CACV 373/2008 &
CACV 43/2009

IN THE HIGH COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF APPEAL

CIVIL APPEAL NO. 373OF 2008 & NO. 43 OF 2009

(ON APPEAL FROM HCMP NO. 928 OF 2008)

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BETWEEN
FG HEMISPHERE ASSOCIATES LLC Plaintiff (Appellant)
And
DEMOCRATIC REPUBLIC OF THE CONGO 1st Defendant (Respondent)
CHINA RAILWAY GROUP (HONG KONG) LIMITED 2nd Defendant
CHINA RAILWAY RESOURCES DEVELOPMENT LIMITED 3rd Defendant
CHINA RAILWAY SINO-CONGO MINING LIMITED 4th Defendant
CHINA RAILWAY GROUP LIMITED 5th Defendant
And
SECRETARY FOR JUSTICE Intervener

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Before: Hon Stock VP, Yeung JA and Yuen JA in Court

Dates of Hearing: 28-31 July, 3-4 August 2009

Date of Handing Down Judgment: 10 February 2010

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J U D G M E N T

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Hon Stock VP:

Introduction

1. In April 2003 arbitral awards were made in France and Switzerland against the Democratic Republic of Congo (DRC). France and Switzerland are parties to the <<New York Convention>>

on the Recognition and Enforcement of Foreign Arbitral Awards. The plaintiff company has acquired the benefit of those awards and has obtained leave in Hong Kong to enforce the awards and injunctions to prevent third parties transferring assets allegedly due to the DRC. The DRC has claimed immunity from jurisdiction and from the process of execution. The Court of First Instance has set aside leave and the injunctions. This is an appeal from that decision.

2. This appeal addresses the questions whether an application for leave to enforce an arbitral award made under the <<New York Convention against a State impleads that foreign State; whether the law of Hong Kong requires application of the doctrine of absolute state immunity from jurisdiction and execution, as opposed to the restrictive doctrine; and whether by agreeing to refer a dispute to arbitration in aNew York Convention >> country, to be conducted according to the Rules of the International Chamber of Commerce (ICC), a foreign State which is not a party to the Convention waives such state immunity from jurisdiction and execution to which it is otherwise entitled.

Background

3. In the 1980s a Yugoslav company, Energoinvest, entered into contracts to construct a hydro-electric facility and high-tension electric transmission lines in the DRC. In connection with these contracts the DRC entered upon certain credit agreements with Energoinvest whereby the DRC was, through the intermediary of the state-owned Société Nationale d'Eletricité, financed by Energoinvest for a substantial percentage of the cost of the works. The credit agreements incorporated ICC arbitration clauses. The DRC defaulted on its repayment obligations.

4. There followed two arbitrations, one in Switzerland, the other in France. They culminated in two final awards dated 30 April 2003 in favour of Energoinvest against the DRC and the Société Nationale in the sums of US$11.725 million and US$22.525 million respectively plus interest. Neither award has been challenged by the DRC.

5. The plaintiff in the current proceedings, FG Hemisphere Associates LLC (FG), is a limited liability company with its principal place of business in New York. It specializes in investing in emerging markets and distressed assets.

6. On 16 November 2004 Energoinvest assigned to FG the entire benefit of principal and interest payable by the DRC under the awards. This benefit constitutes FG's sole assets.

7. We are informed that FG has recovered US$2.783 million through enforcement proceedings in other jurisdictions. By the time the proceedings in Hong Kong were commenced, the DRC was indebted to FG in the sum of US$102,656,647.96.

8. In the months leading up to and including May 2008, it came to FG's notice that as part of a massive investment programme in the DRC by Chinese state-owned companies, those companies would acquire mineral exploitation rights for which entry fees were payable by them to the Government of the DRC. FG's objective thereafter has been to target the fees contingently payable to the DRC in equitable execution of the arbitral awards.

9. On 16 May 2008 FG commenced proceedings in Hong Kong by originating summons seeking leave to enter judgment to enforce the awards; the appointment of receivers by way of equitable execution against the sums said to be contingently payable by the consortium of Chinese enterprises to the DRC; and an injunction to prevent payment of those sums to the DRC. The consortium includes the second, third and fourth defendants, companies incorporated in Hong Kong with limited liability. They are each wholly-owned subsidiaries of the China Railway Group Limited, a company incorporated in the Mainland with limited liability and whose shares are listed on the Hong Kong and Shanghai Stock Exchanges.

10. The monies in respect of which the Hong Kong proceedings have been launched and in respect of which an order was made ex parte preventing their payment by the second, third and fourth defendants to the DRC are said by the plaintiff to be due to the DRC in the circumstances described in the judgment of Reyes J:

"17. By a Memorandum of Agreement dated 17 September 2007 between the DRC and a consortium of Chinese Enterprises (comprising the Export-Import Bank of China, China Railway and Sinohydro) the broad terms for the creation of a Joint Venture Company (JVC) were set out.

18. Under the Memorandum, the JVC was to be held as to 32% by a Congolese Party and 68% by a Chinese Party. The JVC was to develop the DRC's infrastructure in consideration of the right to exploit certain mineral resources of the DRC over the life of the JVC.

19. The Preamble to the Memorandum refers (among other things) to Cooperation Agreements signed on 3 April and 7 December 2001 between the DRC and PRC. It appears that the Memorandum was intended to provide the framework for implementing those Cooperation Agreements between the DRC and PRC.

20. On 22 April 2008 China Railway, Sinohydro and the DRC entered into [a Cooperation Agreement (CA)]. The aim of the CA was to identify the cooperation projects to be implemented by the parties, the ways in which such projects were to be implemented, and the rights and obligations of each party.

21. Pursuant to the CA, a Chinese Consortium (comprising the 2nd to 4th Defendants and 2 Sinohydro subsidiaries) and certain Congolese Investors (comprising Gecamines (the DRC state mining company) and Mr. Gilbert Kalamba Banika) entered into the JVA. Under the JVA, the parties agreed to establish a DRC company in which the 2nd to 4th Defendants would hold 43%, Sinohydro-related companies 25%, Gecamines 20% and Mr. Banika 12% interests.

22. The Chinese Party to the JVA would be responsible for 100% of the JVC's obligations. Gecamines would in turn transfer certain mining rights to the JVC. Each of the parties would be responsible for specific capital contributions, with the 2nd to 4th Defendants making a loan to the Congolese Party in respect of the latter's contribution.

23. Subject to the satisfaction of certain conditions, the Chinese Party would also pay US$350 million of Entry Fees to the DRC and Gecamines for the right to exploit the DRC's mineral resources. Of this, it appears that US$221 million (representing 63.2% of the requisite Entry Fees) would be payable by the 2nd to 4th Defendants.

24 The JVA would only come into effect upon certain conditions having been met. These conditions include approvals by the China National Development and Reform Committee, the PRC's Ministry of Commerce, and the China State Administration of Foreign Exchange.

25. Further, under the JVA, no Entry Fees are payable until a pre-feasibility report has been approved by the PRC authorities; a satisfactory due diligence has been conducted by the 2nd to 4th Defendants and Sinohydro; and mineral rights have been transferred to the JVC.

26 On 28 June 2008 the parties to the CA and JVA entered into a Supplemental Cooperation Agreement (SCA) and Supplemental Joint Venture Agreement (SJVA).

27. As a result of these supplemental agreements, the 4th Defendant was removed as a party to the joint venture. The 4th Defendant was replaced by the China Metallurgical Group Corporation (a PRC state-owned enterprise) which took up a 20% shareholding. The 2nd and 3rd Defendants' stake in the JVC became 28% and that of the Sinohydro companies 20%.

28. Under the supplemental agreements, Mr. Banika was removed as a member of the Congolese Party. His place was taken by Congo Simco (a DRC state company) which became a 12% shareholder in the JVC.

29. On one construction (by no means the only possible reading) of the SCA and SJVA, the Entry Fees due from the 2nd and 3rd Defendants (US$144 million by reference to their share in the JVC) became payable to Gecamines and Congo Simco, rather than to the DRC and Gecamines as before.

30. … Although it is possible that the DRC ceased to be entitled to any part of the Entry Fees as a result of the SCA and SJVA, it is FG's case that Gecamines and Congo Simco are merely agents or fronts acting for the DRC."

Procedural history

11. These proceedings commenced with an ex parte application heard by Saw J on 15 May 2008. Upon the plaintiff's cross-undertaking as to damages and an undertaking forthwith to issue an originating summons, he ordered that:

(a) the second, third and fourth defendants be restrained from making payments (the entry fees) allegedly due from them to the DRC and/or Congo Mining under the joint-venture agreement up to a maximum of US$104 million;

(b) the DRC be restrained from receiving the entry fees up to that maximum sum;

(c) the plaintiff have leave to enforce in Hong Kong the two arbitration awards; and

(d) the parties should attend a judge in chambers on a date to be fixed to hear an application by the plaintiff for the appointment of receivers by way of equitable execution to receive the payments.

12. The plaintiff was given leave to serve the originating summons and the ex parte order upon the DRC outside the jurisdiction at the Ministry of Justice, Department of Justice, Kinshasa, DRC 'or elsewhere in the [DRC]'. The order was sent by solicitors acting for the plaintiff to the Kinshasa address and also to the Embassy of the DRC in Beijing.

13. The originating summons was issued on 16 May 2008.

14. On 16 June 2008, service of the originating summons was acknowledged by solicitors on behalf of the DRC "for the sole purpose of disputing jurisdiction and for the avoidance of doubt, nothing herein shall be construed as waiver of any rights of Democratic Republic of the Congo … (including the right to dispute jurisdiction) which are expressly reserved."

15. On 7 July 2008 Reyes J replaced the various injunctions hitherto made against the 1st to 4th defendants inclusive and granted fresh instructions restraining them until further order from receiving (in the case of the 1st defendant) and making (in the case of the others) payments of the entry fees and granted the plaintiff leave to effect substituted service of the order upon the DRC by service on DRC's solicitors in Hong Kong.

16. By summons dated 7 July 2008, the DRC sought a declaration that the Court of First Instance had no jurisdiction over the DRC in respect of the subject matter of the claim or the relief or remedy sought in the proceedings; a declaration that the originating summons had not been served on the DRC; and for discharge of the various orders thus far made against the DRC.

17. On 23 August 2008, the plaintiff was granted leave to amend the originating summons by adding China Railway Group Limited as the fifth defendant. Leave was subsequently given for substituted service of the amended originating summons on the Hong Kong solicitors acting for the DRC.

18. On 12 November 2008 the Secretary for Justice applied to intervene in the proceedings, leave for which was subsequently granted.

19. The hearing of the plaintiff's originating summons and the defendant summons took place in November and December 2008 and Reyes J delivered judgment on 12 December 2008.

Judgment below

20. The issues at first instance were:

(1) whether on and after 1 July 1997 Hong Kong common law recognized the doctrine of restrictive sovereign immunity whereby a State could not lawfully be impleaded in the courts of this jurisdiction in relation to acts in its sovereign capacity (acta jure imperii) but was not immune from suit in respect of those of its acts of a private law or commercial character (acta jure gestionis) or whether, on the other hand, immunity from suit in this jurisdiction was absolute;

(2) if the restrictive doctrine applied, into which category the relevant act in this instance fell; and

(3) if immunity was absolute or the relevant act was in any event an act jure imperii, whether the DRC had waived immunity by submitting itself to arbitration.

21. Because of his categorisation of the act which he identified as the relevant act, Reyes J did not find it necessary to determine which of the various theories for which the parties before him contended represented the state of Hong Kong common law on the question of sovereign immunity, although he expressed provisional preference for the restrictive approach. It was, he said, unnecessary to express a settled view because he found that the relevant transaction was not of a commercial nature. In this regard, he assumed, for the purpose of the exercise, the hypothesis most favourable to FG, namely, that the entry fees due under the cooperation agreement and the joint-venture agreement, as supplemented, were ultimately payable to the DRC. He concluded that the circumstances giving rise to liability for payment of the entry fees did not constitute a commercial transaction. They did not carry the normal attributes of routine commercial business. The transaction was, rather, a cooperative venture between two sovereign States: the Chinese party was to build extensive infrastructure in the DRC, a development of the entire country for the well-being of its citizens, a project made possible only because it was driven by governments as opposed to private entities. Furthermore, the terms of the agreements were not such as one might expect to find in a conventional trading contract, embracing as they did special tax, customs and visa advantages; and the entry fees were paid in consideration of the grant of a licence to exploit the natural resources of a country.

22. The judge also found against the plaintiff on the issue of waiver. He reminded himself that waiver of immunity in respect of suit does not of itself imply waiver of immunity from execution and that submission to the two arbitrations which were subject to the ICC rules did not constitute unambiguous conduct on the part of the DRC inconsistent with an intention to invoke immunity from execution, noting in particular that the DRC was not a contracting party to the <<New York Convention>>.

23. There were two further issues, namely, an argument by the DRC as to non-effective service

of the originating summons and a further argument that the plaintiff had been guilty of material non-disclosure. Although strictly unnecessary to decide those issues, the judge nonetheless held against the defendants on them.

24. By order dated 12 December 2008, the judge declared that the court had no jurisdiction over the DRC in the proceedings; discharged the ex parte injunction against the DRC dated 16 May 2008; set aside leave to enforce the arbitral awards; set aside leave granted to serve the originating summons on the DRC outside the jurisdiction as well as leave to serve the DRC by way of substituted service; and set aside the originating summons dated 16 May 2008 as later amended, as against the DRC.

25. On 26 February 2009, Reyes J discharged the injunctions against the second to fifth defendants inclusive and dismissed the defendants' originating summons as amended.

26. These appeals are against the orders made by Reyes J on 12 December and 29 February.

The argument in this appeal

27. The DRC asserts that:

(1) the DRC is immune from the jurisdiction of the court in this case because by reason of the Basic Law the court has no jurisdiction to determine issues of state immunity;

(2) even were the primary submission incorrect, the doctrine of restrictive immunity is not part of Hong Kong law, so that the DRC enjoys absolute immunity from both suit and execution;

(3) even if the restrictive theory applies in Hong Kong, the judge below was correct in deciding that the relevant acts were acta jure imperii;

(4) in any event there are no assets of the DRC in Hong Kong against which execution can be levied;

(5) the plaintiff has not effected service on the DRC; and

(6) the ex parte orders of May 2008 were obtained in the face of material non-disclosure and ought for that reason to be set aside.

28. The Secretary for Justice supports the stance of the DRC at least so far as it addresses the state of the common law in Hong Kong at the time of the resumption of the exercise of sovereignty on 1 July 1997, adding to the argument that the restrictive doctrine of state immunity has never attained the status of customary international law and could not therefore properly have been adopted as part of Hong Kong common law.

29. The plaintiff joins issue with these contentions by submitting that no act of state is in issue in this case and that, on the question of restrictive immunity, it is a doctrine that has long attained the status of customary international law, and was in any event part of Hong Kong's law as at 30 June 1997, which has survived the constitutional transition. That being so, the argument runs, there is in this case no immunity as to suit because the relevant act underlying the arbitral awards is self-evidently commercial and, as to immunity from execution, there is no need to determine that issue for the application to the court has not reached the stage of execution but, if that is wrong, the DRC has not discharged the burden upon it to establish that the entry fees are intended for a public purpose and, for that reason, are immune from the processes of execution.

Instruments

30. We are informed that there are 144 signatories to the <<New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958 (the New York Convention>>). The Convention was ratified by the PRC in January 1987. After 1997 the PRC extended its membership in the Convention to Hong Kong. Our attention is invited to:

(1) Article III which provides that each contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon; and

(2) Article V which specifies grounds upon which recognition and enforcement of an award may be refused: for example, upon proof that the parties to the agreement were, under the law applicable to them, under some incapacity or where recognition or enforcement would be contrary to the public policy of the country where recognition and enforcement is sought; the plaintiff pointing out that none of the grounds for refusal exists in the present case.

31. Section 2GG of the Arbitration Ordinance, Cap. 341 provides that:

"(1) An award, order or direction made or given in or in relation to arbitration proceedings by an arbitral tribunal is enforceable in the same way as a judgment, order or direction of the Court that has the same effect, but only with the leave of the Court or a judge of the Court. If that leave is given, the Court or judge may enter judgment in terms of the award, order or direction.

(2) Notwithstanding anything in this Ordinance, this section applies to an award, order and direction made or given whether in or outside Hong Kong."

32. The <<New York Convention>> is given domestic effect by Part IV of the Ordinance. Section 42(2) provides that:

"(1) A Convention award shall, subject to this Part, be enforceable either by action or in the same manner as the award of an arbitrator is enforceable by virtue of section 2GG.

(2) Any Convention award which would be enforceable under this Part shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in Hong Kong and any reference in this Part to enforcing a Convention award shall be construed as including references to relying on such an award."

33. Section 44 of the Ordinance reflects grounds furnished by the Convention for refusal to enforce a Convention award and, again, the plaintiff prays them in aid as not applying in this case. Section 44(1) provides that enforcement of a Convention award shall not be refused except in the cases mentioned in the section.

An Act of State?

34. Art. 19 of the Basic Law provides:

"The courts of the Hong Kong Special Administrative Region shall have no jurisdiction over acts of state such as defence and foreign affairs. The courts of the Region shall obtain a certificate from the Chief Executive on questions of fact concerning acts of state such as defence and foreign affairs 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." (Emphasis added).

35. The first argument advanced by Mr Barlow SC on behalf of the DRC is that this Court has

no jurisdiction to determine the issue of state immunity because, however acts of state might previously have been defined, "defence and foreign affairs" are deemed by the words of art. 19 to constitute acts of state and that since any issue of sovereign immunity necessarily impacts upon the responsibility of the Central People's Government for foreign affairs – a fact evidenced, he says, by letters in this case from the Ministry of Foreign Affairs (the Ministry) – a decision by this Court upon a claim for sovereign immunity is a decision in relation to an act of state.

36. It is noticeable that that contention is not echoed in the submissions of the Secretary for Justice or, for that matter, in either of the Ministry letters to which I shall later refer[1]. There has been no suggestion that the Court should seek a certificate from the Chief Executive and the letters do not constitute such a certificate, not least because they do not on their face purport to be certificates under this Article and they have not been obtained through the office of the Chief Executive. None of this is surprising for the argument is, in my judgment, untenable.

37. The act of state doctrine applies in two directions: first, it applies to preclude the courts of the forum State from questioning the validity of executive and legislative acts of foreign States[2] 'at any rate insofar as those acts involve the exercise of the state's public authority, purport to take effect within the sphere of the latter's own jurisdiction and are not in themselves contrary to international law.'[3] It is suggested also that, following the evolution of the law relating to sovereign immunity, the doctrine 'has since been developed so as to be held inapplicable to an act of a foreign state in the course of its commercial activities… '[4], but I do not understand Mr Barlow's argument on act of state to depend on the designation of the relevant act as commercial or sovereign.

38. Second, the doctrine precludes the courts from investigating the legitimacy of an act of the forum State 'performed in the course of its relations with a foreign State' or of executive acts 'authorized or ratified by the [forum State] in the exercise of sovereign power.'[5] It has not been easy to ascertain which is the act of state the legitimacy of which it is suggested this Court is being asked to determine but, with this statement of the doctrine in mind, the contention seems to be that this Court is being asked to second-guess the Central Government's position on sovereign immunity.

39. I am satisfied that the Court is not in this case asked or required to adjudicate on the legitimacy of an act of the Central People's Government in the conduct of the People's Republic's foreign affairs. It is, rather, required to determine whether a party upon whom proceedings have been served is immune from the jurisdiction of this Court. Nor is this Court asked to adjudicate upon the legitimacy of a legislative or executive act of the DRC.

40. I cannot think that a purposive interpretation of art. 19 of the Basic Law, read in full legislative and historical context, could sensibly lead to the conclusion to which Mr Barlow would take us, namely, that art. 19 was intended to require the doctrine of act of state to be understood in a manner other than that which has prevailed in international law and in its application in Hong Kong prior to 1997.

41. It would be otherwise were this Court asked to pronounce upon the legality under international or national law of the Central People Government's stated position as to sovereign immunity or upon the legality of an act of the Central Government in exercise of its stated position. But we are not asked to do so. In that the Central Government has stated its principled position both in letters to this Court and, historically, in other circumstances to which I shall later advert, we are asked to determine the common law in Hong Kong on the question of sovereign immunity from jurisdiction taking into account the stated position of the Central Government and, in that regard, noting the principle discussed below that, where it is possible to do so, the courts and the executive should on such issues not speak with two voices.

42. Accordingly, in my judgment, the courts are not in this case asked to exercise jurisdiction over an act or acts of state.

43. I might add that the ramifications of Mr Barlow's submission, if correct, would produce palpably anomalous situations. He accepted that if art. 19 were intended to preclude the jurisdiction of the court to determine the question of sovereign immunity, the court would have no jurisdiction over a suit to which a State was a putative defendant even where the State expressly waived immunity in the face of the court; and he was therefore forced to the contention that where a State was plaintiff in this jurisdiction in, say, a commercial action, the court would have no jurisdiction over such counterclaim as the defendant filed against the State in that suit.

44. This Court therefore has jurisdiction to determine the assertion of the DRC that in the present proceedings it is entitled to state immunity from suit and from the processes of execution.

The common law on and after 1 July 1997: the arguments

45. Immediately prior to 1 July 1997, the law in Hong Kong in relation to sovereign immunity was governed by the State Immunity Act 1978, as extended to Hong Kong, with minor revision, by the State Immunity (Overseas Territories) Order 1979. Before the extension of that enactment to Hong Kong, the position was regulated by the common law.

46. Insofar as is relevant for present purposes, the Act stipulated that a State was immune from the jurisdiction of the courts save as specifically provided by the Act[6]. Most of the remaining provisions of the statute listed the exceptions from immunity of which only two would, prior to 1997, have been germane to proceedings such as the present: first, that a State was not immune from proceedings in respect of which it had submitted to the jurisdiction of the courts[7] and, second, that a State was not immune "as respects proceedings relating to … a commercial transaction entered into by the State,"[8] where "commercial transaction" included any "… transactions or activity … into which a State enters or in which it engages otherwise than in the exercise of sovereign authority."[9]

47. However, upon the PRC's resumption of the exercise of sovereignty on 1 July 1997, the Act ceased to have effect in this jurisdiction. That means that, as from that date, the law of this jurisdiction in relation to state immunity from suit and from execution could only properly be determined by reference to the common law and, since the subject matter of the Act has not been replaced by legislation having domestic effect, that remains the position.

