The Act of State and HKSAR Court*

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The most important phenomenon of the world today is economic interdependence that has led to highly organized international and regional establishments such as WTO and EC.[1] Such interdependence has also increased rapidly economic exchanges not only between governments, between corporations and private persons but also between governments and business concerns. Under this circumstance, the line dividing public international law and international economic law is getting thinner and thinner. More and more international prescriptions have become inseparable parts of both public international law and international economic law.[2] The act of state doctrine is a case in point. Traditionally the act of state doctrine is exclusively a public international law concept under which as to be discussed later a court of one country would not pass

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[1] For a detailed discussion on the relationship between international economic integration and development of international economic law, see Eugeniusz Piontek, "European Integration and International Law of Economic Interdependence", *Collected Courses of The Hague Academy of International Law*, Vol. 5, 1992.

[2] For discussions on the sources and contents of international economic law and its relations with public international law and private international law, see Chen, An, *International Economic Law*, Peking University Press, 1994, Beijing, China; Cao, Jianming, *An Introduction to International Economic Law*, Publishing House of Law, 1994, Beijing, China; Yu, Jinsong, *International Economic Law*, Higher Education Press, 1994, Beijing, China; and Wang, Guiguo, *International Economic Law*, Wide Angle Press, 1992, Hong Kong.

judgement of an act done by a foreign sovereign within its territory.[3] With increase of state involvement in business transactions with private persons and corporations, exceptions to the act of state doctrine were introduced in practice, under which commercial transactions by sovereign powers may not enjoy non-justiciability in foreign courts. As international economic law is mainly a body of international rules and customs dealing with cross border transactions, the act of state doctrine is therefore a natural part of international economic law. In fact, as the act of state doctrine is essentially based on customs and state practice, its application also have an important impact on domestic laws and rules concerning regional conflicts. An obvious example is the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China ("Basic Law")[4] which provides the framework for the relationship between the central government and the government of the Hong Kong Special Administrative Region.

The Hong Kong Special Administrative Region ("HKSAR") was established on 1 July 1997 when China resumed exercise of its sovereignty over the territory. Thereafter the policy of "one country two systems" began to be implemented marked by the coming into force of the Basic Law. The Basic Law is a concrete action by China in performing its international obligations under the Joint Declaration on the Question of Hong Kong entered into by China and Britain in 1984. Yet the Basic Law is Chinese law[5] and serves as a legal framework governing the relationship of the Central Government and the HKSAR government and the high degree of autonomy of the HKSAR.[6]

One of the crucial issues for the implementation of the "one

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[3] In the development of the jurisprudence on the act of state, the United States and Britain have played an important role. See Section II of this article.

[4] Adopted at the Third Session of the Seventh National People's Congress of the People's Republic of China on 4 April 1990 and entered into force as of 1 July 1997.

[5] In the hierarchy of Chinese law, the Basic Law is a national law under the Constitution. For discussions on the Chinese law hierarchy, see Leung Mei Fun (ed.), *China Law Report*, Butterworths Asia, 1996, Singapore, at pp. xvi-xvii.

[6] See Xiao, Weiyun (ed.), *One Country Two Systems and the Basic Legal System of Hong Kong*, Peking University Press, 1990, Beijing, China, at pp. 124-133.

country two systems" policy is defining the jurisdiction of the courts in the HKSAR. The system envisaged in the Basic Law is that within the HKSAR the court system will continue except that the Court of Final Appeal serves as the court of final adjudication.[7] The courts may continue to decide cases by interpreting the laws of Hong Kong including most of the aspects of the Basic Law. The HKSAR courts have jurisdiction over all cases within the HKSAR, but they have "no jurisdiction over acts of state such as defence and foreign affairs" according to Article 19 of the Basic Law. In addition, the HKSAR courts are subject to the "restrictions on their jurisdiction imposed by the legal system and principles previously in force in Hong Kong."[8] Anticipating the changes after 1997, the Hong Kong Court of Final Appeal Ordinance provides that the Court of Final Appeal "shall have no jurisdiction over acts of state such as defence and foreign affairs."[9] The remaining question is how the courts in HKSAR interpret what constitutes an act of state so that they should restrain from exercising jurisdiction.

I. The Basic Law Framework

China is a civil law country. Following the tradition of civil law countries, laws in China are interpreted by the legislature, while courts may only enforce the law. The legislature's power of interpretation derives from the Constitution, which empowers the Standing Committee of the NPC to interpret the Constitution and statutes.[10]

When the Basic Law was being drafted, one of the thorny issues

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[7] See Article 19 of the Basic Law.

[8] *Id.*

[9] Section 4(2) of the Hong Kong Court of Final Appeal Ordinance, CAP. 484.

[10] Article 67 of the Constitution of China stipulates:

The Standing Committee of the National People's Congress exercises the following functions and powers:

"(1) to interpret the Constitution and supervise its enforcement; ... (4) to interpret laws".

facing the Drafting Committee which was comprised of members from Hong Kong and the mainland of China was who had the power to interpret the Basic Law. After numerous debates and negotiations, a system was agreed upon by the Drafting Committee, which reflects both civil law and common law traditions in respect of interpretation. Article 158 of the Basic Law stipulates that the Standing Committee of the NPC shall authorize the courts of the SAR "to interpret on their own, in adjudicating cases, the provisions of this Law which are within the limits of the autonomy of the Region."

