

The Vulture Swoops and Devours its Prize: the Unsatisfactory Law of State Immunity in Democratic Republic of Congo v FG Hemisphere Associates LLC

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In June 2011, the Hong Kong Court of Final Appeal issued a landmark decision on state immunity in Democratic Republic of the Congo v FG Hemisphere Associates LLC, in which the majority resiled from restrictive immunity — a doctrine which holds that foreign states do not enjoy immunity from jurisdiction and enforcement in respect of commercial transactions. This article argues that as a matter of constitutional principle and commercial fairness, restrictive immunity is preferable to absolute immunity. The decision of the majority to refer the question of state immunity to the executive branch can be seen as an infringement of judicial independence. Further, in the global economy, restrictive immunity is necessary to assure commercial actors that states will be held accountable for their commercial promises. An inclusive definition of the commercial exception would make it easier for commercial actors to sue foreign states and to enforce judgment against them. This approach to restrictive immunity, advocated in this article, is the clearest path to commercial fairness and respect for the rule of law.

I INTRODUCTION

In June 2011, the Hong Kong Court of Final Appeal issued a landmark decision on state immunity in *Democratic Republic of the Congo v FG Hemisphere Associates LLC (No 1)* (the Congo decision).¹ A state can plead immunity in a foreign court in order to prevent that court from issuing judgment against it (immunity from suit) and from enforcing a judgment against it (immunity from enforcement). The Court of Final Appeal's decision — split three to two — was controversial, owing to the majority's reversal of Hong Kong's long-held position that foreign states do not enjoy immunity from jurisdiction or enforcement in respect of commercial transactions. This position is a manifestation of the "restrictive immunity"

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¹ *Democratic Republic of the Congo v FG Hemisphere Associates LLC (No 1)* [2011] HKCE 747, (2011) 14 HKCFAR 95 [the CFA decision].

doctrine.² The Court held that Hong Kong's constitutional transition from a British colony to a part of the People's Republic of China vested the Chinese Government with the authority to determine whether, and to what extent, foreign states enjoyed immunity before Hong Kong courts. It also marked the first time the Court referred a question of law to the Standing Committee of the National People's Congress (the Standing Committee), which forms part of the executive branch of the Chinese Government.

As a matter of commercial fairness and constitutional principle, restrictive immunity is preferable to absolute immunity. In the context of increasingly complex global commerce, and the growth of public-private partnerships, restrictive immunity is necessary to assure commercial parties that states will be held accountable for their commercial promises. As a matter of constitutional propriety, courts should have jurisdiction to decide what doctrine of immunity applies — it is not a matter for the executive. Accordingly, the Hong Kong Court of Final Appeal's decision to refer the question of state immunity to the Chinese Government was an unjustified encroachment on its judicial independence.

The foregoing position will be outlined in five subsequent parts. Part II will outline the concept of state immunity, with Part III summarising the lower Courts' earlier decisions in *Congo*. Against this background, Part IV will advance a critique of the Court of Final Appeal's decision, examining the majority's arguments and positing grounds for preferring the minority position. Part V will argue that, when adopting a restrictive approach at the jurisdiction stage, this adoption must apply equally at the enforcement stage in order to ensure that claimants have a meaningful remedy. Finally, Part VI will present a potential global approach to state immunity. This approach contemplates the "commercial exception" as a broad exception that would include most commercial transactions, limiting the cases in which a state can rely on its immunity. Additionally, any distinction between immunity from jurisdiction and enforcement should be abolished.

II THE CONCEPT OF STATE IMMUNITY

State immunity is the protection of a state from the jurisdiction and enforcement of a judgment against it in a foreign court. Jurisdiction refers to the power of the courts to determine a claim. Enforcement relates to the actual execution of an arbitral or judicial award against the property of a state. Absolute immunity derives from the concept of equality among states. It is the idea that the acts of one state should not be questioned by the courts of another, encapsulated in the maxim *par in parem non habit imperium*; an

2 The State Immunity Act 1978 (UK), which adopted restrictive immunity, applied in Hong Kong when it was a British colony. After the Handover (that is, the transfer of sovereignty over Hong Kong from the United Kingdom to China) in 1990, however, there was uncertainty surrounding the doctrine's continuing application in Hong Kong.

equal has no power over an equal.

A significant exception to the absolute immunity doctrine has developed in respect of commercial transactions. The most prolific manifestation of this restrictive doctrine is the United Nations Convention on Jurisdictional Immunities of States and their Property (UN Convention on State Immunity).³ Restrictive immunity prohibits states' use of their immunity as a defence against liability under commercial agreements. Restrictive immunity is, however, not consistently applied as a coherent doctrine. Developed states in particular have embraced restrictive immunity, whilst many developing countries, including China, still adhere to absolute immunity. The law of state immunity is further complicated by the absence of a uniform meaning of the commercial exception. There is therefore no consistency of practice or reliable guidance as to a domestic court's assumption or refusal of jurisdiction on immunity grounds.⁴

Historically, restrictive immunity gained traction as states became more involved in the international marketplace, especially after the Second World War. States and their trading entities were increasingly treated as ordinary commercial enterprises when they participated in commercial activities.⁵ Under the restrictive doctrine, states maintained their immunity when they engaged in "official" or sovereign acts (*acta jure imperii*),⁶ but were treated as private entities for claims arising from their commercial transactions and other private law acts (*acta jure gestionis*).⁷

The law of state immunity has developed to both impose liability on states when they default on contracts, and to protect states against sovereign debt litigation. Unlike private companies, there are no bankruptcy protections for financially distressed states.⁸ Jonathan Blackman and Rahul Mukhi argue that although states cannot use the "shield of bankruptcy law" to prevent creditor litigation, state immunity has developed as a rough, somewhat inadequate, proxy for insolvency laws.⁹ The protection of the law of state immunity for a foreign state may be justified, morally, in cases such as the *Congo* decision, where a distressed debt fund (a so-called "vulture fund"), FG Hemisphere, has purchased the right to sue for a debt owed by the Congo at a significantly discounted price, in order to obtain judgment (and enforcement) to recover the full amount of the debt owing.

The distinction between the public and private acts of the state,

3 United Nations Convention on Jurisdictional Immunities of States and Their Property (open for signature in 17 January 2005, not yet in force) [UN Convention on State Immunity].

4 Hazel Fox *The Law of State Immunity* (2nd ed, Oxford University Press, Oxford, 2008) at 530.

5 Landmark English decisions on restrictive immunity include *Philippine Admiral (Owners) v Wallem Shipping (Hong Kong) Ltd* [1977] AC 373 (PC); *Trendtex Trading Corp v Central Bank of Nigeria* [1977] 1 QB 529 (CA); and *Playa Larga (Owners of Cargo Lately Laden on Board) v I Congreso del Partido (Owners)* [1983] 1 AC 244 (HL).

6 Acts by the right of the Sovereign.

7 Acts by the law of performance. David P Stewart "The UN Convention on Jurisdictional Immunities of States and Their Property" (2005) 99 AJIL 194 at 195.

8 Jonathan I Blackman and Rahul Mukhi "The Evolution of Modern Sovereign Debt Litigation: Vultures, Alter Egos, and Other Legal Fauna" (2010) 73 LCP 47 at 48.