48. So we need to ascertain what the common law of Hong Kong now dictates.

49. One line of argument is that on 1 July 1997, the common law of Hong Kong was bound to reflect its position immediately before the application in Hong Kong of the 1978 Act. If that were correct, the law would be that established by the Privy Council in Philippine Admiral v Wallem Shipping (Hong Kong) Ltd[10] that whilst in actions in personam the immunity of a State from suit was absolute, the absolute position had been modified in the case of actions in rem where the relevant act in issue represented the exercise of a commercial, rather than the State's sovereign, function. Since it is common ground that the present proceedings are proceedings in personam and not in rem, the argument, if correct, would render the DRC immune from suit.

50. The contrary argument, by the plaintiff, is that the common law position in Hong Kong as at 30 June 1997 was the same as that prevailing in England at that date, namely, that the commercial activity exception to absolute immunity – reflecting the restrictive doctrine of state immunity – applied to actions in personam as well. The two decisions which heralded and then cemented the restrictive doctrine in that jurisdiction were Trendtex Trading Corporation Ltd v Central Bank of Nigeria[11] and Playa Larga v I Congreso Del Partido[12], decisions of the

English Court of Appeal and House of Lords respectively. According to this argument, that position holds true on and after 1 July 1997 because the Basic Law requires that the common law in force in Hong Kong prior to that date shall be maintained and also because the restrictive doctrine, it is said, reflects customary international law which, by reason of the doctrine of incorporation, has been absorbed into Hong Kong's common law.

51. The stance of the Secretary for Justice is the same as that of the DRC, but since the Secretary for Justice argues that the common law of Hong Kong should now reflect the position taken by the Central Government and since the position of the Central Government, as stated to this Court, is that it does not recognize the restrictive doctrine, the logical consequence of the Secretary's position, if correct, is that the common law of Hong Kong would revert to its position prior to the decision in Philippine Admiral, namely, a position that recognized absolute immunity with no exception for commercial activity whether in rem or in personam, as adumbrated in Compania Naviera Vascongado v The 'Cristina'[13] .

The doctrine of incorporation

52. The doctrine of state immunity from suit by which a foreign sovereign State may not be impleaded, directly or indirectly, in the courts of another sovereign State is a doctrine of customary international law. The shift in England in the second half of the 20th Century from the absolute to the restrictive doctrine of state immunity was premised on a suggested change in customary international law.

53. In common law jurisdictions, customary international law becomes part of the common law by incorporation. Thus:

"There is no external power that imposes its rules upon our own code of substantive law or procedure. The Courts acknowledge the existence of a body of rules which nations accept amongst themselves. On any judicial issue they seek to ascertain what the relevant rule is, and, having found it, they will treat it as incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals."[14]

54. This doctrine of automatic incorporation has been described as a simple traditional view[15] and in R v Jones (Margaret)[16], Lord Bingham was reluctant without full argument to accept the proposition "in quite the unqualified terms in which it has often been stated", and he suggested that there was truth in the contention that "international law is not a part, but is one of the sources, of English law."[17]

55. If the traditional view is the correct view – and argument has not been advanced to the contrary – it must follow that when customary international law changes, the common law incorporates those changes, save to the extent that the newly formulated customary international law conflicts with domestic law. Although the judgment of Lord Denning in Trendtex has been the subject of critical scrutiny in the course of this appeal, there is no argument with his proposition that:

"It is certain that international law does change. … and the courts have applied the changes without the aid of any Act of Parliament. … Seeing that the rules of international law have changed – and do change – and that the courts have given effect to the changes without any Act of Parliament, it follows to my mind inexorably that the rules of international law, as existing from time to time, do form part of our English law. It follows, too, that a decision of this court – as to what was the ruling of international law 50 or 60 years ago – is not binding on this court today. International law knows no rule of stare decisis. If this court today is satisfied that the rule of international law on a subject has changed from what it was 50 or 60 years ago, it can give effect to that change – and apply the change in our English law – without waiting for the House

of Lords to do it."[18]

Customary International Law

56. The conditions to be satisfied before a rule may properly be recognized as one of customary international law were delineated in R (European Roma Rights Centre) v Prague Immigration Officer[19], where Lord Bingham stated[20] that:

"The relevant law was, I think, accurately and succinctly summarised by the American Law Institute, Restatement of the Law, Foreign Relations Laws of the United States, 3d (1986), 102(2) and (3):

'(2) Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.

(3) International agreements create law for the states parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted.'

This was valuably supplemented by a comment to this effect:

'c. Opinio juris. For a practice of states to become a rule of customary international law it must appear that the states follow the practice from a sense of legal obligation (opinio juris sive necessitatis); a practice that is generally followed but which states feel legally free to disregard does not contribute to customary law. A practice initially followed by states as a matter of courtesy or habit may become law when states generally come to believe that they are under a legal obligation to comply with it. It is often difficult to determine when that transformation into law has taken place. Explicit evidence of a sense of legal obligation (e.g., by official statements) is not necessary; opinio juris may be inferred from acts or omissions.'"[21]

57. We may also derive the sense of the matter from The North Sea Continental Shelf case[22] which suggests that what is required is:

"…the consent, express or tacit, of the generality of States … . It is therefore a question of enquiring whether such a practice is observed, not indeed unanimously, but … by the generality of States with actual consciousness of submitting themselves to a legal obligation.

The facts which constitute the custom in question are to be found in a series of acts, internal or international, showing an intention to adapt the law of nations to social and economic evolution and to the progress of knowledge… ."[23]

58. In C v Director of Immigration[24], relied on by the Secretary for Justice, Hartmann J (as he then was) having cited the speech of Lord Bingham in Prague Immigration Officer, concluded that:

"Accordingly, a settled and consistent practice among states, if it is to develop into a rule of customary international law, must be accompanied by conduct on the part of states – including those which are specially affected – acknowledging that the practice has acquired the force of law."[25]

59. A custom practised and accepted as law by the international community generally thereby crystallises into customary international law notwithstanding the fact that not every State observes the custom and accepts it as law[26]. Whether a State chooses to observe the law as a matter of international obligation or whether it incorporates the law domestically is a different

issue. The failure of an individual State to observe or to import that which has, by reason of the consensus of the international community generally, become customary international law does not denude the law of its proper categorisation as customary international law. I note that the phrase "including those which are specially affected" appears in The North Sea Continental Shelf case[27]: "a very widespread and representative participation in the convention might suffice of itself, provided it included that of any States whose interests were specially affected", but in context that meant States which by the nature of the subject matter – in that case, continental shelves – were specially affected. In a Convention such as the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property, there are no "specially affected" States.

60. For a practice to constitute a rule of customary international law, what is required is not only that the practice is a settled and generally accepted one but also a belief on the part of States that the practice is obligatory as a matter of law. That element of belief "may be deduced from various sources, including the conclusion of bilateral or multilateral treaties …and statements by state representatives"[28], but the mere existence of a multilateral convention will not bind non-party States unless there is a wide general acceptance of the convention as law-making over a period, so that the convention becomes part of general international law.[29]

Absolute immunity and the development of the restrictive doctrine

61. In The Cristina[30], Lord Atkin said that:

" … the courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings whether the proceedings involve process against his person or seek to recover from him specific property or damages."[31]

62. That statement has been described[32] as a "classic restatement" of the rule of sovereign immunity from suit deriving from the maxim of public international law par in parem non habet imperium (equals do not have authority over one another). As evidenced by the decision in The Cristina the rule became part of English common law and was then reflected in the State Immunity Act 1978.[33] In The Cristina Lord Wright suggested that the rule was:

" … said to flow from international comity or courtesy, but may now more properly be regarded as a rule of international law, accepted among the community of nations. It is binding on the municipal Courts of this country in the sense and to the extent that it has been received and enforced by these Courts. It is true that it involves a subtraction from the sovereignty of the State, which renounces pro tanto the competence of its Courts to exercise their jurisdiction even over matters occurring within its territorial limits, though to do so is prima facie an integral part of sovereignty. The rule may be said to be based on the principle "par in parem non habet imperium", no State can claim jurisdiction over another sovereign State. Or it may be rested on the circumstance that in general the judgment of a municipal Court could not be enforced against a foreign sovereign State, or that the attempt to enforce might be regarded as an unfriendly act. Or it may be taken to flow from reciprocity, each sovereign State within the community of nations accepting some subtraction from its full sovereignty in return for similar concessions on the side of the others. I need not discuss other possible explanations. The rule is naturally subject to waiver by the consent of the sovereign, who may desire a legal adjudication as to his rights."[34]

63. The Cristina acknowledged a second stage of absolute immunity, recognized by international law and engrafted on England's domestic law, namely, immunity from the processes of execution, whereby the courts of a country:

"… will not by their process, whether the sovereign is a party to the proceedings or not, seize

or detain property which is his or of which he is in possession or control. There has been some difference in the practice of nations as to possible limitations of this second principle as to whether it extends to property only used for the commercial purposes of the sovereign or to personal private property. In this country it is in my opinion well settled that it applies to both."[35]

64. Curial application of the absolute doctrine did not, at least in the West, long survive a transformation in the functions of sovereign States, whereby:

"Nearly every country now engages in commercial activities. It has its departments of state – or creates its own legal entities – which go into the market places of the world. They charter ships. They buy commodities. They issue letters of credit."[36]

65. Whether in Trendtex Lord Denning went too far in holding that so many countries had departed from the unyielding rule of absolute immunity that the rule could no longer be considered one of international law is a question that has been argued in this appeal, but none, I think, would gainsay his description of the commercial roles by then regularly assumed by States. The ramifications of this commercial metamorphosis were heralded in England before Trendtex, as well as in other jurisdictions, no doubt in recognition of the fact that it was palpably unjust to permit States which entered the trading place to avail themselves of the courts as a means of redress, yet to block that avenue to those who would seek redress against the same States in respect of a private, as opposed to a public, act; and that, utilised in such circumstances, the absolute doctrine becomes an artifice, for it denies the fact that in acting in a private law or commercial capacity, the State divests itself of its sovereign character,[37] so that an inquiry by a court in the forum State is not then an inquiry into an act of sovereignty.[38] Thus developed the doctrine of restrictive immunity, which is not the antithesis of absolute immunity - for absolute immunity remains the starting point – but a qualification to the rule.

66. The change is described by Dicey[39]:

"In the 19th century and for much of the 20th century the "absolute" rule of immunity prevailed, whereby foreign States and sovereigns were accorded immunity for all activities, whether governmental or commercial. But the increase in state trading in the 20th century led a number of countries to develop a distinction, generally called the "restrictive" theory, between acts of government[40], acta jure imperii, and acts of a commercial nature, acta jure gestionis. Under the restrictive theory, States were immune in respect of acts of government but not in respect of commercial acts…. The enormous increase in state trading after the Second World War led the United States Department of State to announce, in 1952, its adherence to the restrictive theory[41], and the distinction between governmental and commercial acts was applied by the United States courts and was in 1976 enacted in federal legislation. In 1972 a European Convention on State Immunity, severely restricting the scope of immunity, was concluded under the auspices of the Council of Europe, and came into force in 1976.

In the United Kingdom the courts applied the absolute theory both in relation to actions in rem against trading ships and actions in personam involving trading activities, but in 1975 the Privy Council held that a foreign government was not entitled to claim immunity in an action in rem against a vessel used for trading purposes,[42] and in 1977 the Court of Appeal held, by a majority, that a State was not entitled to immunity in respect of commercial transactions.[43] In 1981, after the law had been altered by statute[44], the House of Lords confirmed that the restrictive theory of immunity applied at common law.[45]"

67. The 1975 Privy Council decision in The Philippine Admiral was on an appeal from Hong Kong. Their Lordships recognized the move since the Second World War in the decisions of courts outside England and in writings on international law towards the restrictive doctrine, there

being no doubt, they said, that the restrictive theory had steadily gained ground, and they held that whilst the theory of absolute immunity remained applicable to an action in personam against a foreign state on a commercial contract, it was no longer applicable to an action in rem against a vessel used for trading purposes. That decision then represented the state of the common law on the subject in Hong Kong.

68. Trendtex was next. It was a majority decision of the Court of Appeal in England in January 1977, by which the doctrine of restrictive immunity was extended to actions in personam. There was criticism in the submissions made to this Court by Sir Ian Brownlie QC, on behalf of the Secretary, of the route by which the Master of the Rolls reached that decision. The argument is that the decision is sound only if the majority correctly analysed the state of international law as it had by then developed, for the common law, if it were properly to invoke the principle of incorporation, could only embrace the restrictive doctrine in respect of actions in personam if that truly reflected international law. Sir Ian's suggestion was that Lord Denning's conclusion as to the state of customary international law in relation to sovereign immunity was in truth the transformation of a wish into law. He argued that the decision did not reflect the state of international law, for the restrictive doctrine was far from universally accepted, and is therefore of no utility in ascertaining the common law in Hong Kong before 1997, even putting aside the fact that an English Court of Appeal decision was not binding upon this jurisdiction.

69. After or as a result of Trendtex such uncertainty in England and Hong Kong as may have persisted about the applicability of the restrictive doctrine was resolved by the State Immunity Act 1978, extended to Hong Kong by the 1979 Order[46], an Act which provided in statutory form exceptions to the immunity of foreign States and which was "designed in part to implement the European Convention on State Immunity".[47] The Act commenced with a statement of a primary rule, that States were immune from the jurisdiction of the courts of the United Kingdom except as provided by the Act.[48] A State was not immune from proceedings in respect of which it had submitted to the jurisdiction of the courts[49] or in respect of proceedings relating to a commercial transaction entered into by the State[50] and where a State had agreed in writing to submit to arbitration in respect of an actual or potential dispute, the State was not immune from court proceedings which related to the arbitration.[51] The Act preserved immunity from the process of execution subject to two exceptions: written consent of the State concerned[52]; and process in respect of property in use or intended for use for commercial purposes[53].

70. After extension of the 1978 Act to Hong Kong, there was no articulation in this jurisdiction of the common law position. This is to be contrasted with developments in England where in 1981 it fell to the House of Lords in I Congreso to determine the state of the common law in relation to acts committed before the Act came into force. The central question in the case was the identification and categorization of the relevant act, that is to say, the need to identify the act relied upon for the exercise of the court's jurisdiction and how to decide whether that act was a private act or a sovereign or public act, "a private act meaning in this context an act of a private law character such as a private citizen might have entered into."[54] But before reaching that stage, their Lordships laid to rest the distinction drawn in Philippine Admiral between actions in rem and actions in personam.

71. The common law position was revisited in Holland v Lampen-Wolfe.[55] The defendant was a United States citizen employed by the United States Government as an education services officer at a military base in the United Kingdom and, in an action for libel commenced against him, he applied to set aside the writ on the ground that he was immune from the court's jurisdiction. By reason of the provisions of section 16(2) of the 1978 Act, which stated that Part I of the Act did not apply to proceedings relating to anything done by or in relation to the armed forces of a State whilst present in the United Kingdom, their Lordships were constrained to determine the question of immunity by reference to the common law. Lord Millett confirmed that:

"In the 1970s, mainly under the influence of Lord Denning M.R., we abandoned [the absolute doctrine of state immunity] and adopted the so-called restrictive theory of state immunity under which acts of a commercial nature do not attract state immunity even if done for governmental or political reasons."[56]

72. Their Lordships recognized that the distinction between matters jure imperii and matters jure gestionis "may be subtle and delicate to define" but suggested that:

"The solution in any particular case where the question of state immunity arises at common law has to be one of the analysis of the particular facts against the whole context in which they have occurred. There is little if anything to be gained by trying to fit the case into a particular precedent or to devise categories of situations which may or may not fall on the one side of the line or the other."[57]

The position in Hong Kong

73. Sir Ian's argument for the Secretary for Justice was that Hong Kong was not bound by Trendtex, I Congreso or Holland, and that since none reflected the true condition of international law on the subject of State immunity, the common law in Hong Kong immediately prior to 1 July 1997, had the matter been considered in this jurisdiction, would not have absorbed the restrictive doctrine.

74. Sir Ian argued, as do those acting for the defendants, that whilst the restrictive doctrine has gained popularity in the international community it has not been practised sufficiently widely to attain the status of customary international law. In support of this line of argument, Sir Ian pointed to several indicia as suggesting that what is happening is no more than a trend and that the English cases represent an Occidental prism:

(1) In Trendtex itself Lord Denning said that:

"…[t]he nations are not in the least agreed upon the doctrine of sovereign immunity. … Some grant absolute immunity. Others grant limited immunity, with each defining the limits differently. There is no consensus whatever. Yet this does not mean that there is no rule of international law upon the subject. It only means that we differ as to what that rule is. Each country delimits for itself the bounds of sovereign immunity. Each creates for itself the exceptions from it. It is, I think, for the courts of this country to define the rule as best they can … ."[58]

However later he said that so many countries had departed from the rule of absolute immunity that it could no longer be considered a rule of international law and referred to the fact that "many countries have now adopted [the doctrine of restrictive immunity]"[59]; yet he seemed, so Sir Ian suggested, to detract from the certainty of that assessment by saying that "even if there were no settled rule of international law on the subject, there should at least be one settled rule for the nine countries of the European Economic Community."[60]

(2) The stance taken by Sir Ian in his capacity as advocate for a party to this appeal is consistent with the position which he postulated in his work Principles of Public International Law that:

"It is far from easy to state the current legal position in terms of customary or general international law. Recent writers emphasize that there is a trend in the practice of states towards the restrictive doctrine of immunity but avoid firm and precise prescriptions as to the present state of the law. Moreover, the practice of states is far from consistent and, as the comments of governments relating to the draft articles produced by the International Law Commission

indicate, there is a persistent divergence between adherents of the principle of absolute immunity and that of restrictive immunity."[61] (Original emphasis)

(3) The 2004 UN Convention on Jurisdictional Immunities of States and Their Property, whilst indicative of the international trend, has been ratified thus far by only six States.

(4) We have been shown replies to a questionnaire circulated by the United Nations in 1979 asking member States to say what their judicial practice was in regard to jurisdictional immunities of foreign States and their property. The document is, however of little use because it is 30 years out of date and because, although no uniformity of practice is demonstrated by the answers, the number responding was small. The same may be said for a 1988 International Law Commission Yearbook which we were shown.

(5) Of more recent vintage is a work by Bankas entitled "The State Immunity Controversy in International Law" which suggests that whilst "most Western countries have thrown their support behind the restrictive immunity… African countries have remained steadfast in support of the classical notion of sovereign immunity because of the fact that restrictive immunity adversely militates against them."[62] In a passage in the same work (upon the last sentence of which Mr Thomas SC places emphasis as evidence of the injustice that can be worked upon a credible claimant against whom the absolute theory is applied) the author states:

"One credible or a logically grounded argument that has always been made by African countries and other developing states is that, given the fact that developing countries are poor and weak economically, and thus lacking of private capital, it has become incumbent on governments of these countries to undertake or venture into commerce in order to promote economic development. These varied and diverse activities undertaken by these states are very important in the promotion of economic growth and political stability. Thus in the absence of such diverse activities, the economy of these countries would become stagnant which in turn creates poverty, instability and chaos. Most African countries in fact control all means of production and distribution and this has slowed down the growth of private enterprise. The Trendtex litigation as may be recalled came about because of the Import Controls that were instituted to create room for other essential commodities to be brought into the country, to avoid acute shortages. This is a good example of the varied activities which must be undertaken by a developing country in order to keep the economy on a good footing. These countries therefore prefer state immunity in order to avoid being open to suit."[63]

75. As against these indicia:

(1) There can be little doubt but that their Lordships in I Congreso proceeded upon the basis not of some limited regional view of what was thought the law should be, but upon a finding of what the international law was, for Lord Wilberforce said in terms:

"In the particular case, it is clear that international law, in a general way, in 1978, gave support to a "restrictive" theory of state immunity [and] we do not need the [1978] statute to make this good. On the other hand, the precise limits of the doctrine were, as the voluminous material placed at our disposal well shows, still in course of development and in many respects uncertain."[64]

(2) Sir Ian would appear as long ago as 1987 to have recognized, in a preliminary report to the ILC[65], that the rule of absolute immunity, insofar as it had been a rule of international law, had disintegrated, although he said that it was difficult to ascertain what principle has replaced it.

(3) Other respected commentators are robust in their assertion that the restrictive principle is now generally accepted. So, for example:

(i) Oppenheim says that:

'Most states have now abandoned or are in the process of abandoning the rule of absolute immunity, and now accept that, for what are usually described as acts of a private law or commercial nature, a foreign state may be subject to the jurisdiction of the courts: immunity from suit being restricted to proceedings relating to its acts jure imperii. ... A few countries, however, seem still to apply the rule of absolute immunity."[66]

And he has added that:

"The abandonment of the rule of absolute immunity has been confirmed by the International Law Commission, in the draft Articles on Jurisdictional Immunities of States and their Property, provisionally adopted in 1986."[67]

(ii) Lady Fox says that:

" … by 1989, as stated by the ILC's second Special Rapporteur… there was 'a clear and unmistakable trend towards recognition of the principle that the jurisdictional immunity of States is not unlimited'. That trend was strongly and widely endorsed in 2004. … A very wide range of States spoke in support of its adoption – the Netherlands (on behalf of the European Union), Bulgaria, Brazil (on behalf of the Rio Group), China, Croatia, (and other successor members to the former Yugoslavia), Guatemala, India, Iran, Libya, Malaysia, Morocco, Romania, the Russian Federation, Sierra Leone, South Korea, Switzerland, Tanzania, Turkey, Ukraine, United States, Venezuela, and Vietnam. It can be concluded that all these countries in some measure supported the restrictive rule of state immunity; … The development of the law of immunity has undoubtedly been and continues to involve a shift away from an absolute doctrine to a restrictive doctrine, but the absence of a universal convention until very recently, and the diversity of State practice …has held back any significant harmonisation of the law."[68]

and:

"…independently of the UN Convention the overwhelming majority of States supports a restrictive doctrine. In the last decade it is increasingly rare to find a case where a national court confronted with a claim relating to a commercial transaction involving a State trading entity has rejected jurisdiction on the basis of an absolute rule of Sate immunity. With the adoption in 2004 of the UN Convention one may declare that a rule of restrictive immunity now prevails."[69]

(iii) Professor Harris has said as recently as 2004 that:

"Originally, most of the states that followed the restrictive immunity doctrine were from the West; the Soviet bloc and most developing states (which tended to be socialist) did not. With the demise of the USSR and related developments, only China, India and a small number of developing states now follow the absolute immunity approach."[70]

76. In the light of this history and the various indicia, it is not in my opinion possible validly to maintain that the rule of absolute immunity has survived as a practice generally observed by the great majority of States. It does not automatically follow that the restrictive doctrine which is said to have replaced it has accrued such widespread acceptance as to constitute a rule of customary international law: that is a question less easy to resolve but I am of the view that the generality of States do subscribe to that doctrine.

