
FACT SHEET

The decision by the Court of Final Appeal to seek an interpretation of the Basic Law from the Standing Committee of the National People's Congress regarding the controversy of state immunity raised in the debt litigation of the Democratic Republic of Congo

1. Background

1.1 In respect of the case of *Democratic Republic of Congo & Ors v FG Hemisphere Associates LLC* ("Congo Case"), the judgment of the Court of Final Appeal ("CFA") of the Hong Kong Special Administrative Region ("HKSAR"), dated 8 June 2011, ordered to seek an interpretation of Articles 13(1) and 19 of the Basic Law¹ from the Standing Committee of the National People's Congress ("SCNPC"). In view of the great importance of the CFA decision, Members agreed at the House Committee meeting on 7 October 2011 to invite the Secretary for Justice to attend a meeting of the Panel on Administration of Justice and Legal Services to brief them on the matter. To facilitate Members' discussion on the Congo Case, this fact sheet provides a summary of relevant news reports and commentaries.

2. Highlight of the Congo Case

2.1 The Democratic Republic of Congo ("Congo") entered into contract with a Yugoslav company for construction of hydroelectric facilities, and broke the contract at last. The ensuing arbitration ruled in favour of the Yugoslav company, but Congo defaulted on the arbitral awards granted against it. FG Hemisphere Associates LLC ("FG"), a United States debt fund, later purchased the awards from the Yugoslav company. A consortium of Chinese state-owned companies acquired mineral exploitation rights in Congo had to pay entry fees to the country. FG obtained an interim injunction from the Court of First Instance ("CFI") in Hong Kong to restrain the consortium from paying the entry fees to Congo. This move was to garnish those fees in equitable execution of the arbitral awards. Congo applied to set aside the order in question and claimed absolute state immunity from jurisdiction in Hong Kong. CFI accepted Congo's claim of immunity. FG appealed and the Court of Appeal ("CA") reversed CFI's decision. Congo then appealed to CFA.

¹ In accordance with Article 13(1) of the Basic Law, the Central People's Government shall be responsible for the foreign affairs relating to HKSAR. At the same time, Article 19 of the Basic Law stipulates that although HKSAR shall be vested with independent judicial power, including that of final adjudication, it shall have no jurisdiction over acts of state such as "defence and foreign affairs". The courts shall obtain a certificate from the Chief Executive on questions of fact concerning acts of state whenever such questions arise in the adjudication of cases. This certificate shall be binding on the courts. Before issuing such a certificate, the Chief Executive shall obtain a certifying document from the Central People's Government.

2.2 The Congo Case aroused the concern of the Office of the Commissioner of the Ministry of Foreign Affairs of the People's Republic of China in HKSAR ("Foreign Ministry"). The Foreign Ministry issued two letters stating the position of the Central People's Government before the judgments of CFI and CA, and a third letter in August 2010. The first letter stated the principled position of the People's Republic of China ("PRC") on absolute state immunity. The second letter stated that the international convention signed by the PRC to recognize restrictive state immunity had yet to take effect and that the PRC insisted on adopting the doctrine of absolute state immunity. The Foreign Ministry placed a third letter before CFA stating how restrictive state immunity would affect the foreign policy of the PRC. This was in response to the earlier CA judgment that adopting the doctrine of restrictive state immunity in Hong Kong would not prejudice the sovereignty of the PRC. The third letter also pointed out that if HKSAR were to adopt a regime of state immunity inconsistent with the position of the state, it would undoubtedly have a serious impact on the diplomatic efforts of the PRC.

2.3 CFA held, by a 3-2 majority, that it should seek the interpretation of Articles 13(1) and 19 of the Basic Law from SCNPC on the Congo Case. Unlike the previous cases, the Congo Case was the first time that CFA took the initiative to seek an interpretation from SCNPC pursuant to the mechanism laid down by the Basic Law. **Justice Patrick CHAN PJ, Justice Roberto RIBEIRO PJ, and Sir Anthony MASON NPJ** opined that without clarifying the meaning of foreign affairs in the Basic Law, the dispute in the Congo Case could not be resolved. Furthermore, the HKSAR courts could not make a decision inconsistent with the foreign policy of the state. On the other hand, **Justice Kemal BOKHARY PJ** and **Justice MORTIMER NPJ** considered that the degree of immunity enjoyed by a country should be determined by the court.

3. Public comments and concerns

Procedure for seeking an interpretation

3.1 In June 2011, the **Hong Kong Bar Association** met with **QIAO Xiaoyang, Chairman of the Basic Law Committee**, in Beijing to exchange views on the procedure to be followed in seeking an interpretation of the Basic Law. **QIAO** assured the **Hong Kong Bar Association** that the interpretation would be conducted strictly in accordance with the request of CFA. The **Hong Kong Bar Association** considered that the procedure to be followed in the interpretation should be made more transparent, and **QIAO** concurred. The **Hong Kong Bar Association** also pointed out that according to the Basic Law, SCNPC should consult the Hong Kong Basic Law Committee in respect of the interpretation, and the Committee's opinions should be placed before the SCNPC deputies for reference.