9 At 48.

while instinctively comprehensible, is difficult to apply in borderline cases. Different legal systems differ in their classification of public and private acts.¹⁰ Ernest Bankas argues, for example, that restrictive immunity has been more widely accepted by industrialised, developed “Western” countries than by developing countries. In the former, the restrictive immunity doctrine has given private actors greater certainty in their interactions with states. In contrast, many developing countries maintain extensive control over the public sector. Where a state is heavily involved in its economic planning, the distinction between the private and public acts of the state may become blurred.¹¹

Problems with the public-private distinction emerge when considering the *Congo* decision, specifically. Suzanne Siu argues that the particular arrangement entered into between the Congo and a consortium of Chinese companies was evidence of “[a] state-driven strategy of fusing sovereign interests with commercial means”.¹² Siu contends that although the Chinese state had entered into the arrangement through corporate entities, the extent of the Chinese Government’s influence was unclear.¹³ Despite being corporate entities, the state-owned companies were subordinate to the political imperatives of the Chinese Government.¹⁴ The background influence of the Chinese state therefore makes it difficult to describe the Congo-China arrangement as a clearly “private” commercial transaction.

Further, the complexity of the determination of the state immunity issue in *Congo* emanates from the interaction between private international law, domestic law, constitutional law and political interests. The interpretation of Hong Kong’s constitutional law was critical to the outcome of the case. The Hong Kong Basic Law (Basic Law) is a law of China but operates as the constitution of Hong Kong.¹⁵ The Basic Law came into effect on 1 July 1997 to facilitate the transition of sovereignty from Britain to China. It implemented the “one country, two systems” regime, under which the Hong Kong legal system would operate with limited Chinese interference for 50 years. Article 8 of the Basic Law provided that English common law would continue to apply in Hong Kong and art 2 preserved the independent judicial power of Hong Kong courts, including that of final adjudication. Nevertheless, Hong Kong courts do not enjoy complete autonomy. The Basic Law confers on the Chinese executive ultimate authority by vesting in the Standing Committee the power to interpret the Basic Law.¹⁶ One of the jurisdictional limitations on Hong Kong courts is the inability to interpret the

10 Fox, above n 4, at 502.

11 Ernest K Bankas *The State Immunity Controversy in International Law: Private Suits Against Sovereign States in Domestic Courts* (Springer, Berlin, 2005) at 95.

12 Suzanne Siu “The Sovereign-Commercial Hybrid: Chinese Minerals for Infrastructure Financing in the Democratic Republic of the Congo” (2010) 48 *Colum J Transnat’l L* 599 at 611.

13 At 620.

14 At 621.

15 The Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China [Basic Law].

16 Article 158. The Standing Committee is the permanent working body of the National People’s Congress and it is the “highest organ of state power” in China. See Constitution of the People’s Republic of China, art 57.

Basic Law, where the legal issue involves a matter of “defence and foreign affairs”.¹⁷ This restriction on the courts’ jurisdiction was important in the *Congo* decision. The question of which doctrine of state immunity applied in Hong Kong turned on whether state immunity was itself an issue of foreign affairs and defence. If it was, the Hong Kong courts would not be able to rule on the issues in dispute in *Congo*.

III THE CONGO LITIGATION: LOWER COURTS’ DECISIONS

The Congo was successful in the Court of First Instance, but lost in the Court of Appeal in a majority decision, two to one. The facts and previous litigation history will be traversed before turning to analyse the Court of Final Appeal’s decision.

Facts

In the 1980s, Energoinvest DD (Energoinvest), a company with its headquarters based in Sarajevo, in the former Yugoslavia, constructed some electrical infrastructure in the Congo for the Congolese Government. To finance the works, the Congolese Government entered into a credit agreement with Energoinvest, in which it advanced credit to the Congo and a Congolese state-owned electricity company, Société Nationale d’Electricité (SNd’E). Despite revision and rescheduling, the Congo and SNd’E defaulted on their repayment obligations. The credit agreements included an arbitration clause, whereby the parties accepted as binding an arbitral award made under the International Chamber of commerce (ICC) rules and the parties would be deemed to have “waived their right to any form of recourse”. In 2001, Energoinvest took the Congo and SNd’E to arbitration and in 2003 obtained two substantial awards against both parties. The enforcement, not the validity, of the awards was challenged in the subsequent litigation.

In 2004, Energoinvest assigned to FG Hemisphere its interests under the two awards. FG Hemisphere purchased the Congo’s “sovereign debt” and sought to enforce this debt in Hong Kong (in addition to other countries) by seeking to lay claim to property owned by the Congo in Hong Kong. This property related to a joint venture entered into by the Congo (through a Congolese state-owned mining company) and a Chinese consortium of companies in 2008. Under this joint venture, the Congo would be paid around USD 221 million as part of the “entry fee” for a mining project in the Congo. FG Hemisphere sought to enforce the two arbitral awards against the Congo by claiming part of the amount of the entry fees. Saw J made an order granting FG Hemisphere leave to enforce the two judgments against the Congo and granted interim injunctions preventing the Chinese companies

17 Article 19.

from paying a part of the entry fee to the Congo.¹⁸

Court of First Instance

The Congo challenged Saw J's orders on the basis that Hong Kong courts had no jurisdiction to adjudicate FG Hemisphere's claim against it. This was for two reasons. First, the Congo enjoyed sovereign immunity as a foreign state. Secondly, the Congo argued that the Hong Kong court was not the appropriate forum for the determination of the issue of sovereign immunity.¹⁹

Reyes J found for the Congo, holding it was protected by state immunity. The Judge held that the commercial exception did not apply because the underlying transaction, namely the joint venture between the Congo and the Chinese consortium, was not of a commercial nature. Although the agreement was entered into through state-owned companies, Reyes J considered it was really a co-operative venture between two governments.²⁰ The large scale of the undertaking (that is, the building of extensive infrastructure in exchange for rights to exploit minerals)²¹ and the provision of special tax and customs advantages that only a state could provide indicated that this was not a commercial transaction in the relevant sense.²² The Judge also stated obiter that the restrictive immunity doctrine continued to apply in Hong Kong. Although the State Immunity Act 1978 (UK), which adopted restrictive immunity, ceased to have effect in Hong Kong after the transfer of sovereignty over Hong Kong from the United Kingdom to China (the Handover) in 1997, the common law developed prior to the extension of the State Immunity Act to Hong Kong, which had established restrictive immunity, was revived.²³ Reyes J considered further that Hong Kong courts did have jurisdiction to determine the scope and extent of state immunity in Hong Kong. The Basic Law did not restrict the courts' jurisdiction in this regard.²⁴

Significantly, the Hong Kong Government intervened in the case. Prior to the hearing, the Hong Kong Secretary of Justice produced a letter from the Office of the Commissioner of the Ministry of Foreign Affairs of the People's Republic of China (the Chinese Ministry of Foreign Affairs), stating that China had always taken the position that states enjoyed absolute rather than restrictive immunity.²⁵ Nevertheless, Reyes J did not accept this position. China had become a signatory to the United Nations Convention on State Immunity, which was evidence that restrictive immunity had found

18 *FG Hemisphere Associates LLC v Democratic Republic of Congo* [2008] HKEC 2119, [2009] 1 HKLRD 410 (CFI) [the CFI decision] at [2]–[6].

19 At [7].

20 At [89].

21 At [88].

22 At [90].

23 At [43] and [71].

24 At [72]–[73].

25 At [14].

favour with China — it could not, therefore, claim to have consistently adopted the absolute immunity approach.²⁶

Finally, Reyes J held that the submission to arbitration under the ICC Rules did not amount to a clear statement or evidence of a waiver of immunity. A waiver of immunity from suit (through an agreement to submit to arbitration) did not amount to a waiver of immunity from enforcement.²⁷

Court of Appeal

A majority of the Court of Appeal overturned the Court of First Instance's decision, holding that restrictive immunity did apply and that the Congo could not use immunity as a shield against liability.²⁸ Stock VP and Yeun JA were in the majority, with Yeung JA dissenting.