77. Be that as it may, and vitally for the issue at hand, it is, in my judgment, idle to suppose that the doctrine was not part of the common law in Hong Kong in and before June 1997. The

absence before that date of a decision (other than The Philippine Admiral) binding upon this jurisdiction, declaratory of the common law, is of no consequence to the present point, for that is all that a decision would have represented: a declaration of the law as it then stood. It is unrealistic to conclude that the courts of Hong Kong (or the Privy Council on an appeal from Hong Kong), on an argument that Trendtex erroneously assessed the state of international law, would have taken a course different from that embraced by the House of Lords in I Congreso and Holland. That is not only because of the foundations already set for Hong Kong by the Privy Council but also because decisions of the House of Lords carried great authority in this jurisdiction.

78. I would hold, therefore, that the common law of Hong Kong as at 30 June 1997 recognised the doctrine of restrictive immunity.

The common law after June 1997

79. It is by now trite that the common law in force before the resumption of the exercise of sovereignty was constitutionally prescribed to continue in force thereafter save to the extent that it was inconsistent with the Basic Law and with local legislation enacted on and after 1 July 1997. The immediately relevant articles are:

(1) Article 8 of the Basic Law which stipulates that:

"The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region." (Emphasis added)

(2) Articles 18 and 19 which provide, in so far as is presently relevant:

"18. The laws in force in the Hong Kong Special Administrative Region shall be this Law, the laws previously in force in Hong Kong as provided for in Article 8 of this Law, and the laws enacted by the legislature of the Region.

National laws shall not be applied in the Hong Kong Special Administrative Region except for those listed in Annex III to this Law. The laws listed therein shall be applied locally by way of promulgation or legislation by the Region.

The Standing Committee of the National People's Congress may add to or delete from the list of laws in Annex III after consulting its Committee for the Basic Law of the Hong Kong Special Administrative Region and the government of the Region. Laws listed in Annex III to this Law shall be confined to those relating to defence and foreign affairs as well as other matters outside the limits of the autonomy of the Region as specified by this Law.

….

19. The Hong Kong Special Administrative Region shall be vested with independent judicial power, including that of final adjudication.

The courts of the Hong Kong Special Administrative Region shall have jurisdiction over all cases in the Region, except that the restrictions on their jurisdiction imposed by the legal system and principles previously in force in Hong Kong shall be maintained.

The courts of the Hong Kong Special Administrative Region shall have no jurisdiction over acts of state such as defence and foreign affairs. The courts of the Region shall obtain a

certificate from the Chief Executive on questions of fact concerning acts of state such as defence and foreign affairs 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."

80. It is common ground that on and after 1 July 1997:

(1) there was enacted no local legislation to replace the State Immunity Act 1978 as extended to Hong Kong or to alter the common law position, whether to reflect the Central Government's stated position on the immunity of States from suit and from the process of execution or otherwise – a fact which, as we shall see, contrasts with steps taken in allied regards – and

(2) no national law was applied that gave effect in Hong Kong to the PRC's stated position, by which I mean its position stated internationally when courts of other jurisdictions have sought to exercise jurisdiction over PRC state entities, which is the same as the position stated in the first of the two Ministry letters presented to this Court.

81. It must logically follow that the rule to be applied by the courts in Hong Kong remains that reflected by the restrictive doctrine unless the common law itself has changed. Since it cannot have changed by reason of any alteration in customary international law – for international adherence to the restrictive doctrine is, on any view, solidifying – it can only have changed if a change has been demanded by its constitutional and societal setting. The demand would, I suggest, have to be clear since there can be little doubt that the change would be regressive. By this, I do not refer to the obvious fact that it would return the common law to a position long abandoned but I refer rather to the assault which would be occasioned to the equal justice principle for which commercial litigants look to our courts. The equal justice principle, to which I have earlier referred[71], is assailed when it permits States to utilize this jurisdiction as a forum when it suits them but to reject the forum when it does not, thus shutting out those who may have valid claims which have nothing to do with acts of a State in a sovereign, as opposed to a commercial, capacity.

82. The setting has changed because Hong Kong is no longer a dependent territory of the sovereign power that had abandoned the doctrine of absolute immunity but is rather "an inalienable part of the People's Republic of China" which, as we shall see, has not.[72] Furthermore, in matters touching upon sovereignty, there is precedent for the approach that the courts and the executive should speak with one voice, though it will be necessary to examine more closely the particular circumstances to which that is directed.

83. Mr Thomas SC, for the plaintiff, does not accept as accurately reflecting the current state of things, the stance of the two Ministry letters to the effect that the PRC's adherence to the doctrine of absolute immunity has been consistent, and he places particular reliance on the PRC's signature to the 2004 Convention and upon the fact that the PRC has acceded to a number of multilateral conventions which themselves reflect the principled basis for distinguishing between commercial and sovereign acts of a State.[73] These misgivings find an echo in the judgment of the court below.[74]

84. Mr Thomasargues further that whatever may be the Central Government's position on the immunity of States from suit and from the process of execution, the Basic Law envisages and demands that Hong Kong's common law in this regard, as it stood before the resumption of the exercise of sovereignty, should carry through and beyond that transition, notwithstanding such conflict as may exist between the law of Hong Kong and the stance of the sovereign entity. In support of his contention he takes us to HKSAR v Ma Wai Kwan[75] for the statement therein that "the intention of the Basic Law is clear. There is to be no change in our laws…. Continuity is the key to stability." He has support too in the suggestion by Professor Mushkat that:

"It may be assumed that HKSAR judges will continue to follow the 'restrictive approach' to state immunity as incorporated in the common law, although this may give rise to some doctrinal conflicts with their Mainland counterparts."[76]

85. Mr Thomas adds that Hong Kong is an international financial and trading centre and it could hardly have been within the contemplation of the Central Government that Hong Kong would abandon the restrictive theory. He points in addition to the absence from Annex III to the Basic Law of any national law relating to State immunity.

Communications from the Executive

86. I come now to the two Ministry letters to which regular reference has thus far been made. Their relevance is this. They are evidence of the PRC's longstanding adherence to the doctrine of absolute immunity to which the Court is asked to have regard in determining the immunity claim of the DRC in this case. It is important to appreciate that in the realm of law with which we are here concerned, there is nothing new, whether in this jurisdiction or elsewhere, in the practice of presentation to the courts of such communications by the executive branch of the Government. There are some circumstances in which statements of fact by or on behalf of the Government would be conclusive, such as whether a foreign state or government has been recognized. Such a circumstance is, as we have earlier seen[77], envisaged by art. 19 of the Basic Law. Although we are not here faced with an art. 19 certificate or with a binding statement of fact – such as whether a particular foreign state has been recognized by the PRC, or whether a particular person is entitled to diplomatic status or has been recognized as a head of State – what the Court is asked, in a case such as the present, is to take the statement into account:

"… the practice of states over a long period has established that foreign states enjoy a degree of immunity from the jurisdiction of the courts of another state. This practice has consisted primarily of the application of the internal laws of states by judicial decisions, taking into account, in some states, communications made to the courts by the executive branch of government."[78]

There was a stage in the United States when the courts "accepted as conclusive a certification by the State Department recognizing and allowing a claim to immunity in [a] particular case"[79], but that is a practice discontinued by legislation, and I note that in The Philippine Admiral, the Board remarked that it had not been suggested by counsel on either side that "their Lordships should seek the help of the Foreign and Commonwealth Office in deciding this appeal by ascertaining which theory of sovereign immunity it favours."[80]

87. The communication now before us is directed at the applicable theory rather than at a specific claim for immunity but it seems to me nonetheless that in the present setting this Court must have close regard to the PRC's attitude to the doctrines of absolute and restrictive immunity, a duty emphasized further by the fact represented by art. 13 of the Basic Law that "[t]he Central People's Government shall be responsible for the foreign affairs relating to the Hong Kong Special Administrative Region". That said, the executive does not in this case seek to dictate a result but rather to draw the Court's attention to its policy, for the Court to take into account.

88. In common law jurisdictions – as elsewhere, no doubt – the executive has, naturally, been astute to draw to the attention of the courts matters which carry potential prejudice to the sovereignty of the nation and the courts have emphasized that in such matters they should speak with the same voice as that of the executive. One such case is Rio Tinto Zinc Corporation and others v Westinghouse Electric Corporation[81] where the question was whether certain letters rogatory emanating from the United States should be given effect in the United Kingdom where the evidence to be obtained was required for a grand jury investigation extra-territorially into the

activities of United Kingdom companies. The Attorney General on behalf of the Government of the United Kingdom intervened to bring certain matters to the notice of their Lordships and in particular that the Government of the United Kingdom considered that the wide investigatory procedures under United States anti-trust legislation against persons outside the United States who are not United States citizens constituted an infringement of the sovereignty of the United Kingdom. Lord Wilberforce said:

"My Lords, I think that there is no doubt that, in deciding whether to give effect to letters rogatory, the courts are entitled to have regard to any possible prejudice to the sovereignty of the United Kingdom – that is expressly provided for in article 12(b) of the Hague Convention. Equally, that in a matter affecting the sovereignty of the United Kingdom, the courts are entitled to take account of the declared policy of Her Majesty's Government, is in my opinion beyond doubt…. The intervention of Her Majesty's Attorney-General establishes that quite apart from the present case, over a number of years and in a number of cases, the policy of Her Majesty's Government has been against recognition of United States investigatory jurisdiction extraterritorially against United Kingdom companies. The courts should in such matters speak with the same voice as the executive … ."[82]

There are comments to the same effect at the Court of Appeal stage in British Airways v Laker Airways[83]. In both cases the UK Government was troubled about claims to extra-territorial jurisdiction which that Government considered "particularly objectionable in the field of anti-trust legislation".[84]

89. It is however not suggested in the present case that the grant of leave to the plaintiff to enforce the awards or the grant of injunctions would effect an infringement of the sovereignty of the PRC.

The two letters

90. Two letters have been presented to the courts in this case; the first to the court below and the second to this Court. The letters were issued by the Office of the Commissioner of the Ministry of Foreign Affairs of the PRC in the Hong Kong Special Administrative Region. The first is dated 20 November 2008 and "makes the following statement":

"Regarding the issue of state immunity involved in the case FG Hemisphere Associates LLC v. Democratic Republic of the Congo and Ors (HCMP 928/2008) before the Court of First Instance of the High Court of the Hong Kong Special Administrative Region, the Office of the Commissioner of the Ministry of Foreign Affairs of the People's Republic of China in the Hong Kong Special Administrative Region, having been duly authorized, makes the following statement as regards the principled position of the Central People's Government:

The consistent and principled position of China is that a state and its property shall, in foreign courts, enjoy absolute immunity, including absolute immunity from jurisdiction and from execution, and has never applied the so-called principle or theory of "restrictive immunity". The courts in China have no jurisdiction over, nor in practice have they ever entertained, any case in which a foreign state or government is sued as a defendant or any claim involving the property of any foreign state or government, irrespective of the nature or purpose of the relevant act of the foreign state or government and also irrespective of the nature, purpose or use of the relevant property of the foreign state or government. At the same time, China has never accepted any foreign courts having jurisdiction over cases in which the State or Government of China is sued as a defendant, or over cases involving the property of the State or Government of China. This principled position held by the Government of China is unequivocal and consistent."

91. Because the PRC is a signatory to the 2004 Convention, which acknowledges the restrictive

doctrine, Reyes J was not convinced that this letter represented the consistent position adopted by the Central Government. It was that judicial reservation which led to the second letter, dated 21 May 2009, which we have admitted as evidence, a letter intended to explain its position in the light of its signature of the Convention.

"1. China considers that the issue of state immunity is an important issue which affects relations between states. The long-term divergence of the international community on the issue of state immunity and the conflicting practices of states have had adverse impacts on international intercourse. The adoption of an international convention on this issue would assist in balancing and regulating the practices of states, and will have positive impacts on protecting the harmony and stability of international relations.

2. In the spirit of consultation, compromise and cooperation, China has participated in the negotiations on the adoption of the Convention. Although the final text of the Convention was not as satisfactory as China expected, but as a product of compromise by all sides, it is the result of the coordination efforts made by all sides. Therefore, China supported the adoption of the Convention by the United Nations General Assembly.

3. China signed the Convention on 14 September 2005, to express China's support of the above coordination efforts made by the international community. However, until now China has not yet ratified the Convention, and the Convention itself has not yet entered into force. Therefore, the Convention has no binding force on China, and moreover it cannot be the basis of assessing China's principled position on relevant issues.

4. After signature of the Convention, the position of China in maintaining absolute immunity has not been changed, and has never applied or recognized the so-called principle or theory of "restrictive immunity" (annexed are materials on China's handling of the Morris case)."

92. It is not easy to know what to make of this, for to suggest that signature of a multilateral convention that adopts a particular policy is of no use in assessing the attitude of the signatory state to that policy seems illogical. Having said that, the firm contention in those letters that China has long before and after adoption of the Convention maintained principled opposition to any indentation upon absolute immunity is a contention supported in part by an appreciation of China's history (to which reference is made in the Preamble to the Basic Law itself) and also by commentary and case instances.

Persistent objection

93. The plaintiff's argument in relation to these letters is that such weight as the court might normally attach to such communications should, in this case, to be tempered by scepticism as to the assertions in them for in truth, the argument goes, the suggestion in the letters that adherence to the doctrine of absolute immunity has been a consistent and principled position of China is contradicted by various acts of the PRC in recent years. This alleged inconsistency is disputed by the Secretary for Justice who says that, to the contrary, the consistency of the position historically adopted by China in relation to state immunity is such that even if, contrary to his contention, the restrictive doctrine of state immunity has gained such widespread traction as to constitute a rule of customary international law, it is, by reason of the PRC's persistent objection to it, not a law by which the PRC is bound and is not therefore a law amenable to incorporation in this jurisdiction. The argument would have to go on to assert that even if that rule has previously been incorporated into the common law of Hong Kong, the fact that the PRC is not bound by the doctrine – if that be the case – must inform this Court's approach and must result in a change to the common law.

94. In 1997, Professor Mushkat's assessment of the Mainland's doctrinal approach was that:

"China's practice relating to sovereign immunity, while not always consistent, reflects a determined adherence to the doctrine of absolute immunity. Chinese authorities have repeatedly asserted the incompatibility of compulsory jurisdiction over a foreign state with the principle of sovereign equality. They have also rejected the restrictive doctrine as practically unworkable and noted the 'arbitrary and varied practice' involved in distinguishing between sovereign and non-sovereign acts. Chinese officials have further contended that allowing foreign states to be sued in domestic courts would result in international tension and disruption to intergovernmental trading arrangements. At the same time, the PRC, consistently with its pragmatic attitude to foreign relations, has not found it objectionable to conclude treaties with other states which provide for the waiver of immunity. It has also acceded to some multilateral conventions which embody 'restrictive' elements of state immunity."[85]

95. In Russell Jackson v PRC[86], Chief Judge Godbold reflected the position taken by the PRC in the case thus:

"At the threshold China stands on the principle of absolute sovereign immunity as a fundamental aspect of its sovereignty. Its position is that under principles of international law it is immune from any suit in a domestic court of any other nation unless it consents. According to the United States' statement of interest:

China's adherence to this principle results, in part, from its adverse experience with extraterritorial laws and jurisdiction of western powers [within China] in the nineteenth and early twentieth centuries.

China asserts that restrictive sovereign immunity has not become a rule of international law, although in recent years some nations have begun to follow it, but these are, China says, only a small number of nations and by and large do not include developing countries, which find restrictive sovereign immunity not in their interest.

China contends that the United States cannot, by a change in its domestic law, abrogate the long accepted international law principle of absolute sovereign immunity. Even though restrictive sovereign immunity may be a developing customary rule of international law, China says that it is not binding upon sovereign states that do not agree to it. Thus, according to China, restrictive sovereign immunity is applicable only within the group of nations that have adopted it and is not applicable to China, which continues to adhere to the principle of absolute sovereign immunity."[87]

96. The reference in the second Ministry letter to the Morris case is to Marvin L. Morris v PRC[88], the particular significance of which is that the official statement and legal memorandum filed by the Government of the PRC in relation to that suit post-dates the adoption of the 2004 Convention upon the signature of which by the PRC the plaintiff places such reliance. The statement or Note by the Embassy of the PRC to the Department of State includes the assertion, undoubtedly correct, that "the Chinese side has declared a solemn position on sovereign immunity to the U.S. side on many occasions." The legal memorandum repeats the stance of the Government of the PRC that the courts of a State shall not accept and try a lawsuit in which a foreign State is listed as a defendant unless that foreign State waives jurisdictional immunity and, even if it does so, the court of the forum State shall not take coercive measures on State property of the foreign State unless the foreign State waives immunity from execution.

97. The argument advanced by the Secretary for Justice is that even were this Court to find that the restrictive doctrine has acquired the status of customary international law, it is a general principle of public international law that newly emerged customary international law does not bind a persistent objector; and that China's historical and consistent attitude to state immunity from suit and execution, as evidenced by the examples to which I have referred, places it in this

category.

98. The principle has been explained by Sir Gerald Fitzmaurice QC as follows:

"A question of great importance for the principle of the rule of law, is that of how far a State can, in the process of the formation of a new customary rule of international law, disassociate itself from that process, declare itself not to be bound, and maintain that attitude – and with what results on the applicability to it of the rule in question. This was in fact part of the Norwegian position in the Fisheries case before the International Court of Justice, Norway contending that certain alleged rules were not general rules of international law at all, but that if they were, they did not apply to Norway, because Norway had "consistently and unequivocally manifested a refusal to accept them". The emphasis here was on the words "consistently and unequivocally", for in their argument the Norwegian Government were at pains to make it clear that they were not contending that a State could at some subsequent time simply declare that it did not accept, or had not accepted, an already established rule of international law. The Norwegian statement on this point is worth quoting in full because of the importance of the principle involved. It ran as follows:

"Clearly such a refusal [i.e. consistent and unequivocal refusal] must not be confounded with a refusal to conform to an established rule already binding on the State concerned. In the later case, the conduct of the State would be contrary to its obligations; the rule of law being already obligatory for it, the refusal to apply it would constitute an illegal act. But if, either expressly or by a consistent and unequivocal attitude, it has manifested the will not to submit to the rule at a time when this had not yet assumed in regard to that State the character of an obligatory rule, the State will remain outside its field of application".

… it was conceded by the United Kingdom that if (a) it could be shown that at one time international law had given States wider rights or a greater freedom than they at present possessed under the actual rules now prevailing; and if also (b) the dissenting State could show that it had openly and consistently made known its dissent at the time when the new rule was in process of formation, or when it came into operation; and if further (c) that position had been consistently maintained since – then it might be that the State in question was not bound; but if on the other hand this dissent was not manifested at the time, then the State would have become bound, and a dissent subsequently manifested, however consistently maintained, would be unavailing to release it from the obligation. It is believed that the position jointly taken up by Norway and the United Kingdom on this point … must be regarded as correct, provided it is strictly confined to the particular premises postulated – namely, open dissent, expressly manifested at the time of the formation of the rule, and consistently maintained subsequently."[89] (Emphasis added)

99. If I am correct in my conclusion that the generality of nations have abandoned the doctrine of absolute immunity and if I am further correct in my conclusion that the restrictive doctrine is now so generally accepted as to constitute a rule of customary international law, the process has been a relatively recent one. Following the principles suggested by Sir Gerald's analysis of the Fisheries case, it is clear that at one stage international law recognized a rule of absolute immunity. At the time that that rule held universal sway, China was a firm adherent. It is clear from the history to which I have broadly referred that at the time the new rule was in the process of formation, China's opposition to the restrictive doctrine was consistent and unequivocal. Subject to its signature of the Convention, its opposition has since been consistent. So, subject to the question of that signature, the case is strong for concluding that the PRC is not bound by such international rule embracing the restrictive doctrine as now exists.

100. Against this consistent stance by the PRC lies the fact, upon which the plaintiff understandably places great emphasis, of the PRC's signature to the 2004 Convention. The

plaintiff argues that not only is that signature at odds with the contention that the PRC has consistently objected to the restrictive doctrine but that the PRC is, by reason of its signature, precluded, as a matter of international law, from now asking this Court to accept that the PRC is a consistent adherent to the doctrine of absolute immunity.

101. The 2004 Convention has not entered into force. It will only enter into force following the deposit of the 30th instrument of ratification or accession with the Secretary-General of the United Nations[90] and thus far the number of such instruments falls well below that figure.

102. Where, as in the case of the 2004 Convention, a treaty is subject to ratification, "the state's consent to be bound will not be effective until the treaty is later ratified."[91]

103. As against that, Mr Thomas points to art. 18 of The Vienna Convention on the Law of Treaties which provides that a State "is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) It has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; … ." Oppenheim states that "there has long been authority for the view that the principle of good faith suggests that the state should refrain, prior to ratification, from acts intended substantially to impair the value of the undertaking as signed."[92] The argument is that the statements put forward in this case by the Central executive by which it purports to maintain its long held adherence to absolute immunity is an act that "defeats the object and purpose of the treaty" and is inconsistent with the Secretary's contention that the PRC has been and remains a persistent objector to the restrictive doctrine.