3.2 **Professor LING Bing from the Law Faculty at the Chinese University of Hong Kong** suggested a number of measures to be considered by SCNPC for reforming the procedure in seeking the interpretation of the Basic Law. First, a public hearing should be conducted to consult the public on the issue of interpretation. In the course of interpretation, the right of expression by all parties involved should be protected in accordance with the fundamental principles of natural justice. Secondly, the impartiality of the deputies responsible for making the interpretation should be ensured. Any SCNPC deputies or members of the Basic Law Committee with a vested interest in the Congo Case or connection with the stakeholders should withdraw from the case. Thirdly, transparency in the course of interpretation should be safeguarded. The process and results of the deliberation by SCNPC and the Basic Law Committee should be made public. Fourthly, the conclusion of the interpretation should be entirely based on facts and law.

3.3 **Benny DAI Yiu-ting, Associate Professor of the Department of Law at the University of Hong Kong**, pointed out that CFA had already taken several measures to minimize the damage caused by the request for interpretation to the judicial authority and judicial autonomy of Hong Kong. First, CFA had conducted a very detailed analysis of all the legal issues involved, and delivered a provisional judgment on these issues before seeking SCNPC's interpretation on the relevant articles of the Basic Law. Secondly, the interpretive questions that CFA set for SCNPC were clearly defined. All questions could be answered almost by a simple "yes" or "no". Thirdly, two CFA judges had written substantive dissenting judgments, reflecting their independence in deciding controversial constitutional issues even if the Central People's Government held adverse views.

3.4 **Albert CHEN Hung-ye, Professor at the Law Department of the University of Hong Kong and member of the Basic Law Committee**, considered that the reference to SCNPC for interpretation had set a good precedent. He pointed out that the CFA judges had clearly explained their views on the interpretive questions. SCNPC had the right to disagree, but it would then have to explain the reason behind. Further, the questions raised by CFA were well defined. This allowed SCNPC to understand CFA's points clearly without limit its scope of interpretation.

3.5 SCNPC did not held a seminar to solicit views from the legal profession in Hong Kong. As explained by **LI Fei, Deputy Director of the Legislative Affairs Commission of SCNPC**, such arrangement was mainly out of respect for CFA. He opined that it would be against the legal tradition in Hong Kong if the seminar was convened before the conclusion of the Congo Case. Besides, CFA had provided comprehensive information to SCNPC for the interpretation and the SCNPC deputies could fully grasp the background and details of the case. Meanwhile, the progress of the deliberation of SCNPC was made public from time to time, which should safeguard the transparency and impartiality of the interpretation.

3.6 **Elsie LEUNG Oi-sie, Deputy Director of the Basic Law Committee**, opined that the Basic Law Committee had approached the Congo Case with prudence and provided a clear explanation to the case. Based on his experience of being a member of the Basic Law Committee over the past five years, **LAU Nai-keung** stated that the Central People's Government had neither the intent nor the urge to interfere with the affairs of HKSAR through the interpretation of the Basic Law. **LAU** further commented that SCNPC had answered CFA's interpretive questions within the scope as required. **P. Y. LO, Chairman of the Special Committee on Constitutional Affairs and Human Rights at the Hong Kong Bar Association**, considered that the "answers" provided by SCNPC exactly addressed, no more and no less, the questions asked by CFA, in an effort not to compromise or undermine the judicial autonomy of Hong Kong. Nevertheless, the Chinese side and the legal profession in Hong Kong should reinforce their communication in view of their different views on the concept of "one country, two systems".

Impact of the request for interpretation on the judicial independence of Hong Kong

3.7 **Professor Johannes CHAN Man-mun, Dean of the Faculty of Law at the University of Hong Kong**, considered that the diverse opinions expressed by the CFA judges who supported and dissented from the reference to SCNPC for interpretation reflected the conflicts between "one country" and "two systems". For "one country", one had to consider the international relations of the country; while for "two systems", one had to consider the integrity of the local legal system as well as the foundation for Hong Kong's rule of law and judicial independence.

3.8 **WANG Youjin, Visiting Professor of China University of Political Science and Law**, considered that many cardinal principles in respect of "one country, two systems" had yet to be established. The Congo Case highlighted the conflicts between the common law adopted in Hong Kong and the Chinese Law. He further pointed out that Hong Kong had to seek the interpretation from SCNPC in order to make progress in the implementation of "one country, two systems". **WANG Zhenmin, Dean of the Law School at Tsinghua University**, considered that the CFA initiation to refer to SCNPC for an interpretation contributed to a successful integration of the Hong Kong judicial system with SCNPC's interpretation regime. **Maria TAM Wai-chu, member of the Basic Law Committee**, opined that this reference for interpretation was a breakthrough with a special meaning to the integration of the legal systems in the two places within the framework of "one country, two systems".

3.9 **ZHANG Rongshun, member of the Basic Law Committee**, opined that the CFA initiation to seek an interpretation activated the interpretation mechanism by SCNPC pursuant to Article 158 of the Basic Law. He further explained that the principle for SCNPC's interpretation was to maintain the judicial independence and the power of final adjudication of Hong Kong, as well as safeguarding the rights of the Central People's Government. Only then could the smooth operation of "one country, two systems" be ensured. **Elsie LEUNG** considered that the interpretation did not mean to interfere with the judicial independence of Hong Kong. There could not be two positions on defence and foreign affairs, notwithstanding the practice of "one country, two systems" in Hong Kong.