The Hong Kong Government intervened again on appeal. The Chinese Ministry of Foreign Affairs explained that China had participated in negotiations leading to the UN Convention in the spirit of consultation, compromise and co-operation.²⁹ As China had not ratified the UN Convention, however, it had not come into force and in the Ministry's view, therefore, China's signing of the UN Convention could not form the basis of assessing China's "principled position" on state immunity.³⁰

Stock VP, disagreeing with Reyes J, considered that the transaction in question was commercial in nature. The Vice-President considered that Reyes J had erred in concentrating on the circumstances giving rise to the Congo's liability to pay the entry fees in the commercial venture. His Honour stated instead that the proper focus should have been on the use to which the property (once the fees were paid) was put: if used for a sovereign or public purpose, the property would be immune from execution; if used for a private or purely commercial purpose, then it would not.³¹ The entry fees were paid in exchange for the performance of a contractual arrangement, therefore the transaction was a commercial one.

Stock VP made a number of important determinations on state immunity. First, the Judge held that the common law prior to the Handover had followed restrictive immunity.³² That common law position revived after the State Immunity Act ceased to apply upon China's resumption of sovereignty over Hong Kong.³³ Secondly, the Judge reluctantly accepted the Chinese Ministry of Foreign Affairs's position that China's signing of the UN Convention on State Immunity did not necessarily represent a commitment

26 At [81].

27 At [111]–[112].

28 *FG Hemisphere Associates LLC v Democratic Republic of the Congo* [2010] HKEC 194, [2010] 2 HKLRD 66 (CA) [the CA decision].

29 At [91(2)].

30 At [91(3)].

31 At [179].

32 At [78] per Stock VP.

33 At [79].

to the doctrine of restrictive immunity.³⁴ Thirdly, Stock VP considered that applying absolute immunity in Hong Kong would be a regression, as absolute immunity was inimical to justice in individual cases.³⁵ In the Judge's view, it was "palpably unjust" that states could benefit from trading in the marketplace and use the courts as a means of seeking redress, yet block that avenue for other commercial actors to seek redress from the same states in respect of private commercial acts.³⁶ Yeun JA decided similarly, providing separate reasons. Both Stock VP and Yeun JA found no waiver on the facts. In their Honours' view, a state's submission to arbitration may cede its immunity from suit but not necessarily from enforcement.³⁷

Yeung JA dissented. The Judge held that both the constitutional law of Hong Kong and the "unequivocal foreign policy" of China required the application of absolute immunity in Hong Kong.³⁸ In reading this conclusion, Yeung JA referred to art 1 of the Basic Law, which established that Hong Kong was an "inalienable" part of China, as well as art 13, which stated that the Chinese Government would be responsible for Hong Kong's foreign affairs. In Yeung JA's view, because state immunity was an aspect of foreign affairs, there was "simply no room for 'two systems'" in the law of state immunity.³⁹ It would be unconstitutional for Hong Kong to violate the Basic Law by adopting a legal position on state immunity incompatible with that of China.⁴⁰ Yeung JA would have held further that the Congo had not waived its right to plead immunity. Finally, the Judge would have agreed with Reyes J that the joint venture between the Congo and the Chinese consortium did not involve a commercial transaction of the kind that would attract the application of the restrictive doctrine.⁴¹

IV STATE IMMUNITY AS A MIX OF NATIONAL AND INTERNATIONAL LAW: THE COURT OF FINAL APPEAL DECISION

The *Congo* litigation illustrates the opacity in the operation of state immunity in international law. Hazel Fox observes that although state immunity is a doctrine of international law, it is applied in accordance with municipal law in national courts. She argues that the application of a general international law concept in specific national contexts gives rise to considerable tensions.⁴²

In the *Congo* case, this tension between international and national

34 At [106].

35 At [118(a)].

36 At [65].

37 At [177].

38 At [182] per Yeung JA.

39 At [226].

40 At [226] and [228].

41 At [242].

42 Fox, above n 4, at 1.

law collided with constitutional considerations. The absence of any specific legislation governing state immunity made its operation in Hong Kong after the Handover uncertain. A key issue was whether state immunity, as a matter of principle, doctrine or law, was a matter relating to foreign affairs within the meaning of art 13 of the Basic Law (the determination of which was reserved for the Chinese executive). If it were such a matter, the question of the Congo's immunity in Hong Kong courts would fall outside the jurisdiction of those courts. If the answer was unclear, the Court of Final Appeal could seek an interpretation of the meaning of "foreign affairs" from the Standing Committee.⁴³

Two interpretations of the Basic Law were possible. First, the Court could have held (and the majority did so hold) that state immunity was a matter of foreign affairs. Hong Kong's policy on state immunity would therefore be determined by reference to China's position. China observes absolute immunity; that policy would also apply in Hong Kong. Alternatively, the Court could have held (as the minority stated) that state immunity was not a matter of foreign affairs. Absent any specific legislative direction on state immunity post-Handover, the common law doctrine of restrictive immunity was revived and applied in Hong Kong.

The majority in the Court of Final Appeal decided that any issue involving state immunity, even when arising out of commercial transactions, was a matter of foreign affairs. Thus, any Basic Law interpretation issues relating to state immunity required an interpretation from the Standing Committee. The majority therefore referred the question of Congo's immunity in Hong Kong courts to the Standing Committee under the art 158 procedure. This, being the first time that the Hong Kong Court of Final Appeal had made such judicial reference to the Standing Committee, marked a watershed event in Hong Kong's constitutional history.

The majority's decision to defer to the executive challenged a fundamental principle of the law of state immunity: it is a rule of law and not an executive discretionary privilege.⁴⁴ Fox observes that states generally recognise that immunity is a rule of law.⁴⁵ She notes that there is an alternative school of thought, however, which maintains that until it is provided for in legislation, immunity remains a matter purely for the executive branch of a state. The majority decision in *Congo* thus provides strong support for this "alternative" view, as it favours conferring power on the executive to determine the scope of state immunity.

The next section examines the debate between the majority and minority regarding whether state immunity is a matter for judicial or executive determination. It addresses the opposing constitutional foundations upon which the arguments of the majority and minority rest:

43 The CFA decision, above n 1, at [51] per Bokhary PJ.

44 Fox, above n 4, at 13.

45 Fox, above n 4, at 13. For comment on the "alternative school of thought", see Lee M Caplan "State Immunity, Human Rights and *Jus Cogens*: A Critique of the Normative Hierarchy Theory" (2003) 97 AJIL 741.

judicial independence, favouring judicial determination, and the “one voice” principle, desiring the executive and judiciary to speak with one voice on foreign affairs matters, and favouring executive determination.

Judicial Independence

The minority Judges argued strongly that courts, in the independent exercise of their jurisdiction, should determine which doctrine of state immunity was available in the courts of Hong Kong. In Bokhary PJ’s view, the Court should have determined which doctrine of immunity applied in Hong Kong despite the pressure to defer to the executive.⁴⁶ It was long accepted at common law that, in the absence of legislation, courts could determine the nature and extent of immunity afforded to a foreign state.⁴⁷ Even though the judicial positions on immunity affected relations among sovereign nations, there was no suggestion that state involvement in commercial transactions was an act of state over which the courts lacked jurisdiction.⁴⁸

In Bokhary PJ’s opinion, the question of state immunity did not engage interpretation of the Basic Law. Although China was responsible for foreign affairs relating to Hong Kong in terms of art 13, the phrase “foreign affairs” had a limited meaning. The Judge noted that art 19, which excluded the courts’ jurisdiction over acts of state such as defence and foreign affairs, stated that the courts would have to seek from the Chief Executive a document certifying questions of fact concerning such acts of state. Such “facts”, in Bokhary PJ’s opinion, referred to matters such as whether the Congo was recognised as a sovereign state in the first place, but not as to the nature and extent of immunity afforded by the Court to the Congo.⁴⁹ Therefore, it was properly within the Court’s role (and not the role of the executive) to determine the nature and extent of immunity.