The system created under Article 158 of the Basic Law is a compromise of the drafters of the Basic Law. It also represents a challenge to the "one country two systems" policy. On the one hand, this Article observes the constitutional requirement that only the Standing Committee of the NPC has the power to interpret the laws of China. On the other hand, it requires the Standing Committee of the NPC to delegate, in so far as the Basic Law is concerned, the interpretation power to the courts of Hong Kong in adjudicating cases. Thus, many of the existing interpretive powers of the Hong Kong courts are preserved.[11]

Article 158 authorizes the HKSAR courts to interpret any provisions of the Basic Law in adjudicating cases except those provisions relating to the responsibilities of the Central People's Government or to the relationship between the central government and the SAR Government. Essentially, the responsibilities of the central government include foreign affairs, defense, and other matters that may be considered "acts of state."[12] Whenever a HKSAR court needs to interpret the Basic Law in adjudicating cases, the court must, before an unappealable judgment is reached, "seek an interpretation of the relevant provisions from the Standing

[11] As Hong Kong follows the common law system, courts thereof are empowered to interpret any laws and regulations of the territory, including most provisions of the Basic Law. *See* Chen Ke, *Interpretation of the Basic Law from a Comparative Point of View*, in COLLECTION OF ARTICLES ON COMPARATIVE CONSTITUTIONAL LAW STUDIES 479 (Jin Mei ed., 1993).

[12] *See* the BASIC LAW, Articles. 13, 14, and 19.

Committee of the National People's Congress through the Court of Final Appeal of the Region."[13] Under this arrangement, the HKSAR courts may interpret the Basic Law including the provisions concerning the qualified matters discussed above. At the same time, in interpreting the provisions on the qualified matters, before a final judgment is made, the Court of Final Appeal must request an interpretation from the Standing Committee of the NPC.

It is not clear, however, whether under Article 158 the lower courts of the HKSAR, while giving an interpretation to provisions on the qualified matters, have an obligation to request an interpretation by the Standing Committee through the Court of Final Appeal. What is clear is that a lower court is obliged to seek, through the Court of Final Appeal, an NPC interpretation when an unappealable judgment is made and when the interpretation will affect the outcome of the case.[14] But there may be difficulties in practice. For instance, a judgement by a lower court is appealable and therefore not final. Nevertheless, the parties concerned may not wish or may not have the necessary financial support to bring the case to a higher court or the Court of Final Appeal. Thus the case becomes final in practice. Under such a circumstance, does the lower court have an obligation to ask the Court of Final Appeal for an interpretation from the Standing Committee of the NPC? What if the court honestly believes either that the case does not involve any of the qualified situations prescribed by Article 158 or that the final judgement of the case will not be affected by such an interpretation? Does the Court of Final Appeal have an obligation to ensure that in such cases an interpretation by the NPC Standing Committee will be sought? If the answer to this latter question is yes, then the Court of Final Appeal would have to check every case decided by the lower courts in order to ensure that the NPC Standing Committee's power under Article 158 will not be affected. This would be a practically impossible task for the Court of Final Appeal. It is then possible that Article 158 procedures may be avoided so long as a case does not reach the Court of Final Appeal.

[13] *Id.*, Article. 158.

[14] *Id.*

Another issue might arise when the Court of Final Appeal and the NPC Standing Committee hold different views as to whether interpretation by the latter is required. In such circumstances, the NPC Standing Committee's view should arguably prevail.[15] In practice, however, a lower court may interpret the Basic Law even though one of the parties to the case argues that resolving the dispute requires an NPC Standing Committee's interpretation.[16] It is not clear either as to what happens when the courts disagree about whether an interpretation is necessary.

Although there are obviously questions that are not answered by the Basic Law, what is important is the principle for dividing the authority of interpretation between the Standing Committee of the NPC and the courts of Hong Kong. The former is responsible for interpreting those provisions relating to matters that are the responsibility of the central government, which include the acts of state and the relationship between the central government and the SAR government, while the latter is authorized to interpret all other provisions.[17]

Another problem with the Basic Law is that it does not set out the principles for interpretation.[18] The Basic Law is Chinese law. It's status in the hierarchy of Chinese law and its effect in Hong Kong, however, help illuminate how it should be interpreted. The Basic Law derives its authority from, and was passed in accordance with the Chinese Constitution. As discussed earlier, it is also a concrete action by China for honouring its obligations of the Joint Declaration. The legal authority of the PRC Constitution extended

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[15] The NPC Standing Committee is the highest body for interpreting Chinese laws. Since the Basic Law is Chinese law, the Standing Committee should have a final say.

[16] *See* HKSAR and Ma Wai-kwan, David, Chan Kok-wai, Donny and Tam Kin-yuen, Court of Appeal, Reservation of Question of Law No. 1 of 1997 (hereinafter the "David Ma case") to be discussed later.