3.10 The **Hong Kong Bar Association** issued a statement after CFA had decided to seek an interpretation from SCNPC. The statement affirmed that the CFA decision to request for an interpretation did not compromise or undermine the judicial autonomy of Hong Kong courts. **Junius HO Kwan Yiu, Chairman of the Law Society of Hong Kong**, pointed out that CFA's own decision to request for an interpretation represented a move to resolve the relevant issues under the mechanism provided by the Basic Law. He did not see any adverse effect on the judicial independence of Hong Kong.

3.11 **Professor Albert CHEN** saw little relationship between the Congo Case and Hong Kong's judicial independence, as the case merely dealt with the affairs between two countries, namely the PRC and Congo. It was appropriate for CFA to invoke the established procedure for seeking interpretation. **Professor LIAN Xisheng from China University of Political Science and Law** considered that the request for interpretation by CFA would not affect "one country, two systems" and judicial independence of Hong Kong. **Rita FAN HSU Lai-tai, deputy to SCNPC**, said that CFA acted according to the law and the move would not affect the judicial independence of Hong Kong courts. According to some **newspaper commentaries**, the CFA reference of a foreign affairs issue for interpretation pursuant to the mechanism under the Basic Law was an embodiment of the spirit of the rule of law. The confidence of the international community in the rule of law in Hong Kong would not be weakened as a result.

3.12 A **political commentator** criticised the majority judges in the Congo Case for not fulfilling their own God-given duties to adjudicate controversial cases. Instead, they had referred the cases to SCNPC to make the decision for them. This approach was a self-debasement on the part of the judges who had the power but did not dare to use it. **Hong Kong Human Rights Monitor** opined that the interpretation reneged the promise that Hong Kong's legal system would remain unchanged for 50 years and it queried whether SCNPC's foremost concern was political needs. The organization worried that Hong Kong courts would continue to come under the interference of the interpretation regime of SCNPC in the future.

3.13 **Eric CHEUNG Tat-ming, Assistant Professor of the Department of Law at the University of Hong Kong**, pointed out that the interpretation resulted in Hong Kong giving up the doctrine of restrictive state immunity adopted before the handover. This would undermine Hong Kong's status as an international financial centre and belittle Hong Kong courts. In particular, Hong Kong courts could not enjoy the same jurisdiction as other overseas courts to adjudicate the commercial disputes between overseas countries.

Three letters issued by the Office of the Commissioner of the Ministry of Foreign Affairs to Hong Kong courts and the Government

3.14 While expressing his reservations over whether the majority judges in the CFA had made the correct decision, **Eric CHEUNG** agreed that they had reasonable legal grounds to do so. The decision to seek an interpretation itself did not undermine the rule of law in Hong Kong. The problem lied in the contents of the third letter issued by the Foreign Ministry which smacked of putting pressure on Hong Kong court and interfering with the judicial independence. **CHEUNG** opined that judicial independence and justice needed to be seen to be done without any interference. The Central People's Government clearly spelled out in black and white that absolute immunity applied to Hong Kong. The public might question whether such immense political pressure would to a certain extent or sub-consciously influence the judges' analysis and conclusion.

3.15 **Professor Johannes CHAN** said that the strong wording of the third letter somehow created the image of the Central People's Government putting pressure on Hong Kong courts. There were also some sayings that emerged in the course of adjudication that SCNPC would go ahead to interpret the Basic Law on its own should the courts insist on adopting the doctrine of restrictive state immunity. All the above would give people the impression that the central authority attempted to influence the judicial independence, which would undermine not only Hong Kong's legal system but also the reputation of the Central People's Government.

3.16 According to some **newspaper commentaries**, the move by the Foreign Ministry to issue letters spelling out the adjudication results that it preferred would create ample political pressure on the independent judgment of the CFA judges. There were concerns that once such a precedent was set, it would become the norm for the Central People's Government to interfere with Hong Kong's administration of justice. This would leave Hong Kong's rule of law and judicial independence vulnerable to influence of the Mainland's legal concept and practice, affecting the legal system that forms the cornerstone of Hong Kong.

3.17 **Professor Albert CHEN** cautioned that one had to understand the context of the hearing, when considering whether the Foreign Ministry had exerted pressure on Hong Kong courts by writing to them three times. He explained that in the course of the appeal, CA questioned the availability of any substantive evidence to prove the consequences caused by adopting the doctrine of restrictive immunity. The Foreign Ministry's letter to CFA was nothing more than addressing CA's query. **WONG Yuk-shan, member of the Basic Law Committee**, considered that the Foreign Ministry was obliged to write to the courts to make them understand the position of Central People's Government on state immunity. The letters also helped set out clearly the possible prejudice that could be done to the PRC's sovereignty. Besides, it was a common practice under the common law that the Department of Justice placed letters before the courts and that did not affect the judicial independence.

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22 February 2012
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