Further, Bokhary PJ stated that the intention of the Basic Law was to ensure continuity between the pre-Handover and post-Handover judicial system. Thus the common law state immunity doctrine that had applied prior to the Handover and prior to the State Immunity Act must continue to apply. A reversion to absolute immunity would disrupt commercial community.⁵⁰ Similarly, Yeun JA in the Court of Appeal had not been attracted to the idea that on the “stroke of midnight”, the restrictive immunity doctrine that had applied in Hong Kong suddenly transformed to absolute immunity. There needed to be some specific legal explanation for such a change; the mention of “foreign affairs” in the Hong Kong Basic Law alone could not trigger an about-face in the law regarding state immunity.⁵¹ Such a drastic change in

46 The CFA decision, above n 1, at [68].

47 Po Jen Yap “Democratic Republic of the Congo v FG Hemisphere: Why Absolute Immunity Should Apply but a Reference was Unnecessary” (2011) 41 HKLJ 77 at 79.

48 Yap, above n 47, at 79. See the trio of English decisions cited above n 5.

49 The CFA decision, above n 1, at [80] per Bokhary PJ.

50 At [76].

51 The CA decision, above n 28, at [257] per Yeun JA.

the law of state immunity would defeat the intention of the Basic Law to maintain business and commercial confidence, as well as the independence of the judiciary and the rule of law.⁵² The minority believed, therefore, that whether state immunity was available in the courts of Hong Kong was a question of common law, for the courts to determine.⁵³

The minority's statements on judicial independence, however, must be read in light of the political environment in which the Court of Final Appeal operated — potentially accounting for the majority's more deferential position. Judicial independence was important not only for the parties in the *Congo* decision, but had much wider implications for the relationship between the Hong Kong courts and the Chinese Government. The Basic Law had given Hong Kong courts final appellate authority, but had nevertheless imposed a significant limitation on it with regard to matters of foreign affairs. Significantly, under art 158 there was a reference procedure that required the Court to seek an interpretation of the Basic Law from the Central People's Government on provisions of the law concerning affairs that were the responsibility of the Chinese Government. Foreign affairs was one such responsibility.

Benny Tai argues that the *Congo* decision was an important test case, both for the issue of state immunity, and for the constitutional relationship between the Hong Kong courts and the Chinese Government, as the first case in which the Court of Final Appeal initiated the reference procedure.⁵⁴ Tai explains that initiating the reference procedure challenged both the judicial authority and judicial immunity of the Court of Final Appeal. It could be a threat to judicial authority, for the Court did not make a final ruling on all legal issues in the case. It could also be a threat to judicial autonomy, because the final interpretation of the relevant provisions of the Basic Law would be left to the Standing Committee which is an executive rather than judicial, body.⁵⁵ The decision to initiate a reference procedure would impose a significant restriction on the Court's autonomy and authority.

These political pressures were likely at the forefront of the judges' minds. The Chinese Ministry of Foreign Affairs had written no fewer than three letters to the Hong Kong courts to inform them about the position of the Chinese Government on state immunity.⁵⁶ Tai argues that if the Court were to apply the common law doctrine of restrictive immunity and decide not to make a reference, it was possible that the Standing Committee might, of its own accord, have issued an interpretation of the relevant provisions of the Basic Law after the Court of Final Appeal had delivered its judgment. Such an outcome, in Tai's opinion, would have been "devastating".⁵⁷ It is not convincing, however, that Hong Kong's final appellate court should

52 The CFA decision, above n 1, at [440] per Mortimer NPJ.

53 At [68] and [84] per Bokhary PJ.

54 Benny Y T Tai "The Constitutional Game of Article 158(3) of the Basic Law" (2011) 41 HKLJ 61 at 61.

55 At 64.

56 At 66.

57 At 66.

decline to reach an independent view of the law simply owing to speculative disagreement from the Chinese Government.

Nevertheless, Tai argues that the majority made a “rational” strategic choice in initiating the reference procedure.⁵⁸ In Tai’s view, the Court deliberately used the *Congo* decision to set a precedent on the manner and form of initiating the reference procedure. First, the Court gave a detailed analysis of all the issues at stake and provided a provisional ruling on these issues before seeking an interpretation on the relevant articles of the Basic Law.⁵⁹ Secondly, the questions that were directed to the Standing Committee were framed as binary, yes or no questions. This form of inquiry would limit the scope of the Standing Committee’s interpretation.⁶⁰ Thirdly, the robust dissenting judgments in the case established that the Court of Final Appeal would maintain its independence and integrity in deciding controversial constitutional issues, even if that position were to be contrary to the position of the Chinese executive.⁶¹

Should the Courts and the Executive Speak with One Voice?

Given that judicial independence did not prevail, the majority rested its decision on an alternative constitutional basis. In essence, each state’s approach to the determination of state immunity must depend on its own constitutional allocation of powers.⁶² In the view of the majority, Hong Kong could not, as a matter of legal or constitutional principle, adopt a doctrine of state immunity that differed with the doctrine adopted by China.⁶³ The executive and the courts had to speak with “one voice” on matters of foreign affairs. The majority reasoned that the conferral or withholding of state immunity was a matter concerning relations among states.⁶⁴ As the executive was responsible for determining whether a particular claimant was a sovereign state upon which the forum state should confer immunity, it should equally be for the executive to determine what exceptions might exist in respect of the grant of such immunity.⁶⁵

The majority held that the Basic Law, through arts 13 and 19, had allocated constitutional responsibility for the conduct of foreign affairs to the executive. As the courts had accepted the “one voice” principle in other cases, there was no reason to exclude that approach in relation to the executive’s policy on state immunity.⁶⁶ The majority relied heavily on the letters provided by the Chinese Ministry of Foreign Affairs as evidence that

58 At 67.

59 At 67.

60 At 67.

61 At 67.

62 The CFA decision, above n 1, at [233] per Chan PJ, Ribeiro PJ and Anthony Mason NPJ.

63 At [183].

64 At [265].

65 At [241].

66 At [247].

China had consistently adhered to absolute immunity. These letters seemed to persuade the majority that there was “plainly ... no basis for suggesting that China had ... abandoned its practice of absolute immunity”.⁶⁷ In the author’s submission, this is a problematic position given the Chinese Government’s signing of an international convention adopting restrictive immunity. Further, the majority stated that the Chinese domestic courts had never claimed jurisdiction over foreign states or governments, “irrespective of ... the nature, purpose or use of its property”.⁶⁸ The position of the Chinese domestic courts, however, does not detract from the Chinese Government’s tentative support for restrictive immunity at the United Nations. China could hardly be taken to be a persistent objector to the restrictive doctrine.

Moreover, the majority put heavy emphasis on the “one country” part of the “one country, two systems” principle, holding that the practice of state immunity in a unitary state must apply uniformly to the whole state. It noted there was no common law jurisprudence suggesting that a region or municipality forming part of a unitary state could adopt a state immunity doctrine that differed from that of the state as a whole.⁶⁹ This is an interesting observation in private international law jurisprudence, where the component parts of federal states have often been treated as different countries with individual systems of conflict of laws rules. Although federal countries, such as the United States of America and Australia, have chosen to pass federal legislation in respect of state immunity,⁷⁰ it is not a novel concept in conflict of laws that “states” within a country might have their own conflict of laws rules that differ from other “states” in that country.

It is argued that the majority’s decision impinges on judicial independence and compromises the rule of law — two principles that the majority had itself recognised as “essential component[s]” of the success of the “one country two systems” regime.⁷¹ Drawing heavily from Bokhary PJ’s dissent, this article advances three reasons on constitutional grounds why the Court of Final Appeal did have the jurisdiction to determine whether the absolute or restrictive doctrine of state immunity would apply in Hong Kong. A fourth substantive reason favouring restrictive immunity is presented on the basis that the restrictive doctrine is more compatible with the requirements of justice.