104. The injunction not to defeat the object and purpose of a treaty is to be interpreted realistically in the context of the subject matter. The Vienna Convention contemplates bilateral as well as multilateral treaties. There will be cases where the conduct of a State after signature and before ratification of a treaty will be such as to denude the compact of its efficacy, so as to render ratification an empty exercise. Examples are provided by Lord McNair QC:

> "… a State which had signed a treaty undertaking to cede territory to the other party would at least commit a breach of faith if, while the treaty was still awaiting ratification, it alienated a part of the territory in question to another State.
>
> ….
>
> … as from the time of signature, every party is under an obligation of good faith not to do anything (other than acts of routine administration) which will diminish the value of any property or other rights which would be transferred, or of any rights which would be created, when the treaty enters into operation; further any party which ratifies the treaty in ignorance of any such diminution of value, has the right, within a reasonable time after acquiring knowledge thereof, to repudiate the treaty or, at its option, while affirming the treaty, to claim compensation for the diminution in value received."[93]

105. It is in my judgment unrealistic, and a misreading of the Vienna Convention, to suggest that pending ratification of a multilateral Convention of the nature with which we are concerned in this case, where certain States parties have for long adhered to a principled policy which the multilateral instrument seeks to change, continued adherence to that policy by a State, pending a decision whether to ratify, will have the effect, ultimately, of defeating the object and purpose of the treaty.

106. The Vienna Convention, by the terms of art. 18 itself, recognizes by the phrase "until it shall have made its intention clear not to become a party to the treaty" that signature is not to be taken as an abandonment of a previous stance. The difference between signature and ratification,

where ratification is required, is in part a recognition that:

" … the state may need time to consider the implications of the treaty. That a state has taken part – even an active part – in the negotiations does not necessarily mean that it is enthusiastic about the subject or the text which was finally agreed … . The breathing space provided by the ratification process allows time for sober reflection."[94]

107. We have been referred to three multilateral conventions to which the PRC has acceded which, it is said, evidence a willingness on the part of the PRC to discard its adherence to absolute immunity. These are:

(1) the 1944 Convention on International Civil Aviation which by Article 3 provides that the Convention shall only be applicable to civil aircraft and not to State aircraft used for military, customs or police services, the implication being that if used for commercial purposes, State aircraft are deemed to be civil aircraft;

(2) the International Convention on Civil Liability for Oil Pollution Damage, 1969, Article XI of which provides that the Convention shall not apply to ships owned or operated by a State "and used, for the time being, only on Government non-commercial service"; and

(3) the International Convention on Salvage, 1989, Article 25 of which provides that no provision of the Convention shall be used as a basis for the seizure, arrest or detention by any legal process of, nor for any proceedings in rem against non-commercial cargoes owned by a State.

108. It is unlikely that this is an exhaustive list of conventions or treaties to which the PRC is a party that permit the exercise of jurisdiction over States in limited circumstances, but we can only proceed on the material before us and on the footing that these represent exceptions set against a long history of principled objection to any inroad upon absolute immunity. The instances are few and I note that two of the three examples predate Russell Jackson and that all three instances predate Marvin v Morris. So the question that poses itself is how these exceptions sit with the strong and unequivocal representations made by the PRC to foreign courts when those have been invited to exercise jurisdiction over PRC state entities or to permit execution over their property.

109. Ms Cheng SC, for the Secretary, argues that, properly analysed, there is no inconsistency. She contends that these are but instances of waiver by treaty in circumstances in which it has been in the particular interest of the PRC to embrace the protection or benefit of an agreement. I think that there is merit in her argument.

110. Waiver by a State may be conveyed "either by express consent given in the context of a particular dispute which has already arisen, or by consent given in advance in a contract or international agreement."[95] As we shall see when I address the question of waiver arising from consent to arbitration, the issue of consent given in advance in a contract is problematic where the contract is not between the foreign and the forum States. Where, however, there is a treaty between a foreign State and a forum State, by which treaty the foreign State expressly waives immunity, the courts of the forum State are thereby empowered to exercise jurisdiction and, depending on the terms of the treaty, to authorize execution.

111. The suggestion that these agreements evidence instances of waiver, thereby constituting no more than case-specific exceptions to a firmly maintained general policy, is supported by an article entitled "Immunities of States and Their Property: The Practice of the People's Republic of China"[96]:

"Although China adheres to the principle of absolute sovereign immunity, it nevertheless also maintains that each country may voluntarily waive its immunity. Moreover, China deems it more desirable to stipulate this waiver by concluding treaties with other countries. China believes that the contracting parties may agree to restrict their sovereign immunity in the treaty only on the basis of their own consent. … China will also comply with international conventions containing provisions on the immunities of states and their property to which it has become a party."[97]

112. The authors refer in the course of this discussion to the first two of the three Conventions to which Professor Mushkat alluded and cite the fact that art. 11 of the 1969 Convention, which relates to oil pollution damage, provides that with respect to ships owned by a contracting state in use for commercial purposes, each state shall be subject to suit in the jurisdiction of another contracting state "and shall waive all defences based on its status as a sovereign state."

113. It would seem sensible to conclude that there must come a stage when a State so regularly waives immunity on the basis of the commercial exception that it must be deemed to have abandoned its previously consistent and principled position. Yet, viewed against the formal pronouncements of adherence to the absolute rule which precede and well as postdate the Conventions cited, I do not think that it can reasonably be concluded, by reason of the markedly few instances of waivers to which we have been taken – waivers extended in the context of reciprocal arrangements of obvious advantage, given their subject matter, to the PRC – that the PRC must because of those few instances be taken as having abandoned its long-held adherence to the doctrine of absolute immunity.

114. Mr Thomas refers further to the fact that by reason of a decision of the Standing Committee of the National People's Congress adopted on 25 October 2005, a national law, namely, the "Law of the People's Republic of China on Judicial Immunity from Compulsory Measures Concerning the Property of Foreign Central Banks" was added to the list of laws in Annex III of the Basic Law. By Article 1 of that Law it is provided that:

"The People's Republic of China will grant to foreign central banks the immunity of judicial compulsory measures of preservation and execution to their properties of foreign central banks, unless the foreign central banks or the governments of the countries to which the foreign central banks belong abandon this immunity in written form, or those properties are specially used for preservation and execution."

115. Mr Thomas suggests that there is a restrictive element in this Law, but in my view it is, to the contrary, reflective of an adherence to the doctrine of absolute immunity.

116. I have, in the circumstances, concluded that if the doctrine of restrictive immunity from suit and from the processes of execution has indeed developed into a rule of customary international law, it remains one to which, notwithstanding its signature to the 2004 Convention, the PRC has persistently objected and that, as yet, it is not bound by such a rule. That is not only the position taken by it in the two Ministry letters but the position which it has otherwise consistently maintained.

The resulting law

117. There is thus brought into sharp focus a contrast between, on the one hand, this jurisdiction's absorption before 1 July 1997 of therestrictive doctrine and, on the other, the apparently consistent rejection of that doctrine by the entity which has, since that date, resumed the exercise of sovereignty over the Region. There is no legislation that resolves that contrast, even though after 1 July 1997 legislation has been promulgated in allied respects.[98] So the question is whether there is clear warrant in law for the Court to hold that the common law, in so far as it incorporated the restrictive doctrine, has fallen away as being necessarily at odds with the

new constitutional framework. It is a question that arises for consideration in the context of Hong Kong's unusual constitutional dispensation at the heart of which lies the concept of one country, two systems; and whilst Mr Thomas emphasizes the fact of two systems within that concept, it is obvious that there are aspects of that dispensation that fall particularly under the rubric "one country", most especially issues that affect sovereignty.

118. Whilst I have found resolution of the question a difficult one, I have had the advantage of reading in draft the judgment of Yuen JA and am persuaded by her reasoning, which I respectfully endorse, most particularly the fact that the success of the application at hand does not constitute or threaten an infringement of the sovereignty of the PRC. This is not a case, such as Rio Tinto, in which this Court is asked to assist a foreign court in the exercise of extra-territorial jurisdiction. Furthermore, since the PRC currently maintains persistent objection to the restrictive doctrine, accordingly not binding itself to such international rule as has developed, and given the circumstances by which Hong Kong's common law on the subject has reached its current state – a position which is, moreover, subject to legislative amendment if that is desired – I do not see application of the restrictive doctrine in this case as prejudicing such objection as the PRC might be minded to advance in the future. Added to these considerations are the facts that:

(1) the invitation to adapt the common law to its status quo ante is an invitation to effect a regressive change, regressive in the sense to which I have earlier referred[99], and inimical to justice in individual cases; and

(2) whereas the National People's Congress has as recently as October 2005 adopted a national law relating to judicial immunity from compulsory measures concerning the property of foreign central banks and, through the vehicle of Annex III of the Basic Law, applied that law to Hong Kong, it is reasonable to assume that is not intended that Hong Kong should abandon the restrictive doctrine save where and to the extent that is specifically enacted. That assumption gains further force by the fact and provisions of the International Organisations and Diplomatic Privileges Ordinance, Cap. 190.

119. Section 6 of that Ordinance provides that:

"Notwithstanding any provision to the contrary contained in any Ordinance, the international custom relating to the immunities and privileges as to person, property or servants of sovereigns, diplomatic agents, or the representatives of foreign powers for the time being recognized by the People's Republic of China shall, in so far as the same is applicable mutatis mutandis, have effect in Hong Kong."

120. Some suggestion has been made that the phrase "for the time being recognized by the People's Republic of China" refers to "sovereigns, diplomatic agents, or the representatives of foreign powers" rather than to "the international custom." However a study of the long title to the Ordinance removes any doubt about the meaning. What is required is adherence to the international custom as it is recognized by the PRC.

121. It follows that a decision was taken to apply by local legislation an international custom as recognized by the national Government. Taking into account as well the hints of movement towards the restrictive doctrine in the PRC's overall approach, it is therefore not unreasonable to suppose that were it intended that the courts of Hong Kong should apply the Central executive's preferred theory of sovereign immunity, that intention would be given effect by legislation.

122. For these several reasons, I find that the doctrine of restrictive immunity currently continues to apply in Hong Kong.

123. This finding does not render the Ministry letters otiose, nor reflect adversely upon the

representations made by them. Their utility is not only in apprising the courts of this Region of factors necessary for a fully informed analysis but also in the maintenance, as a matter of record, of a consistent stance internationally.

Waiver

124. The plaintiff's case is that, whatever the doctrine applicable in Hong Kong, whether absolute or restrictive, the DRC cannot avail itself of it in this case, for such immunity from jurisdiction and from execution as otherwise applies, has been waived.

125. Mr Thomas emphasizes two phases to be addressed. The first phase is the arbitration process itself the final stage of which, he suggests, is recognition of, and leave to enforce, the awards. The argument is that in relation to this phase, the DRC's voluntary submission to the arbitration process constitutes waiver of any claim for immunity from that process.

126. The second phase moves away from recognition and leave to enforce to execution itself, and it is said that Reyes J incorrectly treated all the orders made by Saw J as part of the execution process. In relation to the execution stage, it is argued again that by entering upon the arbitration and by agreeing to the application of the ICC Rules, the DRC has waived its immunity from execution upon the awards as judgments. Then it is suggested that, in any event, the execution phase has not yet been reached so that a claim to immunity from execution is premature.

127. It is generally accepted that an agreement to arbitrate constitutes a waiver of immunity from the arbitration proceedings themselves. It has even been suggested that the question does not properly arise where the arbitrator is not an organ of State, for in such circumstances the maxim par in parem non habet imperium is not apt[100].

128. It is beyond dispute that a State may waive such immunity from jurisdiction and from the processes of execution as it enjoys.[101] The Secretary does not suggest that the policy of absolute immunity to which the PRC adheres precludes waiver by a foreign State; indeed, so to suggest would be illogical.

129. At common law, waiver of immunity from jurisdiction does not imply waiver in respect of execution of judgment: for the latter, a separate waiver is required.[102]

The early cases

130. The question arises in this case whether waiver must be express and in the face of the court or whether it may be implied by submission of the foreign State to an ICC arbitration. The common law rule, at least in England, was that waiver was only effective if it was express and in the face of the court[103]: Mighell v Sultan of Johore[104]; Duff Development Company Limited v Government of Kelantan[105]; Kahan v Pakistan Federation[106].

131. In Duff Development, the Government of Kelantan had granted mining and other rights to the company by a deed which contained an arbitration clause, incorporating the Arbitration Act 1889. Disputes were referred to an arbitrator who made an award in favour of the company and the company thereafter obtained an order under section 12 of the Act giving leave to enforce the award, which order was set aside on the basis that Kelantan was a sovereign independent State.

132. The article in the deed which provided for reference of disputes to a sole arbitrator further stipulated that submission to arbitration "shall be deemed a submission to arbitration within the Arbitration Act 1889…", section 12 of which provided that: "An award on a submission may, by leave of the Court or a judge, be enforced in the same manner as a judgment or order to the same effect." It was contended for the company that that arbitration clause was a submission to the

jurisdiction of the court to order execution to issue upon the award against the property of the Government of Kelantan.

133. Viscount Finlay reviewed the history of English law with regard to the enforcement of awards and pointed out that "[a]part from statute the award of an arbitrator on a reference by agreement could be enforced only by action" and that:

"When this was the state of the law it could not have been contended that the reference by agreement to arbitration with a foreign Government even if made in England would involve any obligation on the part of the foreign Government to submit to the jurisdiction of the English Courts in an action to enforce the award. … . There would certainly be no obligation upon it to accept the jurisdiction and to submit to judgment and execution against any property belonging to it in England. There is nothing in an agreement for settlement by arbitration to import a waiver of the right of a sovereign Power to refuse the jurisdiction of the English Courts in an action upon the award."[107]

134. I pause to note that the procedure for summary enforcement which is constituted by s. 2GG of the Arbitration Ordinance is not intended to provide the sole method of enforcement and that it remains open to a party who seeks to enforce an award to do so by action relying on the implied promise, to which arbitration agreements give rise, that the award will be performed.[108]

135. Viscount Finlay's speech then describes how in due course summary remedies were provided in addition to the remedy by action, including one in 1854 whereby any written agreement for a reference might be made a rule of court. This trend culminated in s. 12 of the Arbitration Act in the consideration of which:

" … it is material to observe that in the case of all the previous enactments for the same purpose the party against whom the rule was applied for would have the opportunity of opposing it, and it is clear that no such rule would have been made as against a sovereign State unless it had entered into an agreement submitting to the jurisdiction. The procedure by rule was merely an alternative procedure for the procedure by action, and the foreign State would have the same right of asserting its immunity as if the old remedy by action on the agreement had been resorted to.

Sect. 12 … involved merely a change of procedure. The award may under it, by leave of the Court, be enforced as if it were a judgment. Application must be made to the Court for leave, and it appears to me that on such an application, if the other party to the award is a sovereign State, that party might assert its immunity from process and that the Court would be bound to refuse leave unless the objection had been waived.

… The leave of the Court being necessary before the award can be enforced as if it were a judgment, if a sovereign State claimed its immunity this would be a good reason for refusing the leave. The assertion that the agreement for the application of the provisions of the Arbitration Act involves a waiver of the right to object to execution on the ground of sovereignty involves reading s. 12 of the statute of 1889 as if it conferred a right to have execution on the award. The only right conferred is a right to apply for leave to issue execution on the award, and this leave will be granted only in suitable cases. It is not a suitable case if a foreign Government is concerned, unless there has been a clear waiver by that Government of its sovereign rights for this purpose. To the arbitration the Government of Kelantan had no objection; they attended the proceedings throughout. It was only when it was proposed to take a step which involved the right to execution against the Government that there was any occasion to raise the objection of sovereignty."[109] (Emphasis added)

136. This conclusion supported that of Viscount Cave who said that he saw no reason for

doubting the correctness of the decision in Mighell that a submission by a sovereign to the jurisdiction of the forum State must take place when the jurisdiction is invoked and he added that:

"If therefore a sovereign having agreed to submit to jurisdiction refuses to do so when the question arises, he may indeed be guilty of a breach of his agreement, but he does not thereby give actual jurisdiction to the Court."[110]

A suggested sea-change

137. Since those judgments, the participation of States in commercial activities with foreign private entities has increased dramatically, especially in recent years, and:

" …this has brought about a wide-spread adoption of arbitration clauses in contracts entered into in this connection, especially when long-term co-operation agreements pertaining to investments and generally to the economic development of foreign countries are concerned. As a consequence, resort to arbitration in disputes between public entities and foreign private parties has also increased sharply. It has been reported, for instance, by the ICC that more than one-third of the cases submitted to arbitration administered by that institution related in recent years to this kind of dispute."[111]

138. Mr Thomas submits that, accordingly, modern thinking has moved on, that there has been a sea-change driven by a recognition that unless commitment to arbitration is firm and enforceable, arbitration agreements with States are rendered pointless. In its common sense and alignment with the notion of equal justice, the contention is unassailable. Its essence is reflected in an article by Professor Bachand[112] in which he said:

"When a state enters into an arbitration agreement with a foreign investor, it undertakes – explicitly in the great majority of cases – to resolve future disputes through a final and binding private adjudicative process. … But the finality of any arbitral award (a purely private act) depends ultimately on the support of national courts, which is provided, at least initially, through the recognition and enforcement process; without such support, the award will only be as final as the losing party chooses it to be. Therefore, access by the winning party to the recognition and enforcement process is essential to ensure that the parties' undertaking to arbitrate will produce all the intended effects. Allowing states to raise pleas of jurisdictional objections in foreign recognition and enforcement proceedings essentially amounts to rendering access by foreign investors to that crucial recognition and enforcement process conditional on the host states' will. It amounts to giving host states the power to determine unilaterally what legal effects an unfavourable award would concretely have; or, to state the point more bluntly, it allows the host state to repudiate its previous promise to resort to final and binding arbitration if it is displeased by the award. Such a solution is clearly objectionable, not only because it runs afoul of the general principle of pacta sunt servanda, a cornerstone of the international trading system, but also because it runs afoul of the fundamental principle requiring equal treatment of the parties, since the host state is vested with a power – to unilaterally decide to give no effect to the award – which is denied to the investor. That is why, in essence, the great majority of commentators rightly point out that states ought to be prevented from raising pleas of jurisdictional immunity in foreign proceedings seeking the recognition and enforcement of awards made against them. For example, commenting on Dutch, U.S., and French developments holding that "when a State has waived its immunity by submitting to arbitration, the scope of the waiver extends to proceedings for confirmation or recognition and enforcement of the resulting award," developments which, he suggested, were reflective of an emerging consensus, Dr Georges R. Delaume wrote, back in 1987, that "[a]s a rule, [such] pleas of immunity have been successful." His support for this solution was as strong as it was unequivocal: "This clearly is the correct solution, since otherwise sovereign immunity would make a mockery of the arbitration process."[113] (Second emphasis

added)

A rule of international law?

139. I emphasised the word "ought" in that passage because the issue is whether the law as it is in this jurisdiction reflects that demand for, and the desirability of, equal treatment. Mr Thomas asserts that it does, contending that implied waiver in the context of arbitrations between States and private persons is a policy now so generally applied that it has itself been transformed into a rule of international law. For this proposition he advances the following summary:

" … the question arises whether submission to arbitration should be regarded as an implicit waiver of immunity. Although states may be tempted to endorse the opposite view, the overwhelming weight of authority calls for an affirmative answer. Decisions of international and domestic tribunals, treaty and statutory provisions found in the European Convention [on State Immunity] and modern western statutes, all concur that a state party to an arbitration agreement is precluded from asserting its immunity in order to frustrate the purpose of the agreement."[114]

140. There is support for this view in a number of other commentaries. Professor Toope postulates that certain national courts and eminent publicists have held that "the enforcement of an arbitral award against a contracting state is not precluded by sovereign immunity, because the agreement to arbitrate constitutes a waiver of that immunity", for which proposition he relies primarily on decisions in the United States, the Netherlands, Sweden, France and Switzerland. He says that these decisions:

"… have encouraged distinguished scholars to conclude that a state's initial agreement to arbitrate now constitutes a complete waiver of sovereign immunity, even at the stage of enforcement. In the words of Professor Bowett:

…[I]n most jurisdictions, a Sovereign State's agreement to arbitrate is deemed to be a waiver of immunity for the purposes of arbitration and, in addition, the waiver is generally regarded as extending to enforcement and execution of any award.

Such an implied waiver is necessarily inferred from the consensual nature of arbitrations arising out of state contracts and is an inverse corollary to the basic premise that "consent to arbitration excludes all other remedies". If all other remedies are excluded, principles of justice and plain common sense require that nothing should be allowed to defeat the intention of the parties to resolve their differences through arbitration.

….

Enforcement typically shows deference to the will of the state, not a challenge to it, for the state has itself chosen to submit to arbitration. … by agreeing to third-party adjudication, a state must be presumed to have consented to the means of enforcement that are necessary to resolve the underlying dispute. A dispute is only "resolved" if the arbitral award has been given effect. Otherwise, the initial agreement to arbitrate is vitiated. Sovereign immunity should not be allowed and commonly is not allowed to operate under the rubric of public policy to prevent enforcement of a non-domestic arbitral award under the <<New York Convention>>."[115]

141. Professor Bachand, to whose work on the subject I have earlier referred[116] intimates that the approach may have become a rule of international law:

"More recently, Kaj Hober wrote that:

"[t]he generally held view today is that an arbitration clause constitutes a waiver of

immunity from the jurisdiction of foreign courts exercising their ancillary role in international arbitration and that the ancillary role extends to the declaration of enforceability of an arbitral award."