[17] Article 158 of the Basic Law. For a discussion on the power of interpreting law by the Standing Committee of the NPC and the courts of the HKSAR under the one country two systems, see Lan, Tian (ed.), A Study on the Legal Issues Relating to "One Country Two Systems", Publishing House of Law, 1997, Beijing, China, at pp. 163-167.

[18] For a discussion on the principles for interpreting the Basic Law, see Wang, Guiguo, "On Interpretation of the Basic Law", *Wen Wei Pao (HK)*, 3 February 1997, at p. C4.

to Hong Kong upon its reunification with the mainland. The Basic Law cannot, therefore, be considered Hong Kong's constitution. Nevertheless, from Hong Kong's perspective, the broad delegation of powers and the comprehensive legal system prescribed in the Basic Law make it have certain characteristics of a constitution.[19] Therefore principles pertinent to the interpretation of constitutions may be adopted in construing the Basic Law.

Although China has a written constitution, the Chinese courts have never interpreted it. The experience of the Standing Committee of the NPC in interpreting the Constitution is also very limited. The courts in Hong Kong did not have much opportunity, if any, to interpret any constitution or constitutional documents, as the United Kingdom does not have a written constitution. It is therefore appropriate that both the Standing Committee of the NPC and the courts of the HKSAR consider the principles and rules pertinent to interpretation of constitution and other basic laws in other countries. Since the Basic Law is an amalgam of China's civil law and Hong Kong's common law systems,[20] the practices of both common law and civil law countries may be drawn for reference.[21] Jurists in both these legal traditions have accepted the view that a constitution should be interpreted in accordance with the principles of con-

[19] Some scholars, in fact, consider the Basic Law a constitutional law of Hong Kong. For instance a Chinese scholar is of the view that: "It should be pointed out that although the Basic Law is not a constitution according to Chinese legal concepts, it is a fundamental law prescribing guiding principles and in common law jurisprudence, has the characteristics of a constitutional law." *See* Chen, *supra*, at p. 474.

[20] One commentator is of the view that: "it can be seen that, in terms of legal procedures and strictness, the drafting process of the Basic Law, compared with that of many domestic laws, required much more work. It was also unusual in world constitutional history that a country spent so much human effort, material resources, time and energy to formulate a constitution for one of its regions through so many procedures". Fang Da, *Basic Law and Democracy, in Selections from Beijing Review (March-May 1990)*, CHINESE L. & GOV'T, Fall 1990, at p. 80.

[21] In this regard, the experience of Germany, Japan and the United States would be useful in interpreting the Basic Law. In Japan, the principle of interpretation of articles involving human rights in the constitution and criminal law is rigid while non-compulsory articles in civil laws are interpreted liberally. Interview with Professor Yasutomo Morigiwa of Nagoya University, Japan (July 4, 1997). The Japanese position is understandable as the Japanese Constitution was prepared under the strong supervision of the allied countries and adopted after the World War II.

sistency, progressiveness, and foreseeability.[22] The Court of Appeal of the HKASR expressed the view that in interpreting the "constitutional aspects of the Basic Law" a generous and purposive approach is "appropriate".[23] It is submitted that such principles are useful for the HKSAR courts in adjudicating cases involving acts of state.

Under Article 19 of the Basic Law, while adjudicating cases where an act of state is pleaded as defence, the court in charge must obtain a certificate from the Chief Executive on the questions of fact.[24] The certificate issued by the Chief Executive has the binding force on the court. In addition, before issuing the certificate, the Chief Executive must obtain from the Central People's Government a certifying document on the matter. This arrangement is similar to the practice of the developed countries such as the United States where the executive branch, which is in charge of foreign relations for the country, may issue documents to the court in cases involving acts of state. The difference is that the Chief Executive of the Special Administrative Region must first obtain a certifying document from the Central People's Government. The ground for the arrangement seems to be the provisions of the Basic Law which stipulate that the Central People's Government is responsible for the defence and foreign affairs relating to the Hong Kong Special Administrative Region. As such, it is the Central Government, not the Chief Executive, which is in the best position to confirm the relevant facts and circumstances which may constitute acts of state. Needless to

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[22] Some commentators are of the view that the most important characteristic of interpreting constitution is the principle of consistency and foreseeability. They also point out that consistency does not mean non-change, that is when major changes take place in a society and such changes could not have been foreseen by the constitution makers, the principle of progressiveness should come into play. See Zhang, Qingfu and Zhou, Hanhua, "Models and Main Principles Regarding Interpretation of Constitutions", Collective Articles on Comparative Constitutional Law, Nanjing University Press, 1993, Nanjing, China, at p. 460.

[23] *See* David Ma case, *supra*, per Chan, Chief Judge.