1 The Courts Have Never Consulted With the Executive

First, the courts have never consulted the executive regarding its position on state immunity. The Privy Council had seen fit to note in 1975, *The Philippine Admiral* the danger of state immunity becoming a matter of

67 At [261].

68 At [260].

69 At [267] and [321].

70 Foreign Sovereign Immunities Act 28 USC § 1602–1611; and Foreign States Immunities Act 1985 (Cth).

71 The CFA decision, above n 1, at [181].

executive discretion and the courts' blind adoption of the executive's view as to what is politically expedient.⁷² Bokhary PJ asserted that consultation with the executive on state immunity matters jeopardises the rule of law and judicial independence. In the "face of a threatened constitutional crisis" that the survival of the rule of law and judicial independence was crucial.⁷³ In deciding whether to seek an interpretation under the art 158 procedure, the Court had to make its decision on the basis of a faithful application of the law. The Court could not simply take the most politically palatable option in order to "[avoid] controversy, however fierce".⁷⁴

In Bokhary PJ's opinion, the question of the availability of state immunity had a straightforward answer. The majority judges' deference to the executive was unnecessary and detrimental and based on political concerns. The question of whether state immunity extended to commercial transactions was an issue for the Court's determination. It did not require any Basic Law interpretation, let alone any interpretation from the Standing Committee. That matters of foreign affairs are the responsibility of the Chinese Government was irrelevant to the determination of the case for state immunity in the context of commercial transactions involves no act of foreign affairs.

Not only has the majority position been criticised for taking an unnecessarily deferential approach, CL Lim argues that consultation with the executive has problematic commercial implications. The Court of Final Appeal has, in Lim's opinion, now categorically excluded cases involving state immunity from its jurisdiction. The effect of the majority's decision was not only that Hong Kong had to follow Beijing's lead on matters entrusted to the Chinese Government, but also that the Hong Kong courts should avoid deciding the question whether an issue truly involved state immunity and should be referred to Beijing.⁷⁵ As a matter of practice, Lim asks how such a political solution would work in the adjudication of everyday commercial cases, involving entities that might, but might not on closer investigation, be taken to be part of a "foreign state".⁷⁶ Although some clarity was better than none at all, this provided only a political solution, which was "a poor substitute for commercial certainty and no great guarantor of justice between merchants".⁷⁷

This criticism was rejected by the majority judges for two reasons. First, China had consistently adhered to the absolute doctrine. China had always afforded absolute immunity to foreign states and claimed absolute immunity for itself. China's position on absolute immunity was neither a "capricious" policy nor one that fluctuated as a matter of "political expediency".⁷⁸ The

72 *Philippine Admiral*, above n 5, at 399D–E, as cited in the CFA decision, above n 1, at [86].

73 The CFA decision, above n 1, at [84] per Bokhary PJ.

74 At [84].

75 CL Lim "Beijing's 'Congo' Interpretation: Commercial Implications" (2012) 128 LQR 6 at 8.

76 At 8.

77 At 9–10.

78 The CFA decision, above n 1, at [272].

Chinese Government preferred to determine its policy on state immunity in light of its own foreign policy interests and to resolve disputes involving other states through diplomatic channels, rather than submitting disputes to the “compulsory, and necessarily less flexible” jurisdiction of a court.⁷⁹

But this preference of the executive government to resolve disputes through diplomatic channels should be irrelevant. The rule of law requires that those who come before a court, including foreign states, should be treated equally. The rule of law thus demands that the courts, not the executive, determine the liability of states under commercial contracts.

Secondly, the majority did not accept that the courts were the most appropriate organ of government for determining a state’s immunity policy. The majority determined that each state allocated responsibility to the executive, legislature or the courts to determine the policy of state immunity, in accordance with its own constitutional arrangements.⁸⁰ In Hong Kong’s case, it was the executive’s role to determine Hong Kong’s state immunity policy. Historically, however, the common law courts have adjudicated on issues involving state immunity, particularly in the absence of an explicit allocation of responsibility to any particular branch of government to determine those issues.

Additionally, the rule of law and the principle of the separation of powers demand that courts should be able to make decisions without consulting the executive. As Mortimer NPJ, the second judge forming the minority, explained, when the State Immunity Act ceased to apply in Hong Kong, it was not replaced with any applicable local law or national statute law. In this vacuum, the common law on state immunity should have applied.⁸¹ Such a conclusion properly respects the rule of law — the executive cannot simply change the law of state immunity on a whim. If the executive wished to change Hong Kong’s policy on immunity, it had to follow proper legislative processes to do so.

2 The Idea of “One State, One Immunity” is Flawed

The second problem with the majority’s decision is its tendency to elide the principle of “one country, two systems” with the idea of “one state, one immunity”. The “one country, two systems” principle cannot be seized as a conclusive statement that the Hong Kong courts and the Chinese Government must speak with one voice on state immunity issues. Bokhary PJ argued that employing the expression of “one state, one immunity” within a “one country, two systems” situation was a dangerous distraction.⁸² The “one country, two systems” situation did not entail “one state, one immunity”. Rather, the idea of state immunity was divisible: the recognition of foreign

79 At [272].

80 The CFA decision, above n 1, at [275].

81 The CFA decision, above n 1, at [523(6)] per Mortimer NPJ.

82 At [123].

states as sovereign states was a matter of “country”; determination of whether state immunity was absolute or restrictive was a matter of “systems”.⁸³ This interpretation of the “one country, two systems” policy respects judicial independence and the rule of law. It recognises that the executive is responsible for forming relations with other states, and thus the recognition of other states as sovereign is properly a matter of executive discretion. But it is for the judiciary to decide independently, without executive consultation, whether state immunity in Hong Kong is absolute or restrictive.⁸⁴

Po Jen Yap offers an interesting, though flawed, argument in favour of the “one voice”/“one state, one immunity” principle. He places paramount importance on the fact that the Hong Kong Secretary of Justice actually intervened in the litigation. He favours the “one voice” principle, whereby judges demonstrate comity by choosing to speak with the same voice as the executive on foreign affairs. He explains that the courts do so out of “judicial modesty” and not because they are acts of state to which they are denied jurisdiction.⁸⁵ In Yap’s view, it was decisive that the Secretary of Justice had intervened on behalf of the Government in the *Congo* decision, making the “one voice” principle both relevant and “unassailable”.⁸⁶ Nevertheless, Yap was prepared to take his position to its logical limit. If, in the future, the executive branch of the Hong Kong Government did not take a stance on the issue of state immunity, the courts would be free to adopt the doctrine of restrictive immunity on its own initiative.⁸⁷ Yap’s proposition seems problematic. The courts’ decision should not depend on the fortuity of the executive’s intervention in a case. Such a position would offend the rule of law and remove any certainty, for the availability of the immunity defence would depend on the executive’s potential decision to intervene in the proceedings. The rule of law depends on the courts’ ability to make decisions without being subject to intervention by the executive.⁸⁸

3 *The Courts have Jurisdiction to Determine the Scope of State Immunity*

Thirdly, it is well established that the courts can determine the nature and extent of state immunity.⁸⁹ Given these precedents, the majority should have accepted that the common law courts had historically ruled on issues involving state immunity, and also accepted that immunity in commercial contexts was not an act of state that fell outside of the courts’ jurisdiction.⁹⁰

83 At [123].

84 At [123].

85 Yap, above n 47, at 82.

86 At 82.

87 At 82.

88 The CFA decision, above n 1, at [83].

89 Refer to trio of English cases discussed above n 5.

90 Yap, above n 47, at 82.

4 Restrictive Immunity is Concordant with Justice

As a substantive argument against absolute immunity, it is argued that the restrictive doctrine is more compatible with conceptions of justice. As Lord Wilberforce stated in *Owners of Playa Larga (Owners of Cargo Lately Laden on Board) v I Congreso del Partido (Owners)*, if states are entering into commercial or other private law transactions with individuals, it is in the interest of justice to allow such individuals to bring their claims before the courts. To require a state to answer a claim upon such transactions did not involve a challenge to any act of sovereignty or governmental act of state.⁹¹

Nevertheless, the majority considered that this notion of commercial justice ignored a more fundamental issue: whether Hong Kong could validly adopt a legal doctrine of state immunity that was inconsistent with the doctrine adopted by the Chinese Government.⁹² In its view, the Court could not express its opinion about the appropriateness of the Chinese Government's policy of absolute, as opposed to restrictive, immunity. The "municipal" courts (including the Hong Kong courts) were simply not equipped to make such a judgment, lacking relevant information and being ill-placed to gauge the full implications of adopting any specific policy on state immunity.⁹³ This conclusion seems indefensible given the long history of the courts having the jurisdiction and being well placed, as an institution, to adjudicate on matters of state immunity.