The idea that states ought to be prevented from raising pleas of jurisdictional immunity in foreign proceedings seeking the recognition and enforcement of awards made against them is not only adhered to by a great majority of commentators, it also finds support in positive law to such an extent that a leading commentator has recently affirmed that it has now become a 'general rule of international law.' "[117]

142. Lady Fox suggests otherwise. Her summary of the approach of various jurisdictions has led her to conclude that:

" … it can now be stated with reasonable certainty, with the authority of Article 17 of the UN Convention [on Jurisdictional Immunities of States and Their Property] in support, that international law limits the scope of jurisdictional immunities of a State party to an international commercial arbitration in the first stage of adjudication and permits national courts to exercise a supervisory jurisdiction in support of the arbitration agreement and the arbitral proceedings. This more restrictive view rejects the assumption that an agreement by a State to arbitrate under the law of one state is to be taken as consent to the exercise of jurisdiction by recognition and enforcement of the resultant arbitration in any other state where enforcement may be sought. Some support is to be found in national legislation in State practice for a wider supervision and the removal of any bar to a national court converting into a judgment a foreign award by recognition and an order for enforcement. But the differing requirements which have to be met in national legislation … indicate that there is no generally accepted rule sufficient to constitute a customary international rule.

The general conclusion must be that, in jurisdictions other than the US, UK and Australia, practitioners at the present time should consider that the exception for arbitration agreements operates solely to remove state immunity from the first stage of arbitration in which the national courts exercise supervisory powers."[118]

143. The position is not sufficiently clear to conclude that the policy of implied waiver has been transformed into a rule of international law. The practice internationally would require a much more detailed study than has been presented to this Court and amongst respected scholars there appears to be no consensus on the point.

The impact of legislation

144. It is important, however, when considering commentaries and the cases to which we have been taken, to recognize that major jurisdictions which have followed the approach urged upon us by the plaintiff, have done so against the backdrop of specific legislation which finds no echo in this jurisdiction because such legislation as was here directed at the subject, the 1978 State Immunity Act, ceased to have effect on 1 July 1997.

145. The impact of specific legislation is evident not only from Lady Fox's analysis but also from Professor Bachand's article:

"Evidence of such a general rule [of international law] can be found in the British, U.S., and Singaporean provisions … but it can also be found in statutes on sovereign immunity adopted after the entry into force of the Canadian statute, such as the South African Foreign States Immunities Act and Australia's Foreign States Immunities Act 1985. … Further evidence of a general rule preventing states from raising pleas of jurisdictional immunity in foreign proceedings seeking the recognition and enforcement of awards made against them can be found

in the 2004 U.N. Convention. Earlier drafts of the arbitration exception … made no mention of recognition and enforcement proceedings, because it was thought that recognition and enforcement was best characterized as a step towards an award's execution, and thus engaging a state's immunity from execution rather than its immunity from jurisdiction. But this conception of the recognition and enforcement process was ultimately rejected by the drafters, which explains why the final version of [the Convention] unambiguously extends the arbitration exception, found in Article 17, to judicial proceedings relating to the recognition and enforcement of an award."[119]

146. Section 2 of the United Kingdom's State Immunity Act 1978 provides, insofar as it presently relevant, that:

"(1) A State is not immune as respects proceedings in respect of which it has submitted to the jurisdiction of the courts of the United Kingdom.

(2) A State may submit after the dispute giving rise to the proceedings has arisen or by a prior written agreement… .' (Emphasis added)

147. Section 9(1) of The State Immunity Act is as follows:

"Where a State has agreed in writing to submit a dispute which has arisen, or may arise, to arbitration, the State is not immune as respects proceedings in the courts of the United Kingdom which relate to the arbitration."

148. It was held in Svenska Petroleum Exploration AB v Government of the Republic of Lithuania (No.2)[120] that the phrase "proceedings relating to arbitration" includes not only proceedings in support of the arbitral process and proceedings challenging the award itself, but also proceedings to enforce the award for:

"Arbitration is a consensual procedure and the principle underlying section 9 is that, if a state has agreed to submit to arbitration, it has rendered itself amenable to such process as may be necessary to render the arbitration effective … [and that] an application …. for leave to enforce an award as a judgment is … one aspect of its recognition and as such is the final stage in rendering the arbitral procedure effective. Enforcement by execution on property belonging to the state is another matter, as section 13 makes clear."[121]

149. Section 13, to which reference is there made, preserves from enforcement of an arbitration award State property save where the State concerned provides written consent (which may be contained in a prior agreement)[122] or where the property "is for the time being in use or intended for use for commercial purposes."[123]

150. Section 17(2) of the Australian Foreign States Immunities Act 1985 provides that where a foreign State has submitted to arbitration that State will not be immune "in a proceeding concerning the recognition as binding for any purpose, or for the enforcement, of an award made pursuant to the arbitration, wherever the award was made," and, by reason of section 30, the courts may order enforcement of an award against a foreign state but only to the extent that the order relates to "commercial property". Professor Toope has suggested that "[t]he notion of "commercial" property or assets should be conceived of in an expansive sense, to allow enforcement against a broad range of state-owned property. Only when execution will interfere with an essential sovereign operation of a state should enforcement be refused, for here the principle of comity has its strongest claim to relevance."[124]

151. The position in the USA is governed by the Foreign Sovereign Immunities Act. Ipitrade International S.A. v Federal Republic of Nigeria[125], concerned an ICC arbitration award in

Switzerland which the petitioner sought to enforce in the USA. The award was subject to the <<New York Convention, to which both the USA and Nigeria were parties. By reason of s. 1605(a)(1) of the Act no immunity is available in a case "in which a foreign state has waived its immunity either explicitly or by implication notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver." The judgment in that case informs us that "the legislative history of this section expressly states that an agreement to arbitrate or to submit to the laws of another country constitutes an implicit waiver." Accordingly, the Court held that Nigeria's agreement to submit all disputes to arbitration constituted a waiver of immunity. The reasoning is sparse but it is, for reasons to which I shall shortly come, relevant to note in respect of this decision that Nigeria was and is party to theNew York Convention >> and that Ipitrade was a decision in 1978 after which the United States enacted, in 1988, a further provision to the FSIA, namely, ss. (6) (B) of s. 1605 of the FSIA which is to the effect that a foreign state is not immune from the jurisdiction of the courts of the United States in any case in which the action is brought to confirm an arbitral award made pursuant to an agreement with the foreign state where "the … award is… governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards… ."

The present case

152. It is common ground in this case that the <<New York Convention>> applies to the awards made in favour of the plaintiff and that, subject to the question of sovereign immunity, they are enforceable in Hong Kong.

153. The agreement to which the DRC and Energoinvest subscribed envisaged that disputes would be submitted before a court appointed in accordance with the Rules of the International Chamber of Commerce in Paris (the ICC Rules). Article 28(6) of those Rules, upon which Mr Thomas most particularly relies, reads:

"Every Award shall be binding on the parties. By submitting the dispute to arbitration under these Rules, the parties undertake to carry out any Award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made."

154. Mr Thomas asserts that the DRC is contractually bound by the terms of Article 28(6), subscription to which must be taken as an implied waiver of any right it may have to rely upon sovereign immunity, for such reliance is necessarily an impediment to carrying out the award without delay, noting in this regard that the French version of the article uses the word 'exécuter'. There are, he says, three decisions which support this argument.

The authorities

155. The first is Creighton Ltd v Government of the State of Qatar.[126] In quashing a decision of the Paris Court of Appeal, the Court of Cassation decided that by agreeing to submit disputes to ICC arbitration, the State of Qatar had, by reason of art. 24 (the predecessor of the present art. 28(6)) of those Rules, undertaken to carry out an award without delay and had thereby waived immunity from execution. No reasoning is provided and Reyes J was of the opinion that Creighton could not be right "insofar as it was there suggested that submission to an ICC arbitration is without more tantamount to a waiver of immunity from execution. I do not think such conclusion logically follows from the premise."[127] In this regard, I note the statement by Lady Fox that:

"The French courts have held that consent given in an arbitration clause to refer disputes to arbitration does not constitute consent to execution in national courts of any award subsequently handed down: 'waiver of jurisdictional immunity does not in any way involve a waiver of

immunity from execution'. The decision in Creighton would seem to be out of line with this general position… ."[128]

156. Walker International Holdings Ltd v The Republic of Congo[129], the second case cited for the proposition that submission to Rule 28(6) constitutes waiver, was a garnishment action by Walker International, the purchaser of a debt in respect of which the company had succeeded against the Republic of Congo in an ICC arbitration. The company filed a motion for a restraining order to prevent the garnishee from paying sums allegedly due to the Republic. The case came before the Court of Appeals after the court below had found against the company on the basis that the property against which the order was sought was not used for a commercial purpose and was therefore not exempted by the Foreign Sovereign Immunities Act (FSIA) from immunity.

157. Section 1610 of the FSIA provides that:

" … The property in the United States of a foreign state … used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if –

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver… ."

158. The Court noted[130] the company's contention that the Republic had waived its sovereign immunity explicitly in its contracts with the garnishee. The contract in question stated that "the Congo hereby irrevocably renounces to claim any immunity during any procedure relating to any arbitration decision handed down by an Arbitration Court… ", and it was on this footing that the appellate court found an express waiver of sovereign immunity. The Opinion of Judge Garza goes on, however, to say:

"In addition, the ROC agreed to abide by the rules of the ICC which precludes the ROC from asserting a sovereign immunity defense. Rule 28(6) states, "every Award shall be binding on the parties. By submitting the dispute to arbitration under these Rules, the parties undertake to carry out any Award without delay and shall be deemed to have waived their right to any form of recourse insofar as such waiver can validly be made." I.C.C. RULE 28(6). Therefore, we hold that the ROC explicitly waived its sovereign immunity. Accordingly, we need not address a potential implicit waiver."[131]

159. For reasons to which I shall shortly turn, and with respect, I find, as did Reyes J in relation to Creighton, the logic difficult to follow, especially insofar as it was held in Walker that the waiver was, by reason of adherence to Rule 28(6), explicit.

160. In Collavino Inc v Yemen (Tihama Development Authority)[132], Collavino carried out work in Yemen under a contract made between Collavino and the Authority (TDA). The contract contained an arbitration clause which was invoked and an award was made in favour of Collavino. The award remained outstanding and Collavino sought recognition and enforcement of the award in Alberta. The company sought to establish that TDA was a State organ of the Republic of Yemen; that the transaction represented a commercial activity of a foreign state, so that by reason of s 5 of the Canadian State Immunity Act state immunity did not bar relief; alternatively, that immunity had been waived.

161. Section 4 of the Act provides that a foreign State is not immune from the jurisdiction of a court if the State waives immunity from jurisdiction; and s 12 provides that the property of a

foreign State, where the property is located in Canada, is immune from attachment and execution unless the State has, either explicitly or by implication, waived its immunity from execution or where the property is used or is intended for a commercial activity.

162. All that Associate Chief Justice Wittmann said on the question of waiver from execution was that:

" … I have no doubt that the TDA waived immunity for enforcement purposes pursuant to s. 12 of the State Immunity Act. It did so by agreeing to international commercial arbitration. Otherwise, the effect of an Award could be thwarted by successfully claiming state immunity in jurisdictions where the TDA has exigible assets."[133]

163. I do not read that judgment as suggesting that, absent legislation that permits such an implication, waiver of immunity is to be implied whenever the result of not doing so would be to thwart the effect of an award. So to suggest would be to contend that the law as it should be, is the law as it is. Regrettably, that is not always so. The fact that the justice of a case might be defeated by claims to State immunity is nothing new. That is what sometimes happened when the doctrine of absolute immunity, unmitigated in its effect by any exception, held international sway. That is why many nations have enacted legislation specifically designed to qualify the common law on waiver and to render the law consonant with the requirements of equal justice.

Analysis

164. The difficulty for the plaintiff, as I see it, is that by lapse of the effect of 1978 Act, this jurisdiction has been relegated to the common law position which requires express waiver. That, as is recognized by Fox[134] is the effect of Mighell and of Duff Development expressly followed in 1989 in A Co Ltd v Republic of X[135]. Fox does not suggest that the common law position has changed. The same point is made by Dicey:

"At common law, sovereign immunity could be waived by or on behalf of the foreign State, but waiver had to have taken place at the time the court was asked to exercise jurisdiction and could not be constituted by, or inferred from, a prior contract to submit to the jurisdiction of the court or to arbitration. The [1978] Act, however, has made a far -reaching and beneficial change… . "[136]

165. It seems to me that the decision which comes closest to the facts of this case and is the most helpful for the difficult analysis that is posed by the waiver issue in this appeal, is that of the United States Court of Appeals for the District of Columbia in Creighton Ltd v Government of the State of Qatar.[137] The decision is instructive because it is a relatively recent one that concerns an attempt to enforce an ICC arbitral award made in favour of a private entity against a foreign State, where, as in the present case, the foreign State had agreed to an arbitration in the territory of a State that had signed the <<New York Convention>>, where the forum State was party to that Convention, but where the foreign State was not party to the Convention and where it was argued that by agreeing to arbitrate in such a territory, the foreign State had impliedly waived its immunity from the jurisdiction of the forum State. In these respects, the case is on all fours with the present.

166. It will be recalled from our examination of Ipitrade[138] that s. 1605(a)(1) of the FSIA provides that no immunity is available in a case in which a foreign state has waived its immunity either explicitly or by implication and that the subsequently enacted subsection (6) (B) removes immunity where enforcement is sought of an award governed by an international obligation, to which the United States is party, that requires recognition and enforcement of arbitral awards.

167. Qatar willingly participated in the ICC arbitration but in the action in the United States by

which Creighton sought to enforce the award, Qatar claimed that the court lacked subject matter jurisdiction, whereas Creighton asserted that by agreeing to arbitrate in France, Qatar had impliedly waived its sovereign immunity.

168. In analysing Creighton's assertion that there had been implied waiver under s. 1605 (a)(1), the Court noted earlier decisions in which it had been held that "most courts have refused to find an implicit waiver of immunity to suit in American courts from a contract clause providing for arbitration in a country other than the United States"; that "… courts have been reluctant to find an implied waiver where the circumstances were not … unambiguous"; and that "a key reason why pre-FSIA cases … found that an agreement to arbitrate in the United States waived immunity from suit was that such agreements could only be effective if deemed to contemplate a role for United States courts". Reference was made to a decision of the Supreme Court[139] in which that Court had said "we [do not] see how a foreign state can waive its immunity under [s]1605(a)(1) by signing an international agreement that contains no mention of a waiver of immunity to suit in United States courts or even the availability of a cause of action in the United States." The Appeals Court noted that the authorities upon which Creighton relied were cases in which the defendant State was a signatory to the <<New York Convention>>, and added that in Seetransport Wiking Trader v Navimpex Centrala[140] "the Second Circuit reasoned, correctly we think, that 'when a country becomes a signatory to the Convention, by the very provisions of the Convention, the signatory state must have contemplated enforcement actions in other signatory states.' " It went on to say:

"Qatar not having signed the Convention, we do not think that its agreement to arbitrate in a signatory country, without more, demonstrates the requisite intent to waive its sovereign immunity in the United States. As Creighton directs us to no other evidence of such an intent, we hold that [s.] 1605(a)(1) does not confer subject matter jurisdiction upon the district court."

169. However, Qatar did not contest Creighton's assertion that "because the <<New York Convention>> calls for enforcement of any arbitral award rendered within the jurisdiction of a signatory country" s 1605 (a) (6) applied to the action. There was merely an argument, unsuccessful in the event, that to apply that statutory exception was impermissibly retroactive, and it was on the basis of the specific arbitration exception created by subsection (a)(6)that the Court held that it had subject matter jurisdiction over the case.

170. In my judgment, the logic underlying the decision is cogent and has been said to be "consistent with Crawford's view that international agreements cannot be interpreted as waiving immunity of a State which is not a party to the international agreement 'since it would violate the pacta tertiis rule' "[141], a rule reflected in art. 34 of the Vienna Convention:

"A treaty does not create either obligations or rights for a third State without its consent."

171. The rationale for the decision, as well as my unease with the decisions to the contrary by the Court of Cassation in Creighton and the Court of Appeals in Walker, find their root in the principle underlying Duff and Mighell, namely, that since equals do not have authority over each other, consent for the exercise of such authority must be unequivocal and communicated by one to the other, from which it follows that, absent legislative permission to imply permission that is not directly communicated, a refusal to consent may well, as Viscount Cave suggested, constitute a breach of agreement between the foreign State and the claimant but the agreement itself does not, without more, confer jurisdiction upon the forum court. It is different if the foreign State is party to an international agreement to which the forum State is also a party, by the terms of which State parties undertake to enforce awards: in such circumstances each State party that enters upon that international agreement clearly says to each other State party: 'We hereby expressly represent to you, and to all other States that are party to this arrangement, that you may enforce such award as is made against us and as is covered by this international agreement.' It cannot in

my judgment be said that by entering upon an ICC arbitration agreement with a private party, a foreign State that is not a party to the <<New York Convention>> is going beyond the making of a representation to the private party and is making a representation to each Convention State that it consents to the enforcement against it in the Convention State of such arbitral award as may be made. It seems to me that jurisdiction in the forum State can, in such circumstances, only be conferred by legislation or by an express representation by the foreign State to the forum State.

The two-stage issue

172. The plaintiff complains that Reyes J resolved the case against it by reference only to the stage of execution, finding that the entry fees, if indeed they were due to be paid to the DRC, were to be used for State purposes and that therefore, even on an application of the restrictive doctrine, were immune from execution. That the fees are due to the DRC either directly or to organs which are the alter ego of the State, is a suggestion disputed by the DRC but for immediate purposes that matters not, for we have, for the purpose of the immunity question only, proceeded on the assumption that they are due to the DRC. What the judge did not do, says Mr Thomas, was to address the earlier stage, namely, immunity from jurisdiction. That, he contends, is important because, first, there is a material difference in the tests to be applied to the two stages: for the exercise of jurisdiction, where the restrictive doctrine prevails, the Court looks at the nature underlying the relevant transaction and at the stage of execution to the purpose for which the assets are intended; and second, because even if there are no DRC assets in Hong Kong, leave to enforce has its utility in respect of such DRC assets as may subsequently present themselves in this jurisdiction. These are arguments which, if successful, would not assist in preserving the injunctions granted or of the appointment of receivers, but merely the order by which leave to enforce was granted.

173. It follows, according to this argument, that it was important for the court below, and is important for this Court, to address the first stage. In relation to the first stage, the contention is that an application under s. 2GG of the Ordinance for leave to enforce a foreign arbitral award against a foreign State is not an act that impleads that State for it is in the nature of a purely ministerial act and, further, that the grant of leave is but the tail end of the arbitration itself from which the foreign State has waived its immunity.

174. I do not agree that the grant of leave is, or is in the nature of, a ministerial act. True it is that s. 44 of the Arbitration Ordinance provides that enforcement of a Convention award shall not be refused except in the cases mentioned in the section – for example, where a party to the arbitration agreement was under some incapacity – but not only does the court necessarily exercise its jurisdiction when it grants or refuses leave, but it also embarks upon an adjudicative function. The fact that the application for leave is prescribed to be made ex parte is not to the point, for the applicant is not thereby relieved of his obligation to disclose possible defences and it is open to the party against whom the award was made to seek to set aside leave, if granted. There is authority for this analysis, properly drawn to our attention by Mr Thomas. It is AIC Ltd v Federal Government of Nigeria and another[142] where Burnton J, as he then was, said:

> " The conversion of a judgment of the original court into a judgment of this court, enforceable by execution, requiring the defendant to pay a sum of money to the claimant… is manifestly an exercise by the court of its jurisdiction. … Thus, even if the registration of a judgment were a purely administrative act, I should hold that it is subject to the immunity conferred by section 1 [of the State Immunity Act]."[143]

175. But, says Mr Thomas, there is a distinction, since AIC concerned registration of a foreign judgment whereas the application for, and the grant of, leave is an extension of the arbitration itself to which process the foreign State has lent itself. For this proposition he cites Svenska[144] for the opinion there expressed that:

"… if a state has agreed to submit to arbitration, it has rendered itself amenable to such process as may be necessary to render the arbitration effective."

176. That, however, was a construction of s. 9 of the State Immunity Act 1978 which provides that a State is not immune in respect of proceedings in the courts of the United Kingdom "which relate to the arbitration" to which the State had agreed in writing to submit. We have no such provision. More in point is Ex parte Caucasian Trading Corporation Limited[145]where:

"It [was] argued that the application to enforce the award must be considered as a mere continuation of the arbitration … . I do not think that contention can be sustained. The application for leave to enforce the award is not a matter which takes place in the arbitration. It is no more a continuation of the arbitration than an action on the award would be."[146]

177. In my judgment, the application for leave to enforce the foreign arbitral award is an application that seeks to invoke the jurisdiction of the court and which, when directed at an award made against a foreign State, is an application that seeks to implead that State, so that the question of immunity from that jurisdiction is one which at that stage has to be raised and addressed. I respectfully agree with Lady Fox's conclusion[147] that, absent legislation to a broader effect, the submission of a foreign State to arbitration "operates solely to remove state immunity from the first stage of arbitration in which the national courts exercise supervisory powers", so that in this case, the submission of the DRC to the ICC arbitration did not constitute waiver to the jurisdiction of the Hong Kong courts to consider an application for leave to enforce those awards, or waiver against execution.

Miscellany

178. I respectfully agree with the conclusions of Yuen JA on the questions of service and non-disclosure and that the plaintiff is entitled to leave to enforce the arbitral awards as judgments in Hong Kong.

179. As for execution, and the injunctions in aid of execution, it seems to me, with respect, that the learned judge erred in concentrating upon the circumstances giving rise to the entry fees liability.[148] He said that "[s]uch payment strikes me as only one which a state or government can exact. Here the DRC is allowing its natural resources or heritage to be used for the direct benefit of its people."[149] The correct test, however, is the use to which the property – the entry fees once paid – are to be put: if for a sovereign or public purpose, then they are immune from the process of execution; if for a private or purely commercial purpose, then they are not. This is an issue of fact which has not been determined and as Yuen JA explains in her judgment[150] there is evidence which supports the contention that the entry fees are the assets of the DRC and that part of those fees when paid are intended for commercial purposes. I respectfully agree with her conclusions that the plaintiff has not shown a good arguable case that the funds in the budget tranche are available for execution[151] but that the plaintiff has shown a good arguable case for injunctions over the Gecamines tranche[152] and that there is an issue that should be remitted for determination. I would restore until that determination or further order the injunctions granted below.