[24] It must be pointed out that in Western countries, in most of cases, acts of state refer to foreign acts of state. Whilst dealing with acts of the country where the court in question is situated, such acts are sometimes referred to as acts of the government.

say, matters of foreign affairs and defence are acts of state.[25] This does not mean however that acts of state only include foreign affairs and defence under the Basic Law. The acts of state thereof carry a wider definition.[26]

The certificate issued by the Chief Executive and the certifying document issued by the Central Government should only concern facts and must not concern the interpretation of law. In other words, such certificate should not state what constitutes an act of state or give interpretation to Article 19 of the Basic Law. The Basic Law's main goal is to implement the "one country two systems" policy while maintaining the prosperity and stability of Hong Kong.[27]

II. State Practice in Acts of State

Like the development of other areas of law, the United States and the United Kingdom have played an important role in developing the doctrine of acts of state. According to Lord Denning,[28] the first acts of state case decided in England was the *Duke of Brunswick v. The King of Hanover*[29] which involved an action of one sovereign against another under an authority. The essential issue was an instrument executed by King William IV in 1833 which was confirmed by the German Diet. Under that instrument the respondent was made guardian of the appellant. The respondent was the British subject and was present at the material time in England. Under the authority of guardianship the respondent sold immovable and movable properties of the appellant. Against that action, the

[25] As to be discussed later, legislative acts by the legislative body of a sovereign state are also considered acts of state by the courts in the United States and Britain.

[26] Article 19 of the Basic Law provides that the courts of the HKSAR "shall have no jurisdiction over acts of state *such as* defense and foreign affairs" (emphasis added). Clearly the words "defense and foreign affairs" are to illustrate what may constitute an act of state. They are nonetheless not conclusive acts of state under the Basic Law.

[27] *See* BASIC LAW, the Preamble.

[28] Lord Denning made this comment while deciding *Occidental Petroleum Corp. v. Buttes Gas & Oil /Co. [1975] 1 Q.B. 557, 572.D.*

[29] [1844] 6 Beav. 1, [1848] 2HL Cas. 1.

appellant prayed the court to declare the instrument of 1833 null and void and claimed money and other properties from the respondent. Holding in favour of the respondent, Lord Cottenham L.C. stated:

> A foreign sovereign coming into this country cannot be responsible for an act done in his Sovereign character in his own country; whether it be an act right or wrong, whether according to the constitution or not, the courts of this country cannot sit in judgement upon an act of a foreign Sovereign effected by virtue of his sovereign authority abroad, an act not done as a British subject, but supposed to be done in the exercise of his authority vested in him as a Sovereign.[30]

The above position was restated by Fletcher Moulton L.J. in *Salaman v. Secretary of State for India* in which he held:[31]

> An act of state is essentially an exercise of sovereign power, and hence cannot be challenged, controlled, or interfered with by municipal Courts. Its sanction is not that of law, but that of sovereign power ....[I]t is a catastrophic change, constituting a new departure. Municipal law has nothing to do with the act of change by which this new departure is effected. Its duty is simply to accept the new departure ....[32]

Later the UK courts gradually imposed restrictions on the act of state doctrine by holding that an act of state might be pleaded as a defence (not as a matter of non-justiciability) and whether the defendant was successful or not depended on the courts' willingness to restrain themselves from exercising jurisdiction.[33]

A leading case representing the shift of position of the UK courts

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[30] *Id.*, at p. 17.

[31] [1906] 1 KB 613.

[32] *Id.*, at pp. 639-40

[33] This shift of policy is important as according to the new principle, acts of state are no longer exempted from foreign jurisdiction as a matter of right. Such acts may not be subject to court jurisdiction only when the court in question is willing to refrain from exercising jurisdiction.

was *Buttes Gas and Oil Company v. Hammer*.[34] In that case both the plaintiff and the defendant were oil exploration companies which were granted oil concessions in Persian Gulf from two different rulers. The plaintiff was given concession from the ruler of Sharjah and the defendant was given concession from the ruler of Umm al Quaiwain. A dispute arose over a rich oil area. The defendant made a slander on the disputed area in England against which the plaintiff brought a suit in the English court. The defendant pleaded the defence of fair comments and justification based on a decree issued by the ruler of Sharjah and other government instructions. The defendant also filed a counterclaim in which he claimed damages for the alleged conspiracy between the plaintiff and the ruler of Sharjah and others to cheat and defraud the defendant. In response to the counterclaim, the plaintiff argued that the justification and counterclaim raised by the defendant were based on the decree of the ruler of Sharjah and other government instructions into which the court had no jurisdiction to inquire and hence the justification and counterclaim must be striken out. In this case, Lord Wilberforce, held:

> there exists in English law a more general principle that the courts will not adjudicate upon the transactions of foreign sovereign states. Though I would prefer to avoid argument on terminology, it seems desirable to consider this principle, if existing, not as a variety of act of state but one for judicial restraint or abstention.[35]

In the United States, the act of state doctrine can be traced back to *The Schooner Exchange v. M'Faddon*[36] decided in 1812. In the opinion of the Supreme Court, Chief Justice John Marshall declared:

> One sovereign being in no respect amenable to another, and being bound by obligations of the highest character not to

[34] [1982] A.C. 888.
[35] *Id.*, at p. 931.
[36] 7 Cranch, 116.2.

> degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign state, though not expressly stipulated, are reserved by implication, and will be extended to him."