5 Preference for the Minority Position

In the author's view, the minority offered the more intellectually and commercially defensible position. It is not enough simply to acknowledge the importance of judicial independence and the rule of law. It is precisely in difficult constitutional situations — "in the face of a threatened constitutional crisis" — that the survival of judicial independence and the rule of law acquires paramount importance.⁹⁴ Judicial independence is not to be found in what the courts merely say, but in what the courts actually do: state immunity is not a matter for executive discretion for the "purpose of avoiding controversy, however fierce".⁹⁵ Further, as a matter of jurisdiction, all foreigners, whether foreign companies or foreign states acting in their private capacity, should be able to contest their claims before the courts, equally able to seek justice.⁹⁶ The unfairness and injustice in allowing a foreign state to sue as a plaintiff but not be sued as a defendant in courts is not merely, in the minority's words, an argument of "lawyerly appeal",

91 *Playa Larga*, above n 5, at 262C–E, as cited in the CFA decision, above n 1, at [510].

92 The CFA decision, above n 1, at [278].

93 At [281].

94 The CFA decision, above n 1, at [84].

95 At [84].

96 The CFA decision, above n 1, at [18] per Bokhary PJ.

which only “resonates within the confines of an individual dispute being decided in a municipal court”.⁹⁷

Nevertheless, a nuanced analysis of the *Congo* decision must acknowledge the tension between the competing values of the Chinese and common law legal orders in Hong Kong. A stringent application of judicial independence and the rule of law, as understood in Common Law jurisdictions, would fail to acknowledge the cultural factors at play. The Basic Law is, after all, an expression of the “one country, *two systems*” principle. The analysis in this article has put great value on the rule of law and judicial independence as constitutional principles justifying the conclusion that the Hong Kong courts should be able to decide for themselves which doctrine of immunity should apply. But it must be acknowledged that these principles carry less weight, or do not exist, in Chinese legal culture. Although it is somewhat superficial to describe the essential elements of a legal culture, it is possible to discern some general differences in constitutional priorities between the English Common Law system that Hong Kong inherited and the Chinese legal system.

Berry Hsu argues that there are “sharp differences” between the traditional Chinese and Common Law judicial systems in respect of individual rights, the rule of law and judicial independence.⁹⁸ Whereas the independence of the judiciary is a “cardinal doctrine” of the Common Law system, Hsu observes that the Chinese Government has traditionally exercised significant influence over the judiciary.⁹⁹ As Sir Anthony Mason has described, the Common Law regards the courts’ role in interpreting statutes as a “fundamental element” in the separation of powers and exercise of judicial power. In China, however, the National People’s Congress, through the Standing Committee, makes and interprets legislation. Other bodies, such as the Supreme People’s Court (the highest court in the Chinese legal system) may issue interpretations but these interpretations do not carry equal authority to the Standing Committee’s interpretations.¹⁰⁰ Thus concepts of judicial independence diverge between the Common Law and Chinese legal systems.

Despite these contrasting aspects of the Chinese legal system, the Basic Law clearly gives effect to the common law doctrines of judicial independence and the rule of law. Article 85 states that the Hong Kong courts shall exercise judicial power independently. The Basic Law intended that the common law would continue to operate in Hong Kong, and drafters of the Basic Law understood that the rule of law and an independent judiciary were central to ensuring commercial certainty. A former Chief Executive of Hong Kong has stated that the preservation of the rule of law was more critical for

97 At [279] per majority.

98 Berry Fong-Chung Hsu *The Common Law System in Chinese Context* (East Gate Book, Armonk (NY), 1992) at 48.

99 At 37.

100 Anthony Mason “The Hong Kong Court of Final Appeal” (2001) 2 *Melb J Int’l L* 216 at 223.

Hong Kong's future success than even the free market autonomy,¹⁰¹ for the free market depended on the ability of commercial parties to rely on the rule of law as upheld by an independent judiciary.¹⁰² Even though the power of final judgment vested in the Court of Final Appeal was qualified by art 158, giving ultimate power of interpretation of the Basic Law to the Standing Committee, the principles of the rule of law and judicial independence should nonetheless be given their full effect and accorded paramount importance.

The *Congo* decision has led to great uncertainty in the law of state immunity, an unpleasant surprise for private parties dealing with states that have property in Hong Kong. Mortimer NPJ points to the fact that the chairman of the Drafting Committee, Mr Ji Pengfei, in 1990, had asserted that the reunification of Hong Kong and China would retain "Hong Kong's status as an international financial centre and free port".¹⁰³ That being the case, the Basic Law could not have intended a volte-face in the law of state immunity in circumstances where individuals, commercial actors and other nations had continued to assume that restrictive immunity would apply in Hong Kong.

Further, this case gives rise to numerous practical questions about the position of the state in international commercial litigation, particularly in light of the rise in the speculative global market for the enforcement of sovereign debt, and the possibility of attempts to enforce arbitral awards against the assets of states and state-owned entities.¹⁰⁴ How these practical questions will be resolved through Beijing's highly political decision-making power remains to be seen. Not only does absolute immunity in Hong Kong create uncertainty and deter commercial activity with states, it is also likely to encourage forum-shopping as commercial parties seek to litigate against states with property in multiple countries, seeking jurisdictions where they are most likely to get a favourable outcome.

Absolute immunity therefore sets too high a hurdle for private litigants wishing to sue a state with property in Hong Kong or China. The recognition of commercial realities ensures that the risk of a state's default on a contract would probably be incorporated in the price of a contract. Nevertheless, restrictive immunity, as a rule of private international law, makes more commercial sense than absolute immunity, giving businesses and investors greater certainty when engaging with states commercially. It is submitted that the *Congo* decision is not welcomed internationally, at minimum, not in Common Law jurisdictions, as it goes against the more favoured approach of restrictive immunity. It could also be the case that the ruling on state immunity in the *Congo* decision turns on an interpretation of whether state

101 Leo F Goodstadt "Prospects for the Rule of Law: the Political Dimension" in Steve Tsang (ed) *Judicial Independence and the Rule of Law in Hong Kong* (Palgrave, Basingstoke, 2001) 180 at 183.

102 At 183.

103 The CFA decision, above n 1, at [439].

104 Chester Brown "State Immunity from Measures of Constraint in International Commercial Dispute Settlement" (paper presented to the New Zealand Centre for Public Law Symposium on Innovative Models in International Commercial Dispute Resolution, Wellington, November 2011) at 1.

immunity is a matter of foreign affairs under the Basic Law, and so carries limited weight as a development of state immunity at common law generally. Although China continues to hold steadfastly onto absolute immunity, it may find that it must adopt restrictive immunity in developing commercial relationships with foreign investors, most probably through treaties rather than the common law. That being the case, what would remain of the *Congo* decision except to damage Hong Kong's judicial independence?