Conclusion

180. In the event, I find that:

(1) the DRC has not waived such immunity from jurisdiction and from execution as it enjoys;

(2) the application for leave to enforce the foreign arbitral awards is a process that invokes the jurisdiction of the court and that impleads the DRC;

(3) the DRC enjoys restrictive but not absolute immunity from the jurisdiction of the courts of Hong Kong;

(4) leave should be given to enforce the arbitral awards; and

(5) the DRC is not immune from execution in respect of such of the entry fees as may be due to the DRC and are not intended to be used for sovereign purposes.

181. Accordingly, I would:

(1) save in certain particulars specified hereafter[153], set aside the orders of Reyes J dated 12 December 2008 and 26 February 2009;

(2) grant the plaintiff leave to enforce the two arbitral awards;

(3) restore until further order the injunctions by which the DRC was restrained from receiving, and the other defendants from making payments of, the entry fees;

(4) order an inquiry along the lines of that suggested in paragraph 284(5) below; and

(5) make an order nisi that the costs of the appeal and of the respondent notices be to the plaintiff.

Hon Yeung JA:

182. I have had the advantage of reading in draft the judgment of Stock VP. I respectfully adopt the outline of the factual background set out in his judgment. However, I disagree with the suggestion that the DRC only enjoys restrictive but not absolute immunity. From a global perspective, and bearing in mind the constitutional provisions of the Hong Kong SAR as well as the unequivocal foreign policy of the PRC, DRC, in my view, enjoys absolute immunity.

183. State immunity, an established rule of international law and a concept whereby one state is disallowed to exercise jurisdiction over another state without that state's approval, originated in the period of monarchal rule in Europe. Under the doctrine of "par in parem not habet imperium" (one cannot exercise authority over an equal), all states are equal and it was considered an infringement of a state's sovereignty to bring proceedings against it or its officials without its consent in a foreign country.

184. One of the landmark decisions of state immunity is The Schooner Exchange v M'Fadden and others (1812) 11 US 116 at 133), in which it was said:

"The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereign to the same extent in that power which could impose such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced to the consent of the nation itself. They can flow from no other source."

185. In The Parlement Belge [1880] 5 P.D. 197 at 217, it was emphasized, "that as a consequence of the absolute independence of every sovereign authority and of the international comity which induces every sovereign state to respect the independence of every other sovereign state, each and every one declines to exercise by means of any of its courts, any of its territorial jurisdiction over the person of any sovereign or ambassador of any other state, or over the public

property of any state which is destined to its public use, or over the property of any ambassador, though such sovereign, ambassador or property be within its territory, and therefore, but for the common agreement, subject to its jurisdiction."

186. Traditionally, state immunity was considered absolute. During the 20th century, the absolute rule was increasingly perceived as anomalous of government participation in business matters and a distinction was drawn between those state activities that are public and those that are private. They were labeled in Latin as: acta jure imperii (acts of government) and acta jure gestionis (acts of commercial nature).

187. The move to modify the absolute immunity rule was basically to limit absolute immunity only to government acts (acta jure imperii). Lord Mustill exposed the rationale behind such modification in Kuwait Airways Corporation v Iraqi Airways Co [1995] 1 WLR 1147 at 1171 E as:

"The rationale of the common law doctrine of the restricted immunity…is that where the sovereign chooses to doff off his robes and descend into the market place he must take the rough with the smooth, and having condescended to engage in mundane commercial activities he must also condescend to submit himself to an adjudication in a foreign court on whether he has in the course of those activities undertaken obligations which he has failed to fulfill."

188. The 1st move to modify the absolute rule occurred in relation to action in rem in The Phillippine Admiral [1976] 2 WLR 214. The Privy Council, nevertheless, suggested that the absolute rule still applied to actions in personam at p 232H-233A of the judgment:

"The rule that no action in personam can be brought against a foreign sovereign state on a commercial contract has been regularly accepted by the Court of Appeal in England and was assumed to be the law even by Lord Maugham in The Cristina [1938] AC 485. It is no doubt open to the House of Lords to decide otherwise but it may fairly be said to be at the least unlikely that it would do so, and counsel for the respondents did not suggest that the Board should cast any doubt on the rule."

189. Later in Trendtex Trading Co v Central Bank of Nigeria [1977] 2 WLR 356, the principle of restrictive immunity was further developed. At p 368, Lord Denning, in emphasizing that there was no immunity in respect of commercial transactions even for a government department, re-stated what he had earlier said in Thai-Europe Tapioca Service Ltd v Government of Pakistan, Directorate of Agricultural Supplies [1975] 1 WLR 1485 at 1491, that:

"... a foreign sovereign has no immunity when it enters into a commercial transaction with a trader here and a dispute arises which is properly within the territorial jurisdiction of our courts. If a foreign government incorporates a legal entity which buys commodities on the London market; or if has a state department which charters ships on the Baltic Exchange: it thereby enters into the market places of the world: and international comity requires that it should abide by the rules of the market."

190. Lord Denning took the view that the rule of customary international law had changed to embrace the restrictive immunity doctrine and that common law should follow. He said at p 367:

"… I would ask: is there not here sufficient evidence to show that the rule of international law has changed? What more is needed? Are we to wait until every other country save England recognizes the change? Ought we act now? Whenever a change is made, someone some time has to make the first move. One country alone may start the process. Others may follow. At first a trickle, then a stream, last a flood. England should not be left behind on the bank. '…We must take the current when it serves, or lose our ventures': Julius Caesar, Act IV, sc III."

191. The restrictive immunity doctrine was confirmed in I Congreso del Partido [1983] AC 244 where Lord Wilberforce concluded at p 262 A-B, that "On the basis of these cases I have no doubt that the 'restrictive' doctrine should be applied to the present case", and at p 263H he cited with approval a passage from the judgment of the Federal Constitutional Court of the German Federal Republic in 1963 in the Claim against the Empire of Iran Case, 45 I.L.R. 57:

"As a means for determining the distinction between acts jure imperii and jure gestionis one should rather refer to the nature of the state transaction or the resulting legal relationships, and not to the motive or purpose of the state activity. It thus depends on whether the foreign state has acted in exercise of its sovereign authority, that is in public law, or like a private person, that is in private law."

192. In order to deal with the difficulties in applying the acta jure gestionis and acta jure imperii distinction, in particular the precise limit of the "restrictive" doctrine, many western nations passed national immunity legislations. USA passed the Foreign Sovereign Immunity Acts in 1976; UK passed the State Immunity Act in 1978 followed by Canada (the federal State Immunity Act in 1982) and Australia and other Commonwealth countries.

193. There is no doubt, as conceded by Sir Ian Brownlie SC for the Secretary for Justice, that there is a trend, both in common law and in customary international law, towards the restrictive immunity doctrine. However, is there sufficient material, from a global perspective, to justify the conclusion that the restrictive immunity doctrine had been embraced as part of the customary international law?

194. Jus cogens (compelling law), a fundamental principle of international law, is accepted by the international community of states as a norm from which no derogation is ever permitted.

195. Customary international law "…consists of rules of law derived from the consistent conduct of states acting out of the belief that the law required them to act way." (Rosenne, Practice and Methods of International Law, p.55)

196. It follows that customary international law can be described as widespread repetition by states of similar international acts over time (state practice), which must occur out of a sense of obligation (opinion juris) and must be taken by a significant number of states and not be rejected by a significant number of states.

197. There must therefore be a consensus among states exhibited both by widespread conduct and a discernable sense of obligation before a rule of law can become part of the customary international law.

198. In C & Ors v Director of Immigration [2008] 2 HKC 165 Hartmann J (as then was) observed at 182.

"The statute of the International Court of Justice, the instrument which endows the court with the jurisdiction to decide international law disputes, gives to the court (under art 38.1) the power to apply 'international custom, as evidence of a general practice accepted by law'.

Academic writers are agreed that a rule of customary international law has three fundamental elements. First, the rule should be of a norm-creating character, capable therefore of forming the basis of a general rule of law. Second, there must be a settled and consistent practice by states; not by all states, but states generally. Third, the practice must be followed because it is accepted as being legally obligatory.

In his speech in R(European Roma Rights Centre) v Prague Immigration Officer [2—5] 2 AC

1, at 35, Lord Bingham was of the view that the elements of customary international law have accurately and succinctly summarized by the American Law Institute, Restatement of the Law, Foreign Relations Laws of the United States, 3d (1986), 102(2) and (3) in the following terms:

'(2) Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.

(3) International agreements create law for the states parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted.'

This summary, said Lord Bingham, was valuably supplemented by the following comment:

'c. Opinio juris. For a practice of states to become a rule of customary international law it must appear that the states follow the practice from a sense of legal obligation (opinio juris sive necessitatis); a practice that is generally followed but which states feel legally free to disregard does not contribute to customary law. A practice initially followed by states as a matter of courtesy or habit may become law when states generally come to believe that they are under a legal obligation to comply with it. It is often difficult to determine when that transformation into law has taken place. Explicit evidence of a sense of legal obligation (e.g., by official statement) is not necessary; opinio juris may be inferred from acts or omissions.'

Accordingly, a settled and consistent practice among states, if it is to develop into a rule of customary international law, must be accompanied by conduct on the part of states – including those which are specially affected – acknowledging that the practice has acquired the force of law."

199. Mr Thomas SC, in his usual eloquence, referred us to the source materials referred to in I Congreso (supra) and emphasized that the restrictive immunity doctrine was applied by the US Courts of Appeals for the 11th Circuit in S & Davis International Inc v Yemen 218 F 3d 1292; by the Switzerland Federal Tribunal in United Arab Republic v Mrs X (1960) 65 ILR 385; by the Botswana High Court in Angola v Springbok Investment (Pty) Ltd (12 Oct 2003) ILDC (BW 2003); by the Court of Cassation in Italy in Borris v Argentina (27 May 2005) ILDC 296 (IT 2005); by the Tokyo District Court, Japan in Interquest Co v Saudi Arabia (27 December 2005) ILDC 1020 (JP 2005); by the Taiwan High Court in Panamanian Embassy Taipei, Taiwan v Collins Co Ltd (17 Feb 2004) ILDC 554 (TW 2004); and by the Supreme Court of Justice, Portugal in AA v Austrian Embassy (18 February 2006) ILDC 826 (PT 2007).

200. However, is the restrictive immunity doctrine a consensus among a significant number of states and not rejected by a significant number of states, and is there a discernable sense of obligation by those states to adopt the restrictive immunity doctrine to make it part of the customary international law?

201. Lee M Caplan, in his article "State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarchy Theory", published in the American Journal of International Law, Vol 97 at p 741, exposed the controversial issue at pp 748 and 760:

"Despite the fact that modern international law has largely discarded the classic notion of inherent state rights, the 'fundamental right' rationale has exhibited surprising resiliency. The Italian Corte di cassazione has opined, for example, that state immunity is 'based on the customary principle par in parem non habet jurisdictionerm, that has received universal acceptance.' The Polish Supreme Court found that 'the basis of the immunity of foreign States is the democratic principle of their equality, whatever their size and power, which results in excluding the jurisdiction of one State over another (par in parem non habet judicium). Scholars,

too, have embraced this rationale. An early edition of Oppenheim's International Law, for example, described the foundations of state immunity as a 'consequence of State equality' with reference to the maxim par in parem non habet imperium.

In recent history, Communist publicists have been among the strongest supporters of the 'fundamental right' rationale, which they found an attractive response to the emergent theory of restrictive state immunity, a theory that affords no immunity for acts of a commercial or private nature. The restrictive view was antithetical to the prevailing socialist philosophy which held that politics and trade were inseparable aspects of the socialist state; in essence, a socialist state acted qua state in all its dealings. M.M. Boguslavskij, the Russian scholar, thus rejected the notion that a state could surrender its sovereignty, and with it its right of state immunity, simply by engaging in commercial private activity. He, like many of the socialist scholars, adhered to the 'fundamental right' view.

For much of the last century, state immunity practice has been starkly divided between two groups of nations: countries that have favored the theory of restrictive immunity, mainly the Western capitalist countries; and countries that have clung to the theory of absolute immunity, mainly the Communist and socialist countries."

202. English courts recognized the controversy even in the judgments of the leading cases on the subject.

"The letter goes on to list those countries whose courts accept the absolute or the restrictive theory respectively – including in the former class the United States itself and the British Commonwealth – pointing out that in many of the countries whose courts sill applied the absolute theory academic writers tended to support the restrictive theory…" [The Philippine Admiral (supra) at p 398H]

"To my mind this notion of a consensus is a fiction. The nations are not in the least agreed upon the doctrine of sovereign immunity. The courts of every country differ in their application of it. Some grant absolute immunity. Others grant limited immunity, with each defining the limits differently. There is no consensus whatever". [Per Lord Denning MR in Trendtex (supra) at p 552G]

"On the other hand, the precise limits of the doctrine were, as the voluminous material placed at our disposal well shows, still in the course of development and in many aspect uncertain." "The issue is as to the limits of the doctrine: merely to state that the 'restrictive' doctrine applies is to say little more than that a state has no absolute immunity as regard commercial or trading transactions, but where immunity begins and ends had yet to be determined." [Per Lord Wilberforce in I Congreso (supra) at pp 260C and 262B]

203. Leading scholars on international law have expressed similar sentiments.

"It is far from easy to state the current legal position in terms of customary or general international law. Recent writers emphasize that there is a trend in the practice of states towards the restrictive doctrine of immunity but avoid firm and precise prescriptions as to the present state of the law. Moreover, the practice of states is far from consistent and, as the comments of governments relating to the draft articles produced by the International Law Commission indicate, there is a persistent divergence between adherents of the principles of absolute immunity and that of restrictive immunity. This divergence of views and the unresponsive attitude of the Sixth Committee of the General Assembly is usually ignored in the academic sources." (Brownlie, Principles of Public International Law, 7th Ed at p 330)

"So far African countries have remained steadfast in support of the classical notion of

sovereign immunity because of the fact that restrictive immunity adversely militates against them. And those sued before foreign judicial authorities have fiercely challenged the jurisdiction of these courts. Nigeria and Libya, for example, have officially protested the application of the restrictive immunity to them. The response therefore by African states to the emerging doctrine of restrictive immunity is not favourable…. One credible or a logically grounded argument that has always been made by African countries and other developing states is that, given the fact that developing countries are poor and weak economically, and thus lacking private capital, it has become incumbent on governments of these countries to undertake or venture into commerce in order to promote economic development. These varied and diverse activities undertaken by these states are very important in the promotion of economic growth and political stability. Thus in the absence of such diverse activities, the economy of these countries would become stagnant which in turn creates poverty, instability and chaos" [Ernest K Bankas, The State Immunity Controversy in International Law (Springger 2005) pp 168 and 170]

204. In the replies to the Questionnaire circulated by the Legal Counsel of the UN dated 20 October 1979 published in the UN Legislative Series, Materials on Jurisdictional Immunities of States and Their Property, New York, 1982, many states still regarded the doctrine of state immunity as "absolute". There were almost equal numbers of states favoring absolute immunity as those favoring restrictive immunity.

205. "Comments and Observations received from Government" to the "Drafted Articles on Jurisdictional Immunities of States and Their Properties" (Yearbook of the International Law Commission, 1988, Vol II, Part One at p 45) also discloses the diverging views of states on state immunity. It is enlightening to refer to following comments by:

Bulgaria

"The principle of jurisdictional immunity of States is universally recognized in international law as being a logical consequence of the principles of sovereignty and sovereign equality of States, which provide for the non-submission of one State to the authority of another (par in parem imperium no habet).

These principles of contemporary international law function in all spheres of inter-State relations, be they political, economic, trade, social, scientific-technological or cultural ones. Therefore, the State always acts as imperium, a purveyor of State authority in its external relationships, and no additional circumstances, such as the development of State functions, can undermine the sovereignty and the principle of non-submission of one State to the jurisdictional authority of another.

This requires that the draft articles on jurisdictional immunities of States and their property should be based on the generally acknowledged and traditional tenet of full State immunity, regulating only a limited number of clearly specified exceptions to it which would be acceptable to the overwhelming majority of States. The draft articles under consideration could not serve as a basis for a universally applicable concept in this field, since in their drafting the legislation of only a limited number of developed Western States has been taken into consideration and consulted. The draft articles should reaffirm the concept of immunities of States and their property, rather than undermine it through many exceptions encompassing important spheres of State activity, thus largely reducing it to a mere legal fiction."

China

"The Chinese Government maintains that the jurisdictional immunity of States and their property us a long-established and universally recognized principle of international law based on the sovereign equality of States. The draft articles on the subject formulated by the Commission

need to spell out the states of this principle in international law."

Czechoslovakia

"Czechoslovakia considers that the draft articles should unequivocally confirm State immunity as a corollary to one of the fundamental principles of international law, the principle of sovereign equality of States. Cases when a State and its property do no enjoy immunity are very rare and should be specifically enumerated in the draft articles in such a manner as to provide for the strengthening of legal certainly in inter-State relations. It is necessary to work out a regulation that will prevent attempts – which have become more frequent, particularly in recent years- at restricting the immunity of States and their property through unilateral acts."

Thailand

"Under the Thai judicial system, a State as a political unit, in the sense of a 'country' in more common parlance, cannot sue or be sued. Therefore, the theme of the draft articles…finds no place in Thai courts. Moreover, property of the Thai Government is immune from measures of constraint taken in pursuance of judicial judgments, decisions or awards."

Union of Soviet Socialist Republics

"The position of the Soviet State, expressed in normative documents, practice and doctrine, has always consisted of recognition for the State and its property of full jurisdictional immunity derived from the principles of international law concerning sovereignty, sovereign equality and non-interference in the affairs of other States."

206. We have been referred to the United Nations Convention on Jurisdictional Immunities of States and Their Property 2004 ("the UN Convention"), which, by Article 10, has excluded immunity for commercial transactions. It has been emphasized that the People's Republic of China (the "PRC") is a signatory to the UN Convention.

207. Under Article 28, the NN Convention shall be open for signature until 17 January 2007 and under Article 30, it shall enter into force upon the ratification by not less than 30 states.

208. According to the updated information provided by the parties, there are 28 signatories to the UN Convention and that only 6 states have ratified it. This is perhaps an indication of the extent to which the international community of states has accepted the doctrine of restrictive immunity and their sense of obligation to apply such doctrine.

209. Lee M Caplan observed in his article "State Immunity, Human Rights, and Jus Cogens: A Critique of the Normative Hierarch Theory" (supra) at p 760; "state immunity practice has been starkly divided between two groups of nations, countries that have favored the theory of restrictive immunity, mainly the Western capitalist countries; and countries that have clung to the theory of absolute immunity, mainly the Communist and socialist countries."

210. Professor Brownlie, in Principles of Public International Law 3rd Edition, observed at 333: "it is difficult as yet to see a new principle which would satisfy the criteria of uniformity and consistency required for the formation of a rule of customary international law."

211. I agree with those observations. In my view, there are insufficient uniformity and consistency required to embrace the restrictive immunity doctrine as part of the customary international law.

212. The DRC is a sovereign state and, prima facie, a case for absolute immunity has been made

out. The burden shifts to FC to establish that the criteria for an exception, (that the restrictive immunity doctrine is part of the customary international law and should be incorporated as part of the common law), are met.

213. Regardless of where the burden lies, the restrictive immunity doctrine is not a settled and consistent practice by states and there is no discernable sense of obligation among states to adopt the restrictive immunity doctrine. There are in fact a significant number of states that have rejected "restrictive" theory.

214. In my view, the restrictive immunity doctrine cannot be said to be a part of customary international law at all.

215. Mr Thomas SC emphasized the decisions of the arbitration tribunal that the DRC could not rely on sovereign immunity because "it is a commercial agreement that the state freely negotiated and accepted in the exercise of an activity subject to private law (jure gestionis), not in the exercise of its sovereign authority (jure impeprii)". Mr Thomas SC suggested that the DRC is bound by those findings.

216. I do not agree. State immunity is a question of the law of the forum and the enforcing court is not bound by the determination of the tribunal that renders the arbitral award. The Court of Appeal in the Province of Quebec, Canada addressed this issue in Kuwait Airways Corp v Iraq (2009 QCCA 985) when the following question was posed: "Does the State Immunity Act apply in the context of proceedings to recognize a foreign judgment, especially where the issue of entitlement to state immunity has already been addressed and adjudicated upon by the foreign court in the very judgment whose recognition is being sought?"

217. Pierre J Dalphond JA, in addressing the question, said at para 20:

"With regard to the first question, it seems obvious to me that Canadian courts are bound to apply the State Immunity Act, which is federal legislation that prevails over any provincial rules regarding enforcement of foreign judgments. To assert that they are bound to homologate the English judgments because the issue of entitlement to state immunity has already been decided is tantamount to saying that Canadian courts are bound to apply a foreign law, the State Immunity Act 1978 (c 33)(UK), as interpreted by the English Courts, instead of the relevant Canadian act…"

218. Whatever is its position in international customary law and irrespective of whether it has been incorporated as part of the common law, the restrictive immunity doctrine is only applicable in Hong Kong SAR if it is not in conflict with the domestic law of Hong Kong SAR.

"The laws previously in force in Hong Kong, that is, the common law, rules of equity, ordinances, subordinate legislation and customary law shall be maintained, except for any that contravene this Law, and subject to any amendment by the legislature of the Hong Kong Special Administrative Region." (Article 8 of the Basic Law)

219. It must be remembered that "The Hong Kong Special Administrative Region is an inalienable part of the People's Republic of China" (Article 1 of the Basic Law) and that "The Central People's Government shall be responsible for the foreign affairs relating to the Hong Kong Special Administrative Region" (Article 13 of the Basic Law).

220. Indeed Article 19 of the Basic Law expressly states; that "…The Court of the Hong Kong Special Administrative Region shall have no jurisdiction over acts of state such as defence and foreign affairs."