Oetjen v. Central Leather Co.[37] is another leading case supporting the doctrine of non-justiciability of act of state. It involved a seizure of hides from a Mexican citizen as a military levy by a general acting on behalf of his government. Later those hides were sold to a Texas corporation. The plaintiff in the court instituted legal proceedings for claiming back those hides alleging that the seizure was illegal as it was contrary to the Haague Conventions. The US Supreme Court rejected the plea and held:

> The principle that the conduct of one independent government cannot be successfully questioned in the courts of another is as applicable to a case involving the title to property brought within the custody of a court, such as we have here, as it was held to be the cases cited, in which claims for damages were based upon acts done in a foreign country, for it[s] rests at last upon the highest considerations of international comity and expediency. To permit the validity of the acts of one sovereign state to be reexamined and perhaps condemned by the courts of another would very certainly 'imperil the amicable relations between governments and vex the peace of nations'.[38]

In fact, the American courts often find themselves under pressure from the Executive Branch in cases involving foreign governments. In such cases, the courts have apparently inclined to take the position of the Executive Branch, for in the view of the courts, it is the Executive Branch that is responsible for foreign relations. For

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[37] 246 US 297 [1918].

[38] *Id.*, at pp. 303-4.

instance, in *Alfred Dunhill v. Republic of Cuba*,[39] the plaintiffs (Americans) were importers of cigars from a Cuban company owned by the Cuban nationals. In 1960 the Cuban government confiscated the business and assets of the Cuban cigar company, started to operate the business of the seized Cuban concern and continued to export cigar to the United States. The original owner of the Cuban concern instituted legal proceedings in the United States, claiming the properties and amount due from the American importers. One of the issues in the case was whether the failure of the respondent to return the funds mistakenly paid by the petitioner was an 'act of state' of Cuba. The Supreme Court of the United States pronounced:

> The major underpinning of the act of state doctrine is the policy of foreclosing court adjudication involving the legality of acts of foreign states on their own soil that might embarrass the Executive Branch of our Government in the conduct of our foreign relations. But based on the presently expressed views of those who conduct our relations with foreign countries, we are in no sense compelled to recognise as an act of state the purely commercial conduct of foreign governments in order to avoid embarrassing conflicts with the Executive Branch. On the contrary, for the reasons to which we now turn, we fear that embarrassment and conflict would more likely ensue if we were to require that the repudiation of a foreign government's debts arising from its operation of a purely commercial business be recognised as an act of state immunized from question in our courts.[40]

Continental countries basically follow the principle adopted by the common law countries in respect of acts of state, although the terminology used may differ. Instead of "acts of state", "acts of government" and "non-justiciable acts" were adopted by the courts and laws of the continental countries. French law does not allow any

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[39] 425 U.S. 686.

[40] *Id.*, at p. 697, as per Justice White.

challenge in a court for acts involving the French government with foreign governments or the relationships between French government and international organizations. Typical example in this regard is negotiation, conclusion and implementation of international treaties and agreements. Some scholars have attempted to draw a distinction between "act of government" and "act of state": the doctrine of "act of state" is a legal concept of mainly common law origin which precludes assessment by the courts of the legality of "sovereign acts" of foreign states, whilst the concept of "act of government" refers to acts of the state of which the court is situated. The doctrine of act of state is mainly concerned with public international law and private international law, whereas act of government arises mainly in the sphere of domestic public law.[41]

Under the French law, the acts of French authorities in the conduct of foreign relations are not subject to judicial review[42] and are therefore not justiciable.[43] This general theory of immunity is however tending to shrink as a result of development of the theory of detachable act and acceptance of the principle of no fault liability of the state arising from duly concluded international agreements. Under the detachable act theory, if the French authorities have discretion or independent choice with regard to the procedures by which they perform their international obligations and can

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[41] See Ergec: 'Le controle juridictionnel de l'administration dans des matieres qui se rattachent aux apports internationaux', *Revue de droit international et de droit compare, 1986*, p. 73 in particular at 74.

[42] Some commentators maintain that "Whilst international treaties obviously concern the relation of the French state with foreign states, they are not acts of government. Apart from that they are not acts of municipal law, since they do not emanate from the French government alone, the rules applying to them are 'completely different from those applying to acts of government'." Chapus, *Droit administratif general*, 1985, p.618 and 619.

[43] Examples of non-justiciable act of government include: suspension of navigation in maritime safety zone in order to conduct nuclear tests (CE, 11 July 1975; *Paris de la Bollardiere*, p. 423); intervention with a foreign state to protect the goods or interests of a French national (CE, 2 March 1966, *Cramennel*, p. 157.); refusal to take proceedings before an international court (CE, 9 January 1952, *Geny*, p. 17); refusal to communicate to a union proposals addressed to an international body (CE, 10 February 1978, CFDT, p. 61).

themselves take the initiatives as regards the means of which they comply with the obligations, such acts may be adjudicated by the court.[44] Examples in this regard include deportation, extradition of aliens, etc.[45] The condition for the application of the principle of no fault liability is that the alleged damage is abnormal and special and that reparation is not precluded by their agreement itself.[46]

The German position in respect of acts of state is not as clear as one would have hoped. In the first place, there is no concept of acts of state in German law. Secondly, there is a notional difference of opinion between German court and legal theorists on "acts of government" (*Regierungsakte*) or "non-justiciable acts" (*justizfreie Hoheitsakte*), although the two views lead to almost the same result.[47] In practice, any action brought by an individual to a German court will be admissible if the act complained of harms to his personal rights. Major policy making acts seldom have such an effect though.[48]

German practice shows that the relations with friendly nations are a prime factor which controls the justiciability of foreign government's acts in the German court. This practice is similar to UK practice and comparable to recent US practice which gives emphasis on the embarrassment of the executive branch in their foreign relations with other countries.