V STATE IMMUNITY FROM EXECUTION

The problem presented in Part IV concerning the difficulty of establishing jurisdiction in a state immunity case is only the first hurdle that private litigants must clear. This section critiques the second hurdle: the need for non-state parties to defeat a plea for state immunity from execution (which is also called "measure of constraints"). State immunity from execution relates to the actual enforcement of an arbitral or judicial award against the property of a state. This means that even if a state were unable to claim immunity from jurisdiction, it could still plead immunity from execution to prevent its assets from being seized. This heightened protection for a state has led to immunity from execution being described as the last fortress, "the last bastion of State immunity".¹⁰⁵ It is argued that immunity from execution renders restrictive immunity hollow.

In international law, state immunity from jurisdiction and enforcement have remained distinct concepts. Although international trends have favoured the adoption of restrictive immunity, this development has occurred more noticeably in relation to immunity from jurisdiction than immunity from execution.¹⁰⁶ The International Court of Justice recently observed that "immunity from enforcement enjoyed by States in regard to their property situated on foreign territory goes further than the jurisdictional immunity enjoyed by those same States before foreign courts".¹⁰⁷

State immunity from execution is one of the most pressing issues in the law of state immunity requiring reform. Fox observes that it remains rare for state assets to be seized without consent.¹⁰⁸ Immunity from enforcement has remained largely absolute except in respect of property that is in use or is intended to be used for commercial purposes. Fox therefore describes state immunity from execution as producing an unsatisfactory "half a loaf" situation, where restricting immunity from jurisdiction has developed without parallel restriction of immunity from enforcement.¹⁰⁹

There are at least three reasons why the development of the restrictive

105 Report of the International Law Commission on the work of its forty-third session [1991] vol 2, pt 2 YILC 1 at 56.

106 Brown, above n 104, at 4.

107 Jurisdictional Immunities of the State (*Germany v Italy: Greece Intervening*) [2012] ICJ 143 at [113].

108 Fox, above n 4, at 8.

109 At 8.

theory has moved more quickly on the issue of adjudicative immunity than it has with execution immunity. First, the notion of state immunity from execution directly impacts on the sovereign independence of states because it deprives a state of physical property.¹¹⁰ Secondly, execution against sovereign assets interferes directly with the foreign relations of the forum state, especially where judgment is sought to be enforced against diplomatic and consular property.¹¹¹ Thirdly, developing nations, often the debtor-defendants in commercial cases, are not protected by insolvency protection.¹¹² As Fox elaborates, there is no international law of insolvency to resolve a state's general inability to meet its financial commitments and the rescheduling of state debts remains a largely political process.¹¹³ Some sensitivity is therefore required with regard to states' insistence that commitments in respect of their public budget should have priority over the claims of individual commercial creditors.¹¹⁴

The distinction between state immunity from jurisdiction and enforcement is problematic and can lead to undesirable outcomes. It means that a private litigant who successfully claims a right against a state cannot necessarily claim a remedy (such as in the *Congo* decision). Immunity from execution leads to the unattractive situation where, even if a state is unable to claim immunity in respect of a foreign court's jurisdiction, it may be able to claim immunity when it comes to enforcement. The International Court of Justice has recently explained the situation in these terms:¹¹⁵

Even if a judgment has been lawfully rendered against a foreign State, in circumstances such that the latter could not claim immunity from jurisdiction, it does not follow ipso facto that the State against which judgment has been given can be the subject of measures of constraint on the territory of the forum State or on that of a third State, with a view to enforcing the judgment in question. Similarly, any waiver by a State of its jurisdictional immunity before a foreign court does not in itself mean that that State has waived its immunity from enforcement as regards property belonging to it situated in foreign territory.

As a matter of practice, Fox argues that the dual protection of state immunity makes it easier for states to evade their commercial obligations. This risk deters investors from doing business with states and tends to produce "greater friction between countries than is caused by any reduction in immunity from jurisdiction".¹¹⁶ Default by states in honouring their commercial obligations also leads to the unwillingness of private parties to accept states as trading partners, and parties will have to internalise the risk of contracting with a

110 Jeremy Ostrander "The Last Bastion of Sovereign Immunity: A Comparative Look at Immunity from Execution of Judgments" (2004) 22 Berkeley J Int'l L 541 at 574.

111 At 574.

112 At 574.

113 Fox, above n 4, at 600.

114 At 661.

115 *Germany v Italy*, above n 107, at [113].

116 Fox, above n 4, at 661.

state that may default (and plead immunity to avoid liability).

In light of the developments in respect of state immunity described above, the question in the *Congo* decision was whether the Congo's submission to arbitration in a commercial dispute could be taken as a waiver of any immunity from enforcement. A waiver is the agreement not to plead state immunity as a bar to a claim, meaning that the State party would submit to the jurisdiction of the forum State.¹¹⁷

The majority in the Court of Final Appeal agreed with Reyes J and the Court of Appeal that there was no basis for finding that the Congo had waived its state immunity before the Hong Kong courts — either in respect of recognition or execution of the arbitral awards. Reliance on the terms of the arbitration agreement between the Congo and Energoinvest was sufficient by itself. The Congo had signed up to the ICC's rules, agreeing that by submitting the dispute to arbitration, the parties would execute any awards made without delay and would be deemed to have waived their right to any form of recourse that could validly be made. State immunity would be included as one such form of recourse. The majority made it clear that when states agree to the contractual jurisdiction of an arbitral tribunal that does not amount to submitting to the jurisdiction of another state's courts.¹¹⁸ The rationale of state immunity stems from the *par in parem* principle, therefore it is the mutual recognition of co-equal sovereign states which leads each state to refrain from exercising jurisdiction over the foreign state without its consent.¹¹⁹ The majority decided that the courts could not deem a state to have submitted to a forum state's jurisdiction when it had not explicitly, by its words or conduct, submitted to such jurisdiction, or when it had clearly objected to such jurisdiction in the proceedings. To do otherwise would be to damage the relations between the two states.¹²⁰

This position is flawed. The minority's position that the ICC term of reference did amount to a waiver is more compelling. It provides an outcome that is more consistent with justice in commercial relationships. As a starting point, Bokhary PJ accepted that rights under an award are worthless if they are unenforceable.¹²¹ The Judge considered it would be "absurd" to allow a state to submit a dispute to arbitration despite its immunity from jurisdiction, then allow it to prevent the award from being enforced by relying on immunity from execution.¹²² As Bokhary PJ put it, "states cannot blow hot and cold in the same breath".¹²³

Bokhary PJ believed that the ICC terms of reference were decisive. In his opinion, these terms of reference constituted an effective waiver of

¹¹⁷ The CFA decision, above n 1, at [374].

¹¹⁸ At [378] per majority.

¹¹⁹ At [392].

¹²⁰ At [392].

¹²¹ At [164].

¹²² The CFA decision, above n 1, at [164], citing Emmanuel Gaillard and John Savage (eds) *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (Kluwer Law International, The Hague, 1999) at 391.

¹²³ The CFA decision, above n 1, at [164].

any immunity from enforcement that the Congo might have had in Hong Kong. The most persuasive element of the minority position is the consistent application of commercial fairness — if restrictive immunity can be justified on the basis that it is fair and just for commercial parties at the jurisdiction stage, those justifications must continue to apply at the enforcement stage. In this sense, the minority's decision on waiver is preferable to the decisions of Stock VP and Yeung JA in the Court of Appeal, the latter holding that restrictive immunity should apply, but that the Congo was nevertheless protected from enforcement as it had not waived its immunity from enforcement. The minority in the Court of Final Appeal, conversely, was prepared to take their position to its logical conclusion and find that the ICC terms of reference were effective. In this way, the minority Judges in the Court of Final Appeal challenged the distinction between state immunity from jurisdiction and execution.

