355. Emphasis supplied.

[12] Under Art 18 of the Basic Law, the SCNPC may apply a national law (made by the NPC or SCNPC) to the HKSAR by adding the law to the list of national laws applicable to the HKSAR in Annex III to the Basic Law.

make a "policy" (such as "the policy of state immunity") which effectively operates as a source of law in the HKSAR. This brings us to the third and final issue to be discussed here.

Borrowing from the American Model

Both the majority and the minority of the CFA in the *Congo* case discussed and considered the American case law that governed foreign sovereign immunity in the United States before the enactment of the Foreign Sovereign Immunities Act (FSIA) in 1976. The minority pointed out that the pre-FSIA American regime, in giving the executive the power both to enunciate a general policy of foreign sovereign immunity and to give to the court "suggestions of immunity" in individual cases, was an unsatisfactory and undesirable system in that it enabled political considerations – particularly considerations of what was "politically expedient" – to affect judicial decisions in cases where foreign sovereigns were sued.[13] On the other hand, the majority in effect decided that by virtue of the nature of foreign sovereign immunity, the constitutional status of the HKSAR and the provisions of the Basic Law,[14] the legal regime of sovereign immunity in the HKSAR is to some extent similar to the pre-FSIA American regime, insofar as under both regimes, the executive of the national government – which is constitutionally charged with the conduct of foreign affairs – has, as a matter of the constitutional allocation of powers within the legal system,[15] and in the absence of any

[13] See paras 86, 90, 489–491 of the judgment. With respect, whether the pre-FSIA American regime was a good system was one question; whether, as a matter of the true interpretation of the Basic Law, the applicable regime in the HKSAR regarding sovereign immunity is actually similar to the pre-FSIA American regime is another question. The two questions should not be confused with one another.

[14] See para 226 of the judgment.

[15] The concept of the constitutional allocation of powers is crucial to the majority judgment. See paras 233, 266, 275, 321 and 331 of the judgment. In this regard, the majority distinguished the UK position from that of the HKSAR under the Basic Law, on the ground that the UK does not have a written constitution and the British courts determined for themselves (as a matter of the constitutional allocation of powers) that they had the power (without consulting the executive) to decide on questions of sovereign immunity as a matter of common law (before the enactment of the State Immunity Act 1978). See paras 257 and 276 of the judgment. The majority judgment also pointed out that even under the State Immunity Act (SIA), the UK executive has a considerable role to play: "… the SIA 1978 empowers the executive, by Order in Council, to restrict or extend the immunities and privileges conferred on a foreign State by the Act if it should appear to the government that such privileges and immunities exceed those accorded by the law of that State in relation to the United Kingdom; or are less than those required by any international agreement to which that State and the United Kingdom are parties. In other words, the SIA 1978 empowers the executive to calibrate the extent of state immunity granted to a foreign State on the basis of reciprocity and in accordance with the international rights and obligations of the United Kingdom." (para 258)

national law made by the national legislature on the subject,[16] the power to enunciate a national policy on foreign sovereign immunity that the courts should regard as binding. Such a policy effectively operates as a source of law.

The following scholarly comments on the pre-FSIA American regime ("the pre-FSIA regime") are instructive. Charney points out that one possible interpretation of the pre-FSIA regime is that "the executive branch has sole authority to make policy and law with regard to certain foreign affairs matters, it may also have the authority to influence some court determinations unilaterally".[17] According to Bradley's analysis, in the pre-FSIA regime the courts in effect "recognize[d] an independent lawmaking power"[18] with regard to matters of sovereign immunity on the part of the executive branch of government that is charged with the conduct of foreign affairs. He pointed out that the system may be understood as a "regime [of] judicial deference to executive branch lawmaking".[19] Henkin's description of the pre-FSIA regime is as follows: "if the Executive announced a national policy in regard to immunity generally, or for the particular case, that policy was law for the courts and binding upon them, regardless of what international law might say about it."[20] He pointed out that one possible interpretation of the regime is that it "represent[ed] some broad principle of Presidential 'legislative power' in foreign affairs",[21] i.e. the "view that the President can declare national policy in foreign affairs with legal effect binding on the courts".[22]

Such American jurisprudence may be borrowed by us in the HKSAR to understand and explain the majority decision of the CFA in recognizing the binding force of the CPG's determination under Arts 13 and 19 of the Basic Law of the national policy on foreign sovereign immunity. The overriding authority of such a determination may be further buttressed by Art 160 of the Basic Law and the SCNPC Decision of

[16] The CFA majority stressed that the existing regime of foreign sovereign immunity in the PRC is such that there is no law (enacted by the legislative organ of the state) on the subject and the matter is dealt with by executive policy: see paras 259 and 370. In para 370, the court stated: "[N]o national law on state immunity has been promulgated, the matter being treated, as in many other countries, as a matter of national policy determined by the executive and adhered to by the courts. There can be little doubt that if a national state immunity law were to come into existence, it would be applied to the HKSAR."

[17] Jonathan I. Charney, "Judicial Deference in Foreign Relations" (1989) 83 *Am J Int'l L* 805 at 807.

[18] Curtis A. Bradley, "*Chevron* Deference and Foreign Affairs" (2000) 86 *Va L Rev* 649 at 711.

[19] *Ibid*., at 712.

[20] Louis Henkin, *Foreign Affairs and the Constitution* (1972) at 59.

[21] *Ibid*., at 60.

[22] *Loc. cit*.

February 1997, which govern the extent to which pre-1997 laws may survive the handover, and which require the modification and adaptation of such laws so as to render them consistent with the post-1997 constitutional status of the HKSAR and the international rights and obligations of the CPG. This explains why the fourth question referred by the CFA to the SCNPC for interpretation in the present case concerns, inter alia, Art 160 and the SCNPC Decision of February 1997.

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