In summary, according to Western literature "An act of state includes not only an executive or administrative exercise of sovereign power by an independent state or by its authorized agents or officers, but also its legislative and judicial acts, such as statutes,

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[44] Opinion delivered by Odent in the Tribunal des conflicts, 2 February 1950, Radiodiffusion francaise, RDP, 1950, p. 423, inparticular at p. 427.

[45] For examples relating to French practice of non justiciability of act of government with full authority, see *Maclaine Watson v. EC Council and Commission of the European Communities* (Case C 241/87), 10 May 1990.

[46] Conseil d'Etat, *Compagnie generale d'energie radio electrique*, 30 March 1966, Rec. Lebnon, p. 257; on that judgment see AJDA, 20 June 1966, Chronique Puissochet et Lecat, p. 349; the decision marks the extension to international agreements of no fault liability arising from laws.

[47] M.P. Singh, *German Administrative Law in Common Law Perspective*, Springer-Verlag Berlin, Heidelberg 1985.

[48] See Macklaine Watson v. EC Council and Commission, at p. 215.

orders, or judicial pronouncements."[49]

The current trend is, whether a particular act should be regarded as an act of state "depends upon the nature of the act and (sometimes) at any rate upon the intention with which it was done, and the intention is to be inferred from the words and conduct and surrounding circumstances."[50]

> "When the government of a country enters into an ordinary trading transaction, it cannot afterwards be permitted to repudiate it and get out of its liabilities by saying that it did it out of high government policy or foreign policy or any other policy. It cannot come down like a god on to the stage - *the deus ex machina* - as if it had nothing to do with it beforehand. It started as a trader and must end as a trader. It can be sued in the courts of law for its breaches of contract and for its wrongs just as any other trader can. It has no sovereign immunity.[51]

Therefore commercial activities by foreign sovereign are subject to adjudication. Some also argue that conduct by foreign governments in violation of fundamental human rights should not be recognized as act of state to bar jurisdiction of the court. This has been written into the *Restatement (third) of Foreign Relations Law of the United States* which reads:

> A claim arising out of an alleged violation of fundamental human rights - for instance, a claim on behalf of a victim of torture or genocide - would (if otherwise actionable) probably not be defeated by the act of state doctrine, since the accepted international law of human rights is well established and

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[49] See S.A. Williams and Alc de Mestral, *An Introduction to International Law chiefly as interpreted and applied in Canada*, 2nd edn., particularly the chapter on State Responsibility 174 at p.181. Also see F.A. Mann, " *The Sancrosanctity of Foreign Acts of State (1943)*, 59 L.Q.Rev. 42.

[50] As per Lord Pearson in Nissan [1970] A.C. at 238A only Lord Reid in the same case felt that political considerations precluded judicial inquiry into the motives of the crown. Id., at 212 F.213A.

[51] *I Congresso del Partido* [1980] 1 Lloyd's List L.R. 32.

contemplates external scrutiny of such acts.

From its practice, it is apparent that the Chinese government favours the traditional view, i.e., not to subject acts of state to the jurisdiction of the court.[52] The Chinese scholars' view however is somewhat similar to that of Western scholars and courts. According to Professor Luo Haocai, Vice President of the Supreme People's Court of China, "Chinese legal scholars hold two views on the definition of acts of state. One view considers that the acts of state only include national defence and foreign affairs, other acts cannot be regarded as acts of state. According to the other view which is broader, acts of state include acts of government or acts of the ruling body, related to all kinds of decisions made by the central government of a country through exercising its sovereign functions.

With regard to the nature and characteristics of an act of state, Professor Lou stated: "The act of state is an exercise of sovereignty, representing the highest interest of the country in question," so the political nature is its main characteristic. To judge whether or not an act is an act of state depends mainly on the following three factors: whether the act is done with a political objective, whether it concerns the exercise of sovereign power and whether it represents the fundamental interests of the whole people. In any event, whether an act should be considered an act of state should not be determined merely according to the nature of the organs which have undertaken the act."[53]

According to Chinese scholars, an act of state may fall into one of the three categories, i.e., foreign affairs, national defence and public interest. Whilst the first two categories are relatively easy to define, the public interest category may be subject to a broad definition. Chinese scholars are in general agreement that such acts

[52] See Wang, Guiguo, "China's Attitude Toward State Immunity: An Eastern Approach", in proceedings of the International Symposium in Commemoration of the Centennial of the Japanese Association of International Law entitled: Japan and International Law: Past, Present and Future, held at Kyoto on 13-14 September 1997, at pp. 168-188.