221. The PRC, since its establishment in 1949, has consistently and regularly insisted on the practice of absolute state immunity as part of its foreign policy. (See Russell Jackson v the PRC 550 US F Supp 869 (ND Ala 1982), Russell Jackson v the PRC 794 f.2d 1490 (US Court of Appeals (11th Circuit)) at para 23 to 26, and Marvin L Morris v the PRC 478 F Supp 2d 561 (SDNY 2007).

222. In connection with the present proceedings, the Office of the Commissioner of the Ministry of Foreign Affairs of the PRC had issued a statement on 20 November 2008 in the following terms:

"The consistent and principled position of China is that a state and its property shall, in foreign courts, enjoy absolute immunity, including absolute immunity from jurisdiction and from execution, and has never applied the so-called principle or theory of 'restrictive immunity'. The Courts in china have no jurisdiction over, nor in practice have they ever entertained, any case in which a foreign state or government is sued as a defendant or any claim involving the property of any foreign state or government, irrespective of the nature or purpose of the relevant act of the foreign state or government and also irrespective of the nature, purpose or use of the relevant property of the foreign state or government. At the same time, China has never accepted any foreign courts having jurisdiction over cases in which the State or Government of China is sued as a defendant, or over cases involving the property of the State or Government of China. This principled position held by the Government of China is unequivocal and persistent."

223. The Office of the Commissioner of the Ministry of Foreign Affairs of the PRC also declared in another letter dated 21 May 2009 that despite the signing of the UN Convention, "the position of China in maintaining absolute immunity has not been changed, and has never applied or recognized the so-called principle or theory of 'restrictive immunity'".

224. The absolute immunity doctrine, adopted by the PRC as part of its international legal obligation, applies to the Hong Kong SAR.

225. I agree with the submission of Mr Richard Zimmern that the law on state immunity of Hong Kong SAR should be accepted as being a matter of foreign affairs and that the practice of Hong Kong SAR with regard to state immunity should be consistent with that of the PRC. I also accept the suggestion that in the context of the issue of state immunity, the position and practice of the PRC is of paramount and overriding importance.

226. When it comes to foreign affairs of which state immunity is one aspect, there is simply no room for "two systems" at all. Hong Kong SAR courts, having regard to the provisions of the Basic Law, should not adopt a legal position concerning state immunity incompatible with the position of the PRC.

227. Lord Wilberforce states emphatically in Rio Tinto Zinc Corp v Westinghouse Electric Corp [1978] AC 547 at 616 F-G and 617 C:

"... I think that there is no doubt that, in deciding whether to give effect to letters rogatory, the courts are entitled to have regard to any possible prejudice to the sovereignty …Equally, that in a matter affecting the sovereignty … the courts are entitled to take account of the declared policy of …(the) Government, is in my opinion beyond doubt.

The courts should in such matters speak with the same voice as the executive (see The Fagernes [1927] P 311): they have, as I have stated, no difficulty in doing so."

228. In my view, the constitution in Hong Kong SAR, bearing in mind the clear and unequivocal foreign policy of the PRC with regard to state immunity, does not permit the application of the

doctrine of restrictive immunity and that the only state immunity doctrine that should be adopted in Hong Kong SAR is one of absolute immunity.

229. Mr Thomas SC emphasized that, by entering into the ICC arbitration and by agreeing to ICC rules of arbitration, the DRC had waived its right to plead immunity from execution. He suggested that when a state had voluntarily submitted to arbitration, it had rendered itself amenable to such process as might be necessary to render the arbitration effective.

230. Mr Thomas SC argued that the rule in Duff Development Co v Government of Kelantan [1924] AC 797, Mighell v Sultan of Johore [1984] 1 QB 149 and Kahan v Pakistan Federation [1951] 2 KB 1003, namely submission to arbitration does not constitute a waiver of state immunity, is no longer good law because the rule was founded upon the doctrine of absolute immunity. The implication was that if the doctrine of absolute immunity applied, then so did rule in Duff, Kahan and Mighell (supra).

231. As I have ruled that the restrictive immunity doctrine is not part of the customary international law and therefore the DRC is entitled to absolute immunity, I am content to rest my decision on the rule established in Duff, Kahan and Mighell that the DRC, despite its submission to arbitration, had not waived its right to state immunity.

232. I wish to repeat the observations of Jenkins LJ in Kahan (supra) at p 1012, and of Lord Esher MR, Lopes LJ and Kay LJ in Mighell (supra) at pp 159, 161 and 163:

"But the matter is not free from authority, and I think it is established beyond question by authorities binding on this court that a mere agreement by a foreign sovereign to submit to the jurisdiction of the courts of this country is wholly ineffective if the foreign sovereign chooses to resile from it. Nothing short of an actual submission to the jurisdiction – a submission, as it has been termed, in the fact of the court – will suffice."

"We had not then to deal with the question of a foreign sovereign submitting to the jurisdiction; every body knows and understands that a foreign sovereign may do that. But the question is, How? What is the time at which he can be said to elect whether he will submit to the jurisdiction? Obviously, as it appears to me, it is when the Court is about or is being asked to exercise jurisdiction over him, and not any previous time. Although up to that time he has perfectly concealed the fact that he is a sovereign, and has acted as a private individual, yet it is only when the time comes that the Court is asked to exercise jurisdiction over him that he can elect whether he will submit to the jurisdiction. If it is then shewn that he is an independent sovereign, and does not submit to the jurisdiction, the Court has no jurisdiction over him. It follows from this that there can be no inquiry by the Court into his conduct prior to that date. The only question is whether, when the matter comes before the Court, and it is shewn that the defendant is an independent sovereign, he then elects to submit to the jurisdiction. If he does not the Court has no jurisdiction."

"In my judgment, the only mode in which a sovereign can submit to the jurisdiction is by a submission in the face of the Court, as, for example, by appearance to a writ."

"I should put it thus: the foreign sovereign is entitled to immunity from civil proceedings in the Courts of any other country, unless upon being sued he actively elects to waive his privilege to submit to the jurisdiction."

233. The aforesaid approach was reaffirmed in the judgment of Saville J in A Co Ltd v Republic of X [1990] 2 Lloyd's R 520 at p 524:

"In the present case the State argues that there was no power to waive those immunities. I am

not persuaded that this is so, but whether or not I am right in this view does not matter, since I agree with Mr. Jacobs that on the authorities no mere inter partes agreement could bind the State to such a waiver, but only an undertaking or consent given to the Court itself at the time when the Court is asked to exercise jurisdiction over or in respect of the subject matter of the immunities…"

234. In my view, the judge was also right in concluding as he did that the DRC had not, in any event, waived the right to claim immunity from execution in Hong Kong SAR. It is one thing for a foreign state to allow proceedings to be brought but quite another to allow judgment that has been obtained to be enforced against it. It must be recognized that the seizure and sale of a state's assets in order to satisfy a judgment against it constitutes a particularly dramatic interference with its interests and could damage its ability to function properly.

235. Mr Thomas SC suggested that the DRC could not claim sovereign immunity from the process of equitable execution that FG proposed to initiate because the DRC had not yet raised a defence that the entry fees in question were intended to be used for foreign purposes. It was suggested that the judge, in deciding as he did that the entry fees were being used or intended for use by the DRC for sovereign purposes, had in fact decided the issue pre-maturely.

236. I do not agree with Mr Thomas's submission. Whatever is the nature of the underlying transactions, FG was enlisting the assistance of courts in Hong Kong SAR to try to enforce arbitration awards against the proceeds of the exercise of sovereign authority and it will ultimately involve the seizure of such proceeds.

237. FG, under the originating summons, sought and obtained an injunction restraining the DRC from receiving payments under the transaction and an injunction restraining the PRC from making the payments to the DRC. FG made it clear that the injunction orders were necessary to conserve an asset against which the judgment/awards might later be executed.

238. The proceedings related not to the underlying transactions but to the enforcement of the awards, and involved the exercise of jurisdiction by courts of Hong Kong SAR. The DRC challenged its obligation to submit to the jurisdiction of the courts of Hong Kong SAR in the face of FG's attempt to enforce the arbitration awards against it.

239. Unlike a court faced with an allegation that a claim does not disclose a cause of action, a court faced with an immunity claim cannot withhold its decision until the end of the trial. There can be no trial until the court decides whether the foreign state is subject to the court's jurisdiction.

"When a question of immunity is raised, then the question whether a State is or is not immune must be decided as a preliminary issue before the substantive action can proceed." (Dicey, Morris & Collins: The Conflict of Laws, 14th Edition, Vol. 1: para 10-018)

240. Similar view was expressed by Kerr LJ in J.H. Rayner (Mincing Lane) Ltd v Department of Trade and Industry [1989] Ch 72 at 194G:

"In the upshot, therefore, I am persuaded that whenever the question arises…whether a defendant state is immune… or not immune, then this question must be decided by a preliminary issue…, in whatever form and by whatever procedure the court may consider appropriate, before the substantive action can proceed."

241. In my view, the judge was right to decide on the issue of whether the DRC could raise immunity from execution against the entry fees in question.

242. The judge found, on extensive and unchallenged evidence that the transactions in question were not "commercial", but the exercise by the PRC, through a consortium of Chinese Enterprises and the DRC, of sovereign authority in the interests of their citizens, and therefore the transactions did not fall within the commercial trade exemption even if the doctrine of restrictive immunity were to apply.

243. There is no basis to reverse the judge's findings at all.

244. I would dismiss FG's appeal and allow the cross-appeals on the basis that the DRC is entitled to absolute immunity under the law of Hong Kong SAR.

245. I would also grant a costs order in favour of the respondents.

Hon Yuen JA:

246. I have had the benefit of reading in draft the judgments of the Vice-President and Yeung JA in which most of the materials placed before this court have been reviewed. On the crucial difference between them on the question of law whether restrictive immunity applies in Hong Kong, I take the view that the customary international law principle of restrictive immunity had been incorporated into the Common Law before the transfer of sovereignty in 1997 and has continued as the law of Hong Kong after the transfer. On the facts, I take the view for the reasons set out later in this judgment that Saw J's orders for (1) leave to enforce the arbitration awards, (2) the grant of injunctions, and (3) directions for the appointment of a receiver should be restored, and that there should be a further order that an issue along the lines of para. 279 be remitted to a judge for determination.

247. In brief, the issues are:

(1) has the Basic Law deprived the courts of Hong Kong of jurisdiction to consider a claim for sovereign immunity (more appropriately called state immunity)?

(2) what is the Common Law of Hong Kong on state immunity now after the resumption of sovereignty by the People's Republic of China?

(3) if the restrictive immunity principle applies, were the Democratic Republic of the Congo's acts the subject matter of the arbitration awards acta jure imperii?

(4) should there be leave to enforce the arbitration awards, and were there assets of the DRC in Hong Kong over which the injunctions could have been granted (and directions given for a receiver to be appointed by way of equitable execution)?

(5) has the DRC been properly served?

(6) should the injunctions be discharged in any event for material non-disclosure?

(1) Has the Basic Law deprived the courts of Hong Kong of jurisdiction to consider a claim for state immunity?

248. I agree with paragraphs 34 - 40 of the Vice-President's judgment that the courts of Hong Kong have jurisdiction to consider and determine a defendant's claim for state immunity. I would add the following point which I think it is important to bear in mind, not only when considering this aspect of the case, but also other issues discussed in this judgment.

– State immunity is a rule of law

249. More than 70 years ago in The Cristina, the House of Lords held that state immunity "is sometimes said to flow from regard for international comity or courtesy, but may now more properly be regarded as a rule of international law, accepted among the community of nations" (p. 502). Hence state immunity should not be regarded as solely executive-driven, as simply an act in a State's conduct of its relations with foreign States, but as a matter of law which falls to be decided by the courts of the forum State. This underlying legal nature of state immunity should inform and be applied consistently in relation to the issues in this appeal.

– Executive's position has some impact on determination of state immunity claim

250. However the executive's position regarding a foreign State does have some impact upon the courts' determination of a claim for state immunity. First, in a claim for state immunity, the defendant (whether an individual or a government) must first show that he/it is the sovereign of a foreign State. If there is an argument as to whether that individual or government is a sovereign (as in the Johore, Kelantan and Pakistan cases), the courts must defer to the executive. In Hong Kong, this is not only by reason of the Common Law rule set out in those cases, but also because art. 13 of the Basic Law provides that the Central People's Government shall be responsible for foreign affairs relating to the Hong Kong SAR and the CPG's decision to recognize or reject an individual or government as a foreign sovereign is an act within the "act of state" doctrine referred to in paragraph 38 of the Vice-President's judgment. The third paragraph of art. 19 of the Basic Law is thus engaged because the recognition of foreign sovereigns is clearly within the category "an act of state such as foreign affairs".

251. Secondly, art. 18 of the Basic Law provides that National Laws relating to defence and foreign affairs may be applied in Hong Kong after consultation with, amongst others, the government of the HKSAR. Pursuant to this article, Annex III now contains three National Laws which have been applied to Hong Kong that impact on immunity (but not state immunity) viz. the Regulations of the PRC concerning Diplomatic privileges and immunities, the Regulations of the PRC concerning Consular privileges and immunities and the Law of the PRC on judicial immunity from compulsory measures concerning the Assets of Foreign Central Banks.

– Statutory vacuum after lapse of SIA significant

252. However what is striking is that whilst the previous sovereign the United Kingdom extended to Hong Kong its national law on state immunity (the State Immunity Act 1978) by the State Immunity (Overseas Territories) Order 1979, no action was taken to fill the statutory vacuum left by the lapse of the SIA when the PRC resumed sovereignty (it is common ground that the International Organizations and Diplomatic Privileges Ordinance Cap. 190 does not apply to state immunity). It may be that there was no National Law on state immunity in the PRC and so none could be applied to Hong Kong via the art. 18 route, but it is notable that no domestic legislation was put in place to fill the statutory vacuum, leaving the issue of state immunity to be governed by Common Law, when (for reasons set out in the Vice President's judgment with which I respectfully agree) the customary international law principle of restrictive immunity had been incorporated into the Common Law some 1½ decades before 1997. I shall discuss later in this judgment the significance of the fact that the SIA was not replaced by legislation to follow the PRC's position on absolute immunity.

(2) What is the Common Law of Hong Kong on state immunity now, after the resumption of sovereignty by China?

253. As I have indicated earlier, I respectfully agree with the reasons given by the Vice-President for holding that immediately before the transfer of sovereignty in 1997, the Common Law of Hong Kong incorporated the customary international law principle of restrictive immunity.

– How can transfer of sovereignty alter International Law (incorporated into Common Law)?

254. It is important to remember that the decision of the House of Lords in I Congreso was the result of extensive research and debate, with references to judicial decisions and academic articles from all over the world, as can be seen from the arguments and references in the report. The House of Lords found following extensive argument from eminent counsel that customary international law had developed from the principle of absolute immunity to that of restrictive immunity. This international law was absorbed into the Common Law under the doctrine of incorporation.

255. In other words, their Lordships in I Congreso did not decide to reject absolute immunity and impose restrictive immunity as a rule developed as the law of England. Rather they found that restrictive immunity has become International Law as it has been practised and acknowledged by the majority of States as legally binding on them. The Common Law simply incorporated it. How can the transfer of sovereignty in Hong Kong change that understanding of what the international law is?

– Common Law principle not inconsistent with the Basic Law

256. Article 8 of the Basic Law stipulates that the laws (including the Common Law) previously in force in Hong Kong before the transfer of sovereignty shall be maintained unless inconsistent with the Basic Law. I do not see how the maintenance of the Common Law principle of restrictive immunity is inconsistent with any provisions of the Basic Law. I have previously referred to the reasons given by the Vice-President for the view that the determination of a claim for state immunity is not an act of state within the meaning of art. 19 and I will discuss later in this judgment my view that the sovereignty of the PRC as affirmed in art. 1 is not prejudiced by the Common Law recognition of the principle of restrictive immunity. As we have seen, no relevant National Law has been applied pursuant to art. 18 and no domestic legislation passed.

– Possible adjustments in application of principle after transfer of sovereignty

257. Hence it is difficult to see how the resumption of sovereignty by China at the stroke of midnight on 1 July 1997 would have the effect of causing the Common Law to revert to the principle of absolute immunity. Of course I accept that in the application of the rule of state immunity, relevant adjustments should be made following the transfer of sovereignty. Thus if the UK recognized X as a foreign sovereign but the PRC recognized only Y as the sovereign of the same State, the transfer of sovereignty of Hong Kong would mean that the Hong Kong courts would henceforth accept only Y as the sovereign of that foreign State. Apart from that however, it is difficult to see how the transfer of sovereignty would have the effect of causing the Common Law to revert to a principle which International Law has rejected one and a half decades ago for failing to provide equal justice and which well-established academic writers say has been "abandoned" (Oppenheim) and which has "disintegrated" (Brownlie).

– In what circumstances does the Common Law adapt existing principles?

258. It is of course true that the Common Law is flexible – indeed one of its strengths is its ability to progress by adapting existing principles – but it is important to remind ourselves that the reasoning behind the Common Law's adaptations and developments is to reflect the changing norms of society in order to meet contemporary concepts of justice. This reasoning has been affirmed by high authority in the quotations below. I shall then seek to show first, that norms have not changed in Hong Kong so as to demand a reversal to absolute immunity, secondly that the maintenance of restrictive immunity would not lead to any injustice, and thirdly that the sovereignty of the PRC would not be prejudiced or embarrassed by Hong Kong courts continuing to apply restrictive immunity because the principle does not bind the PRC under the exception of

the persistent objector.

259. In McLoughlin v O'Brian and others [1983] AC 410, Lord Scarman said that the Common Law is extended or adapted in the following circumstances (pp. 429-430):

"The common law, which in a constitutional context includes judicially developed equity, covers everything which is not covered by statute. It knows no gaps: there can be no 'casus omissus'. The function of the court is to decide the case before it, even though the decision may require the extension or adaptation of a principle or in some cases the creation of new law to meet the justice of the case. But, whatever the court decides to do, it starts from a baseline of existing principle and seeks a solution consistent with or analogous to a principle or principles already recognised". (Emphasis added).

In Broome v Cassell & Co [1972] AC 1027, Lord Diplock referred to the development of the Common Law to achieve contemporary concepts of justice in the society in which the rule functions (at p.1127):

"I do not think that your Lordships should be deflected from your function of developing the common law of England and discarding judge-made rules which have outlived their purpose and are contrary to contemporary concepts of penal justice in England, by the consideration that other courts in other countries do not yet regard an identical development as appropriate to the particular society in which they perform a corresponding function". (Emphasis added).

– No change in norms in Hong Kong

260. Coming then to the three points I alluded to earlier, it has not been shown that norms in Hong Kong have changed with the transfer of sovereignty so as to demand a reversal to the absolute immunity principle, a principle acknowledged in 1992 to have been abandoned by most States with others in the process of abandoning it (Oppenheim, p.357). I have earlier referred to the significance of the consequence of not replacing the SIA when it lapsed in 1997, leaving as the operative law in Hong Kong the Common Law which has incorporated the customary international law principle of restrictive immunity. In my view, the fact that there was no movement to introduce legislation to provide for a reversal to absolute immunity indicates that there was no change in the norms of a society that had not only embraced the principle of restrictive immunity (whether in common law form or statutory form) for a substantial period of time, but indeed had been alert in recognizing that principle in the landmark case of The Philippine Admiral and possibly even in a much earlier authority (Midland Investment Ltd v The Bank of Communications [1956] HKLR 42, at p.48).

261. That there was no movement for reversal to absolute immunity is not surprising. In 1997 Hong Kong was (and it continues to be) a centre of international commerce. Individuals, businesses and nations from all over the world conducted their affairs in accordance with a general understanding of the law applied here. If the community had adopted a new norm and required an about-turn in the law of state immunity, surely there would have been calls for new legislation to be put in place upon the lapse of the SIA. I cannot conceive that such an important matter as a reversal from restrictive immunity to absolute immunity would have been left to a chance that someone at some unknown time in the future might argue the point in a case in court, with businessmen and nations alike being content to conduct their affairs in the meantime by second-guessing a result.

262. There is certainly support for the view that the restrictive immunity principle was assumed to continue to apply in Hong Kong (see Prof. Mushkat, One Country, Two International Legal Personalities, p.66). It is relevant that since the 1990's, PRC private entities have been actively engaged in international commerce and there is support for the view that the PRC itself "may

well consider a probable shift of its position on the principle of state immunity from the absolute doctrine to the restrictive doctrine for the purpose of better accommodating the rapid growth of the private sector in China's economic structure and significantly enhancing the judicial protection of the interest of Chinese private entities actively involved in international commerce since the 1990's" (State Immunity, China and its Shifting Position: Qi, Chinese Journal of International Law (2008) Vol. 7 No. 2 pp.307-337). It is also the opinion of the DRC's own expert on Chinese law Prof. Liu that the PRC government has become "more inclined" towards restrictive immunity (pp.2777-8). The PRC's signature of the 2004 State Immunity Convention supports this shift. Although the Ministry letters assert adherence to absolute immunity by the PRC and its application by the PRC courts, they do not suggest that absolute immunity should be applied in Hong Kong courts which are enjoined to apply the Common Law in the absence of statute. So whatever position the principle of restrictive immunity has reached in the PRC, there is nothing which suggests a sea-change in the norms in Hong Kong such that we need to turn the clock back from having embraced restrictive immunity to re-applying absolute immunity, which had already "disintegrated" as a rule of international law as early as 1983 (Brownlie pp.25-6).

– Maintenance of principle of restrictive immunity does not lead to injustice

263. Secondly, we have seen that the Common Law adapts its principles in order to meet the demands of contemporary concepts of justice. For reasons set out in the Vice-President's judgment, absolute immunity does not provide equal justice and so a reversal to absolute immunity does not meet the Common Law's criterion for change. It is notable that the work on what eventually became the 2004 State Immunity Convention began in 1978, with the text of the draft articles being adopted by the International Law Commission in 1991. Although the final text of the State Immunity Convention – which adopts the principle of restrictive immunity – was said to be "not as satisfactory as China intended" (see the Ministry letter), the PRC was one of the first 6 signatories to the Convention. So even though the Convention is not yet binding on the PRC, it has not suggested that the principle of restrictive immunity as adopted in the Convention would offend any contemporary concepts of justice.