VI PROPOSED APPROACH TO RESTRICTIVE IMMUNITY AND THE COMMERCIAL EXCEPTION

In providing a critique of the *Congo* decision, this article has advocated broadly for restrictive immunity. For the foregoing reasons, restrictive immunity is not only the fairest and most commercially sound principle to apply, but the doctrine is also necessary to encourage commercial actors to engage with the state. Commercial actors are increasingly and inevitably involved in delivering public services. There are real commercial advantages to public-private partnerships, especially where states lack the capacity or the expertise to deliver certain public goods. Commercial transactions concluded in the course of delivering public services should be treated the same way as regular commercial transactions, to give commercial actors the assurance that the state's commercial obligations will be enforced. The restrictive immunity doctrine should apply globally. Divergent approaches to state immunity in different countries gives rise to forum-shopping problems and commercial uncertainty. This allows states to escape liability by keeping their assets in a country that applies absolute immunity and blocks an avenue of recourse for a commercial actor to make a claim against the state. Whether an arbitration agreement against a state will be enforced will also depend on the forum in which the proceedings are brought. The current law of state immunity as it applies in different countries is evidently incoherent and highly unsatisfactory. It is therefore an area of international law in need of harmonisation, if not unification.

Restrictive immunity must be the most appropriate approach. It provides the best legal framework for balancing the need to provide states with sufficient protection while achieving individual commercial justice. Restrictive immunity resolves this tension by preserving as its starting point the protection of states by absolute immunity, but introduces an exception that holds states accountable in respect of commercial transactions with private

individuals and companies. A carefully crafted commercial exception is necessary to provide certainty, allowing both states and private parties to be certain about their obligations under contracts with a state party.

Unfortunately the *Congo* decision does not provide significant guidance as to the definition of the commercial exception. There are, however, helpful precedents from international conventions (such as the UN Convention on State Immunity) and domestic legislation from other countries, which have attempted to define the commercial exception. Although there are flaws with the commercial exception definition used in the UN Convention on State Immunity, working within the framework of the UN Convention is the favourable solution. As the UN Convention is the product of several decades of negotiation, it is the most promising avenue for achieving harmonisation (and possibly unification) in the law of state immunity.

Before describing how the commercial exception is formulated in specific contexts, it is necessary to outline this article's preferred definition of restrictive immunity. First, there should be no immunity where a state has engaged in a commercial transaction. This is the "commercial exception" to absolute immunity. Secondly, examples of typical commercial transactions that fall within the exception should be given, such as contracts for sale of goods, loan contracts or other contracts of a commercial nature. These first two examples are commonly found in definitions of the commercial exception.¹²⁴ The most problematic issue arises in relation to the third element: how to deal with the residual category of transactions which do not obviously fit into the list of common commercial transactions. The preferable approach is that found in the State Immunity Act 1978 (UK), which provides a broad definition of "commercial transaction". That Act defines "commercial transaction" as including "any ... transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages [*other than in the exercise of sovereign authority*]"¹²⁵ This definition makes it clear that the state can only rely on immunity if it is clear that its actions are made in its capacity as a sovereign. It requires a state to prove that it was acting within its sovereign capacity. Any commercial transaction into which the state enters outside of its sovereign capacity would likely be caught by the exception. So a definition similar to that in the State Immunity Act would tend to include most commercial transactions into which the state may enter in the same way as a private individual or company, with the balance in favour of a finding that the commercial exception would apply. The demonstrable purpose or motive of the state in entering into the transaction would be relevant, but would not be a touchstone of a private litigant's ability

124 See the UN Convention on State Immunity, above n 3, art 5 (establishing that states enjoy immunity in respect of itself and its property), art 10 (establishing the exception for commercial transactions) and art 2(2) (defining a commercial transaction by reference to typical commercial transactions). See also the State Immunity Act 1978 (UK), s 1 (establishing State immunity from jurisdiction), s 3(1) (establishing the commercial exception) and s 3(3) (defining "commercial transaction" by reference to typical commercial transactions).

125 State Immunity Act, s 3(3)(c) (emphasis added).

to defend a plea of immunity.

A preference for the United Kingdom's approach is best understood by comparison with the UN Convention on State Immunity, which adopts a problematic hybrid nature/purpose test. Currently, art 2(2) of the UN Convention states that the commercial nature of a contract is to be determined by reference to the nature of the contract, but the purpose is also taken into account. The practice of the state of the forum determines whether a transaction has a commercial or non-commercial character. This hybrid nature/purpose test is problematic because it encourages countries to take different approaches.¹²⁶ Reliance on what is state practice could allow each country's administrative approach to determine the commercial or non-commercial character of a transaction. Fox notes, however, that the use of the hybrid nature/purpose test was seen as a necessary compromise among different countries in the drafting of the UN Convention.¹²⁷ In comparison, the United States has relied solely on the nature of the contract to determine its commercial or non-commercial character, such that the courts will have jurisdiction where the activity involved is of a kind that may be carried on by private persons.¹²⁸ The nature test provides greater certainty than the hybrid test as it eliminates the need to determine the motive of the state in entering into a transaction. But the best definition is, as discussed above, one that places the burden on the state to show that it was entering into the transaction in its sovereign capacity.

Finally, it is argued that immunity from enforcement should not apply once restrictive immunity is accepted. The arguments for preserving the distinction between immunity from jurisdiction and enforcement are not persuasive. It is difficult to see why a commercial actor, having established that a court does have jurisdiction to determine a case and that the issue is determined in its favour, may nevertheless fail to claim any remedy for breach of its rights. If restrictive immunity is available and the courts have jurisdiction under the commercial exception, then the state must accept it must pay any damages that are awarded against it. It is an accepted element of ordinary litigation that the breach of a right or the commission of a wrong should be remedied by payment of damages — the fact that it is a state which is party to the litigation should not change this rule.

The proposed approach to restrictive immunity would bring greater clarity in a situation like the *Congo* decision and cement that where the state enters into a transaction outside of its sovereign capacity, the state is not involved in a matter of foreign affairs.

126 Joanne Foakes and Elizabeth Wilmshurst *State Immunity: the United Nations Convention and its effect* (Chatham House, ILP BP 05/01, 2005) at [13].

127 Fox, above n 4, at 537–538.

128 Foreign Sovereign Immunities Act (US), § 1603(d).

VII CONCLUSION

As Judge Christopher Greenwood has remarked, although the commercial exception may be firmly established, its application in practice has caused more difficulty than expected.¹²⁹ In the *Congo* decision, the application of the law of state immunity was complicated by an underlying struggle for dominance between the Chinese Executive-driven legal order and the more liberal Common Law system. The decision also challenges the acceptance by many academics and legal practitioners of the doctrine of restrictive immunity as enjoying universal, or near-universal, application. It has even challenged the expectations of Chinese academics, who expected that the growth of private interests in China and its signature of the UN Convention on State immunity in 2005 signalled a “probable shift” in China from its position of absolute immunity in favour of restrictive immunity.¹³⁰ Although Beijing’s recent confirmation of the majority’s decision in the Court of Final Appeal gives absolute immunity a firm stamp of approval, it is possible that this situation may not remain for long. As Dahai Qi puts it, the restrictive doctrine may become increasingly necessary to accommodate the rapid growth of the private sector in China’s economic structure and significantly enhance judicial protection of the interests of Chinese private commercial entities actively involved in international commerce.¹³¹

It is clear from the *Congo* decision that the law of state immunity is not applied consistently around the world and this inconsistency has led to a highly unsatisfactory commercial environment for non-state parties. Despite problems with the workability of the commercial exception, the restrictive immunity doctrine remains the fairest and most just doctrine of state immunity for the global economic in the 21st century.

129 Fox, above n 4, at foreword.

130 Dahai Qi “State Immunity, China and Its Shifting Position” (2008) 7 Chinese JIL 307 at 307.

131 At 307.