[53] Luo Haocai (ed.), *The Chinese Judicial Review System*, Peking University Press, Beijing (1993), at p. 309.

by the administration may not be challenged or judicially reviewed by the court. Examples given in relation to such acts include, enforcement of martial law limited to certain provinces, autonomous regions or municipalities directly under the central government, special measures adopted for dealing with emergency or disaster relief, important actions for guaranteeing the implementation of major construction projects of the country and important decisions for promoting national economic development.[54]

Chinese law may also throw light on the issue of act of state. For instance, the Administrative Procedure Law lists a number of matters that are not subject to judicial review. Such matters include administrative rules and regulations, regulations or decisions and orders with general binding force formulated and announced by administrative organs; decisions of administrative organ on awards or punishments for its personnel or on the appointment or relief of duties of its personnel.[55]

III. Act of State in HKSAR Court

As soon as the HKSAR had been established, the Hong Kong Court of Appeal was called upon to express its view on the validity of the Provisional Legislative Council of Hong Kong.[56] The issue arose in 1990 when the National People's Congress ("NPC") adopted the Decision on the Method for the Formation of the First Government and the First Legislative Council of the Hong Kong

[54] *Id.*

[55] The Administrative Procedure Law, Art. 12.

[56] Before the establishment of the HKSAR, there had been a threat in the society that the validity of the Provisional Legislative Council would be challenged in the court. As soon as the Chinese government resumed exercise of sovereignty over Hong Kong, the defendants in David Ma case argued that the Provisional Legislative Council was not valid under the Basic Law. Accordingly the Reunification Ordinance adopted by the Provisional Legislative Council should be invalid; the Ordinance stipulates to the effect that the laws in Hong Kong, except those determined by the Preparatory Committee for the HKSAR as inconsistent with the Basic Law, should continue to be effective. Should the Provisional Legislative Council be held to have been invalid, there would be a legal vacuum and therefore the defendants should be freed.

Special Administrative Region.[57] At that time, it was assumed that most of the members of the last Legislative Council of the colony would be transferred automatically to the first Legislative Council after 1997 (generally referred to as "through train").[58] The last Governor of Hong Kong, Mr. Patten introduced his political reform package which made the "through train" arrangement no longer possible. The Preparatory Committee for the Establishment of the HKSAR government then decided to set up a temporary legislative body with limited powers and functions.[59]

In a criminal case,[60] the defendants challenged the establishment of the Provisional Legislative Council as without proper authorization and therefore invalid. One of the issues involved was whether the HKSAR courts had jurisdiction to examine the Basic Law and the acts of the NPC and to determine whether the NPC had properly established the Provisional Legislative Council. In its judgement, the Court of Appeal held that "regional courts have no jurisdiction to query the validity of any legislation or acts passed by the sovereign ... In the context of the present case, ... the HKSAR courts cannot challenge the validity of the NPC Decisions or Resolutions or the reasons behind them which set up the Preparatory Committee. Such decisions and resolutions are the acts of the Sovereign and their validity is not open to challenge by the regional courts.... Nor ... can the HKSAR courts examine why the Preparatory Committee set up the Provisional Legislative Council in exercising the authority and powers conferred on its [sic] by the NPC to carry out the Sovereign's decisions and resolutions."[61]

The Court of Appeal did not explain in detail its legal reasoning

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[57] The Decision was adopted on 4 April 1990, Section 2 of which provides, *inter alia*, that the Preparatory Committee "shall prescribe the specific method for the formation of the first Government and the first Legislative Council". The question was whether the creation of the Provisional Legislative Council fell into the definition of "specific method".

[58] See Tam, Wai Chu, "A Brief Introduction to the Provisional Legislative Council of HKSAR - Supplement for H.K. Return", *China Law* (July 1997), at p. 89.

[59] See Wang, On Interpretation of the Basic Law, supra.

[60] See David Ma case, *supra*.

[61] *Id.*, at pp. 23-4.

why the HKSAR courts cannot examine an act by the Sovereign, the NPC of China, except by stating that the act by the NPC was an act of the Sovereign. Apparently the Court followed the tradition of the colonial court in coming up with the decision. In addition, the Court stated:

> The NPC is the highest state organ of the PRC, which is the Sovereign of the HKSAR. It had made its Decisions in 1990 and 1994 regarding the formation of the HKSAR. It is not disputed that the Preparatory Committee was authorized by the NPC to carry out the tasks which are set out in the 1990 and 1994 NPC Decisions. ... [I]t is clearly within the authority and powers of the Preparatory Committee to do acts which are necessary and incidental to the preparation of the establishment of the HKSAR. When it has become clear that there would be no first Legislative Council, the Preparatory Committee decided on 24th March 1996 to set up the Provisional Legislative Council. This was done in December 1996. It is conceded by the Government that the Provisional Legislative Council is not the first Legislative Council of the HKSAR.[62]

The Court of Appeal obviously relied on the doctrine of necessity while refusing to examine the validity of the Provisional Legislative Council.[63] This can be traced from the passage in which it held: "The Preparatory Committee established the Provisional Legislative Council as an interim body to enable the first Government to get going in the absence of the Legislative Council and to set about forming the first Legislative Council."[64] Necessity was a ground for setting up the Provisional Legislative Council, but it could hardly be a legal reason for the HKSAR courts not to exercise jurisdiction. It is not clear why the Court of Appeal did not grasp the opportunity

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[62] *Id.*, at p. 33.