– No prejudice to or embarrassment of PRC's sovereignty

264. Thirdly, the ability of the Common Law to progress with the demands of justice cannot be elided with statements that the executive and the judiciary should speak with one voice on matters of sovereignty to justify the argument that once China resumed sovereignty over Hong Kong, the courts of Hong Kong – enjoined by the Basic Law to apply the Common Law – should then ignore the customary international law. There is no suggestion in the evidence that the maintenance of the Common Law of restrictive immunity would prejudice the sovereignty of the PRC.

265. In theory, it is absolute immunity (not restrictive immunity) which subtracts from the sovereignty of a nation as its courts are not able to exercise their jurisdiction even over disputes within their territorial limits (see The Cristina p.502).

266. In practice as well, the application of restrictive immunity in Hong Kong courts would not subtract from the sovereignty of the PRC. First, should the PRC extend any National Laws to Hong Kong in the future under art. 18 to impose the principle of absolute immunity, the Common Law principle of restrictive immunity would simply cease to apply. Secondly, as we have seen, when a court determines a claim for state immunity, the issue whether a defendant is a foreign sovereign is decided by the PRC as sovereign and by it alone. More important are the following two points. Thirdly, the maintenance of the Common Law principle of restrictive immunity would not place the PRC in a position where it would be open to a charge of breach of its obligations under any international conventions. The only convention on state immunity that the PRC has signed is the 2004 Convention which promulgates the application of restrictive

immunity, and indeed there is expert legal opinion to the effect that the DRC itself also follows the restrictive immunity principle. Fourthly, even putting aside the PRC's execution of the Convention and the duties it may have thereby undertaken to promote the principles contained in it, it is clear that the PRC's interests would not be prejudiced by a decision by the courts of Hong Kong that the Common Law principle of restrictive immunity has continued to apply here. I would adopt paragraphs 97 – 99 of the Vice President's judgment making the case that the PRC has exempted itself from the application of restrictive immunity by actions which have made it a persistent objector. Therefore whilst the international law stipulates restrictive immunity, there is a strong case that it cannot be enforced against the PRC which, by its longstanding objections while the restrictive immunity doctrine was in the course of emerging, can put itself out of the reach of that principle (Anglo-Norwegian Fisheries). Therefore no prejudice would be caused to the sovereignty of the PRC by the Hong Kong courts adhering to the Common Law incorporation of the customary international law principle of restrictive immunity. No prejudice or embarrassment is suggested in either of the Ministry letters.

267. For the reasons set out above, I take the view that after the resumption of sovereignty by the People's Republic of China, the Common Law of Hong Kong on state immunity has remained that of restrictive immunity. If however I am wrong in this conclusion and this court is bound to apply absolute immunity, then I would agree with the Vice-President's reasons for arriving at the view that the DRC has not waived immunity by the agreement to arbitrate.

(3) If the restrictive immunity principle applies, were the DRC's acts the subject matter of the arbitration awards acta jure imperii?

268. In this regard, the relevant acts are those of the DRC in entering into credit agreements with Energoinvest in connection with the construction of a hydro-electric facility and electric transmission lines in the 1980's, which were the subject matter of the arbitrations (I understand Mr Barlow to agree with this and although Miss Cheng has made submissions to the contrary, I believe on this issue, the DRC's concession is the relevant and operative consideration). Having said that, it is important to note that this is a separate and distinct issue from the nature of the DRC's assets against which execution is sought, an issue which will be discussed later.

269. In his judgment Reyes J did not decide the issue whether the Energoinvest credit agreements were acta jure imperii or acta jure gestionis and it therefore falls to this court to do so. It is clear from I Congreso (pp.262-7) that whatever may be the motives or purpose of a State for entering into a commercial transaction, the relevant consideration is the nature of the transaction. The examples given of a contract to buy boots for soldiers or to construct barracks for an army are in point. The nature of the Energoinvest transactions being financing arrangements, it is clear that the DRC cannot rely on acta jure imperii to avoid being impleaded in these courts for enforcement of the arbitration awards. This is also the decision of the arbitration tribunals whose awards the DRC has not challenged.

(4) Should there be leave to enforce the arbitration awards, and were there assets of the DRC in Hong Kong over which injunctions could have been granted (and directions given for a receiver to be appointed)?

270. This question raises a number of issues: (i) whether FG was entitled to leave to enforce the arbitration awards; (ii) whether FG has shown a good arguable case (or there is good reason to suppose) that the DRC was to be the beneficial recipient of the Entry Fees; and (iii) whether FG has shown a good arguable case (or there is good reason to suppose) that it can target the whole or part of the Entry Fees as not being immune from execution.

– (i) Leave to enforce arbitration awards as a judgment

271. I shall deal first with issue (i), whether FG is entitled to leave to enforce the arbitration awards. I agree with the Vice-President's reasons for rejecting FG's contention that the grant of leave to enforce an arbitral award was purely a ministerial act. A judicial discretion is involved and in the present case Saw J exercised his discretion in FG's favour although his order was later set aside by Reyes J.

272. Before proceeding further, it is important to note that there is a difference between claims for immunity in respect of suit and in respect of execution. This difference has long been recognised and is not the subject of disagreement between the parties. On the basis that restrictive immunity applies and that the acts of the DRC the subject matter of the arbitration awards were acta jure gestionis, it must follow that the DRC can be sued in Hong Kong on the awards under s.2GG of the Arbitration Ordinance. That is FG's legal right and that right does not depend on the presence of DRC assets in Hong Kong. Accordingly I would hold that FG is entitled to leave to enforce the arbitration awards as a judgment and that that part of Saw J's order should be restored in any event irrespective of issues (ii) and (iii).

273. Issue (ii) is whether FG has shown a good arguable case that the DRC has assets in Hong Kong, and issue (iii) is – on Mr Thomas's fair concession that a State may claim immunity against execution even if it fails to claim immunity against suit (Re Suarez) and that a State has immunity from execution against its assets which are used or intended to be used for sovereign or public purposes – whether FG has shown a good arguable case that it can target the Entry Fees (being receivables) as assets for which the DRC does not have immunity from execution.

274. First, I agree with the Vice-President's reasons that the DRC has not waived immunity against execution against State assets intended for public purposes by entering into the arbitration agreement, so issue (ii) remains, put another way, whether there is a reasonably arguable case that the Entry Fees are the DRC's assets, and if that is answered in the affirmative, issue (iii) is whether the Entry Fees (in whole or in part) are available for execution as they are intended to be used by the DRC for commercial and not public purposes.

– (ii) Good arguable case DRC to receive Entry Fees

275. On issue (ii), the evidence shows that the Joint Venture Agreement is directly derived from two Cooperation Agreements made in 2001 by the DRC followed by a Memorandum of Agreement in 2007 and a Cooperation Agreement in 2008 both made also by the DRC. Although the Congolese signatories to the JV Agreements made thereafter were Gecamines (also known as Congo Mining) and a Mr Banika, a representative of Gecamines (later replaced by Congo Simco), FG alleges that they were the DRC's mere agents or nominees or alter ego (Allen I, paras. 95 and 99). Neither Gecamines nor Banika nor Congo Simco had been referred to in the 2001 Cooperation Agreements or the 2007 Memorandum of Agreement (Allen I, para. 39(c)(iv)) and it is said that the JV Agreements were in reality made by the DRC (Allen I, para. 39(c)). There is no direct evidence from the DRC itself contradicting these allegations. Lu Feng on behalf of some of the Chinese parties to the Joint Venture Agreement does not purport in her affirmations to speak for the DRC. The expert opinions on Congolese law as to whom beneficially the Entry Fees are payable are conflicting. However there is evidence (see para. 277) that it is the DRC which has made decisions as to how the Entry Fees are to be allocated. On the whole of the above evidence I consider that there is a good arguable case that the Entry Fees are the DRC's assets. This view is supported by the matters set out in paras. 85-91 of Reyes J's judgment.

– (iii) Good arguable case some Entry Fees intended for commercial purposes

276. As for issue (iii), the Entry Fees are immune from execution if they are intended to be used for the DRC's public purposes, as opposed to its commercial purposes. Again there is no direct

affidavit evidence on this aspect from the DRC, only on behalf of some of the Chinese parties (Lu I, para. 33). However there is some documentary evidence of the DRC's intended use of the Entry Fees. On the materials before this court the evidence shows that one part of the Entry Fees is intended to be used for the DRC's sovereign or public purposes (which I will for convenience refer to as "the budget tranche"), whilst another part is intended for commercial or private purposes, i.e. to support Gecamines, a state-owned company ("the Gecamines tranche").

277. The budget tranche refers to the part of the funds intended to be placed in the state budget. There has been an official announcement by the DRC Minister of Public Works, Infrastructure and Reconstruction that of the Entry Fees of US$350 million, "$100 million is going to Gecamines and $250 million is going to be sent to the Public Treasury in the form of an external resource in support of the 2008 state budget. This distribution, decided by the Government, is to allow the state to meet a part of its expenditures and to allow Gecamines to improve its Treasury" (Allen III, para. 18). (Emphasis added). There is also evidence that in a speech by the DRC Prime Minister to the National Assembly in December 2008, the DRC has placed Entry Fees of US$200 million in the 2009 budget (Allen IX para. 10(b)). Assuming that this refers to the same sum, it would appear that the budget tranche has been reduced from US$250 million to US$200 million. It is reasonably clear that this tranche is to meet state expenditure, i.e. for sovereign or public use. As for FG's argument based on the Infrastructure Minister's reference to the agreements being "commercial in nature", in the context of his speech he was explaining why ratification by parliament was not necessary because the agreement was not between States, or between a State and an international organization, but between a State (i.e. the DRC) and private parties, and that "based on the foregoing, it is appropriate to affirm that this Agreement is commercial in nature, that is, it is subject to the rules of commercial law, and is in complete conformity with our constitution" (Allen IV para. 90). In any event, the relevant question at Common Law is what is the intended use of the funds, not how the funds were derived. I consider that FG has not shown a good arguable case that the funds in the budget tranche is available for execution.

278. The Gecamines tranche refers to the balance of US$100 million – US$150 million, which on the above evidence appears intended to be transferred to Gecamines. It is true that it is FG's case that Gecamines has been run as an organ of the state, not as a commercial enterprise with its own corporate interests (Allen I, para. 94), but the way in which a company is run does not mean that funds to be transferred to it will be applied for public purposes. There appears to be no evidence from the DRC that this tranche is intended to be used for sovereign or public purposes and I would hold that FG has shown a good arguable case for injunctions over this tranche.

279. However neither Saw J nor Reyes J has considered the materials in this light and so there is no finding whether it was reasonably arguable that the Entry Fees payable by the 2nd to 5th Defendants (cf the Sino Hydro parties) were intended for the Gecamines tranche and if so, whether the Gecamines tranche comprises US$100 million or US$150 million. I would remit this issue to a judge for determination.

(5) Has the DRC been properly served?

280. I am in complete agreement with the judgment of Reyes J on this issue and see nothing I can usefully add to his analysis. The method of service permitted by Saw J was an option which was more direct than the usual channel of service stipulated by Order 11 rule 7 RHC. Although in the end both options proved abortive, the DRC instructed solicitors to file an Acknowledgment of Service albeit limited to the purpose of contesting jurisdiction. I agree with the judge that in those circumstances the master was entitled in the exercise of his discretion to order substituted service by service on those solicitors.

(6) Should the injunctions be discharged in any event for material non-disclosure?

281. Reyes J held in the exercise of his discretion that he would not have discharged the injunctions for material non-disclosure. In particular he was aware of the argument that FG had no assets other than the awards of which it had previously recovered a small part. The fact that it has spent what it had previously recovered would not have changed Reyes J's exercise of his discretion as that was but a fraction of the sums the subject matter of the injunctions. The grounds for an appellate court's interference with a judge's exercise of discretion are limited. I do not see any error in law or in material fact, nor has it been shown to this court that the learned judge had failed to take relevant matters into account or that his decision was plainly wrong.

Conclusion

282. For the reasons I have discussed I agree with the orders proposed by the Vice-President.

Hon Stock VP:

283. Accordingly, by a majority, these appeals are allowed.

284. The following orders are made, that:

(1) the order of Reyes J dated 12 December 2008 be set aside, save for paragraphs (8), (11) and (12) thereof;

(2) the order of Reyes J dated 26 February 2009 be set aside, save for paragraph (3) thereof;

(3) the orders of Saw J dated 15 May 2008 and of Master Lung dated 31 October 2008 be restored;

(4) the orders culminating in and including the order of Reyes J dated 7 July 2008 and referred to collectively in the Amended Notice of Appeal in CACV 43 of 2009 as 'the Injunction Order', and the injunction against the 5th defendant referred to in paragraph 1(b) of the said Notice, be restored until further order;

(5) the case be remitted to the Court of First Instance for:

(i) an inquiry to determine to what extent, if any, the entry fees payable by the 2nd to 5th defendants inclusive are intended by the DRC for payment to Gecamines and, further, whether the amount thus payable is amenable to or immune from execution;

(ii) such further directions thereafter as may be necessary for the disposal of the summonses herein.

285. For the avoidance of doubt, the injunctions thus restored are restored in full, in other words to restrain receipt and payment of the entry fees up to the entire amount covered by the present injunctions; this is in order to preserve the position pending determination of the inquiry referred to at paragraph 284(5) above.

286. There will be an order nisi that the costs of this appeal and of the respondent notices be paid by the defendants to the plaintiff; and that the costs of the Originating Summons and of the defendants' summonses be reserved pending determination of the inquiry.

287. The parties shall have liberty to apply.

Sir Ian Brownlie QC

288. The Court notes with much regret the tragic loss of Sir Ian Brownlie QC in January 2010. His signal distinction in the field in which he specialized so long was internationally recognized and the Court was privileged to have received his courteous and conscientious advocacy.

(Frank Stock)	(Wally Yeung)	(Maria Yuen)
Vice-President	Justice of Appeal	Justice of Appeal

Mr Michael Thomas, SC, Mr Russell Coleman, SC & Ms Zabrina Lau, instructed by Sidley Austin for the Appellant/Plaintiff

Mr Barrie Barlow, SC, instructed by Huen Wong & Co., for the 1st Respondent/1st Defendant

Mr Richard Zimmern, instructed by DLA Piper Hong Kong for the 2nd to 5th Respondents/2nd to 5th Defendants

Sir Ian Brownlie, QC, Ms Teresa Cheng, SC & Mr Adrian Lai, instructed by Department of Justice for Secretary for Justice (Intervener)/6th Respondent

[1]paras 90 and 91 below.

[2]Dicey, Morris & Collins The Conflict of Laws 14th ed., Vol I, at para. 5-043.

[3]Oppenheim's International Law 9th ed. at pp. 365-6, para. 112.

[4]Oppenheim at p. 367.

[5]Dicey paras. 5-041 and –042.

[6]s. 1(1).

[7]s. 2.

[8]s. 3(1)(a).

[9]s. 3(3)(c).

[10][1977] AC 373.

[11][1977] 1 QB 529.

[12][1983] 1 AC 244.

[13][1938] AC 485.

[14]Chung Chi Cheung v R[1939] AC 160 at p. 168. See also Brownlie Principles of Public International Law 7th ed. at p. 41.

[15]Sales and Clement International Law in Domestic Law: the Developing Framework 124 LQR (2008) 388 at p. 412.

[16][2007] 1 AC 136.

[17]at p. 155.

[18]at p. 554.

[19][2005] 2 AC 1.

[20]at p. 35.

[21]See alsoHalsbury's Laws of England 4th ed., Vol 18(2) at para 602, n4 as to the usual evidential sources of State practice and other indicia of customary international law.

[22][1969] ICJ Rep. 3

[23]at p. 77-78.

[24][2008] 2 HKC 165.

[25]at p. 182, para. 68.

[26]Oppenheim at p. 29.

[27]at paras. 73 and 74.

[28]Oppenheim Vol. 1 p 28.

[29]I Congresoat p. 260 F-G.

[30][1938] AC 485.

[31]at p. 490.

[32]Lord Denning in Trendtex at p. 555.

[33]Dicey Morris & Collins at para 10-002.

[34]at p. 502.

[35]at p. 490.

[36]Trendtex at p. 555.

[37]see Ohio v Helvering (1934) 292 US 360, 369.

[38]ICongreso at p. 262.

[39]paras. 10-004 and 10-005; pp. 274-276.

[40]perhaps more accurately called acts of a governmental nature.

[41]see the Tate Letter to which I refer at para. 86 below.

[42]The Philippine Admiral.

[43]Trendtex.

[44]State Immunities Act 1978.

[45]The I Congreso del Partido. For this proposition, Dicey refers also to Alcom Ltd v Republic of Colombia [1984] AC 580; Planmount v Republic of Zaire [1981] 1 All.E.R. 1110.

[46]para. 45 above.

[47]Dicey at para. 10-006.

[48]s.1(1).

[49]s.2.

[50]s.3.

[51]s.9.

[52]s.13(3).

[53]s.13(4).

[54][1983] AC 244, at p. 262.

[55][2000] 1 WLR 1573.

[56]at p. 1584. For an earlier confirmation of the common law position, see also Littrell v United States of America (No. 2) [1994] 4 All ER 203.

[57]per Lord Clyde at p. 1580.

[58]at p. 552.

[59]at p. 555.

[60]at p. 557-8.

[61]7th ed.,at p. 330.

[62](2005) at section 6.10.

[63]at p. 170.

[64]at p. 260C.

[65]Contemporary Problems Concerning the Jurisdictional Immunity of States.

[66]at pp. 357 and 360.

[67]at p. 361.

[68]Fox The Law of State Immunity 2d ed., (2008) at pp. 235-236.

[69]ibid at p. 412.

[70]Cases and Materials on International Law 6th ed., (2004) at p. 307.

[71]see para. 65 above

[72]Basic Law, Article 1.

[73]see para. 107 below.

[74]Judgmentparas. 62 and 63.

[75][1997] HKLRD 761.

[76]One Country, Two International Legal Personalities (1997) p. 66.

[77]para 34 above.

[78]Oppenheim at p. 342.

[79]Oppenheim at p. 1051.

[80]at p. 399.

[81][1978] A.C. 547.

[82]at pp. 616-617.

[83][1984] 1 QB 142.

[84]at p. 193.

[85]at p. 66.

[86]794 f.2d 1490 (US Court of Appeals 11th Circuit) (1986).

[87]at paras. 23-26.

[88]478 F Supp 2d 561 (2007).

[89]The General Principles of International Law, Hague Academy, Recueil des cours Vol. 92 (1957, II) at pp. 99-100.

[90]Arts. 29 and 30.

[91]Oppenheim para. 600, at pp. 1225-1226.

[92]para. 612 at p. 1239.

[93]The Law of Treaties (1961) at pp. 203-204.

[94]Aust Modern Treaty Law and Practice 2nd ed., (2004) at p. 104.

[95]Oppenheim at pp. 351-352.

[96]Huang Jin and Ma Jingsheng, Hague Yearbook of International Law 1988.

[97]at pp. 165-166.

[98]see para. 118(2) below.

[99]paras 65 and 81 above.

[100]see Foreign State Immunity and Arbitration Dhisadee Chamlongrasdr (2007) at pp. 81-82.

[101]see, for example, The Cristina at p. 503.

[102]see Dicey at p. 298, para. 10-074; Oppenheim at p. 350; Brownlie at pp. 340 and 343; Fox at p. 262.

[103]see Fox at p. 261; Brownlie at p. 240.

[104][1894] 1 Q.B. 149.

[105][1924] A.C. 797.

[106][1951] 2 K.B. 1003.

[107]at p.817.

[108]s. 42(2) Arbitration Ordinance, para 32 above.

[109]at pp. 818-819.

[110]at p. 810.

[111]Riccardo Luzzatto International Commercial Arbitration and the Municipal Law of States (1997) 157 Recueil des cours de l'Académie de droit international de La Haye 9at p. 87.

[112] Overcoming Immunity-Based Objections to the Recognition and Enforcement in Canada of Investor-State Awards Journal of International Arbitration, Vol 26 No. 1 (2009) at pp. 59-87.

[113]at p. 67.

[114]Sovereign Immunity and Transnational Arbitration,Georges Delaume in Contemporary Problems in International Arbitration (1986) at p. 315.

[115]Mixed International Arbitration : Studies in Arbitration Between States and Private Persons (1990) at pp. 146-150.

[116]para. 138 above.

[117]at p. 69.

[118]at p. 501.

[119]at p. 69.

[120][2007] 1 Lloyd's Rep 193.

[121]at p. 218, para. 117.

[122]s.13(3).

[123]s.13(4).

[124]Mixed International Arbitration at p. 149.

[125](1978) 17 ILM 1395.

[126]French Ct of Cassation, ch.civ,1; 6 July 2006.

[127]atpara. 113.

[128]at pp. 487-488.

[129]395 F.3d 229 (5th Cir) (2004).

[130]at p. 234.

[131]at p. 234.

[132](2007) ABQB 212.

[133]at para. 139.

[134]at p. 261.

[135][1990] 2 Lloyd's Rep. 520, trenchantly criticized by Dr F. A. Mann (1991) 107 L.Q.R. 362.

[136]at para. 10-028, p. 285. To the same effect, see Chamlongrasdr at p. 190, para. 6.6.

[137]181 F 3d 118 (DC Cir 1999).

[138]at para. 151 above.

[139]Argentine Republic v Amerada Hess Shipping Corp 488 U.S.428 at pp. 442-43.

[140]989 F 2d 572 at 578 (2d Cir. 1993).

[141]see Chamlongrasdr at para. 4.60.

[142][2003] EWHC 1357.

[143]at para. 18.

[144]at para. 117.

[145][1896] 1QB 368.

[146]at pp. 371-372, per Rigby L.J.

[147]para. 142above.

[148]see para. 21 above.

[149]para. 91.

[150]paras. 275 to 278 below.

[151]para. 277 below.

[152]para. 278 below.

[153]para. 284(1) below.