[63] Necessity was argued by a number of scholars and experts as one of the basis for establishing the Provisional Legislative Council. See *Ming Pao Daily*, 20 December 1996, at p. C7, and Wang, On Interpretation of the Basic Law, *supra*.

[64] See David Ma case, *supra*, at p. 35.

to address the legal issue of the fundamental ground for the court not to examine the acts by the NPC. By saying that NPC is sovereign and therefore its acts are not subject to jurisdiction of a regional court is not adequately persuasive. What if the act by NPC is unconstitutional? Isn't judicial review of unconstitutional acts by the government and legislature a current trend for protecting human rights? In addition, the relationship between the HKSAR and the rest of China is not simply a change of sovereign for Hong Kong, as after China resumed exercise of sovereignty over Hong Kong, the relationship is governed by the Basic Law. So is the jurisdiction of the courts in the HKSAR.[65] The reason why the Court of Appeal refrained from referring to the Basic Law is not clear. It could be argued however that since the Basic Law provisions on act of state was not relied upon by either party, as a tradition the Court did not need to comment on the issue. Had the court relied on the Basic Law, the procedures stipulated thereof must be followed. Such procedures should include the production by the Chief Executive of the HKSAR of the certificate stipulated in Article 19 of the Basic Law.[66]

In the view of the Appeal Court, "the HKSAR courts do have the jurisdiction to examine the existence (as opposed to the validity) of the acts of the Sovereign or its delegate. In fact, if the matter should ever come to court as in this case, the courts would be failing their duty not to do so. In other words, in the context of this case, ... the HKSAR courts should have the power to examine:

(1) whether there *was* any NPC decision or resolution setting up or authorizing the setting up of the Preparatory Committee,
(2) whether there *was* any Preparatory Committee decision or resolution setting up the Provisional Legislative Council,

[65] Before 1 July 1997, the Hong Kong courts' jurisdiction was based on the common law and other laws of Britain, whilst after 1 July 1997, the courts in Hong Kong are governed by the Basic Law which provides the sources of power of the courts.

[66] Article 19 provides that "The courts of the Region shall obtain a certificate from the Chief Executive on questions of fact concerning acts of state ... 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".

(3) whether the Preparatory Committee *had* in fact set up the Provisional Legislative Council and whether this Provisional Legislative Council *was* in fact the body which was set up pursuant to the decisions or resolutions of the NPC and the Preparatory Committee"[67]

The above statement is in compliance with the court position that regional court has no jurisdiction over an act by the sovereign. In order not to exercise jurisdiction, the court must first determine whether the act was done by the sovereign or in the name of the sovereign.[68]

What is worth noting is that the HKSAR Court of Appeal chose to rely on the tradition of the colonial court in respect of its Sovereign rather than the Basic Law.[69] It is submitted that in the present case, the court should have based its decision on the Basic Law and followed the procedures thereof in ascertaining whether the establishment of the Provisional Legislative Council constituted an act of state. By referring to the Basic Law, the question of the legality of the Provisional Legislative Council would not need to be answered by the court at all.[70]

In Cheung Lai Wah & Others and The Director of Immigration[71] (Cheung Lai Wah case), the Court of Appeal again had to face the issue of the legality of the Provisional Legislative Council. In this case, the Court apparently changed at least to some extent its position taken in the David Ma case. It stated that "it would seem that [the] analogy with the colonial courts in the *David Ma* case

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[67] *Id.*, at p. 25.

[68] In international practice, a broader definition is apparently given to "sovereign or sovereign state" in determining state responsibilities. At the same time, these words are narrowly defined in granting immunities.

[69] As to be discussed later, the court in Cheung Lai Wah & others case admitted that it made an analogy of the courts of the HKSAR with the colonial courts. See [1998] 1 HKLRD 772.

[70] Since under the Basic Law the courts in the HKSAR have no jurisdiction over acts of state and since in the view of the Court of Appeal, the establishment of the Provisional Legislative Council is an act of the sovereign, the Court did not need to go into the validity issue.

[71] [1998] 1 HKLRD 772.

might not have been entirely appropriate. It may be that in appropriate cases, ... the HKSAR courts do have jurisdiction to examine the laws and acts of the NPC which affect the HKSAR for the purpose of, say, determining whether such laws or acts are contrary to or inconsistent with the Basic Law which is afterall not only the Constitution of the HKSAR, but also a national law of the PRC."[72] The legal basis on which the Court came to the conclusion that the HKSAR courts had jurisdiction to examine the laws and acts of the NPC was not explained.

The Court of Appeal was also of the view that "the HKSAR courts have the jurisdiction to judicially review the laws passed and the acts done by the Provisional Legislative Council to see whether it has acted within the powers given to it by the Preparatory Committee."[73] To hold that the HKSAR courts have jurisdiction to judicially review the acts done by the Provisional Legislative Council is justifiable and reasonable and is not inconsistent with the Basic Law. The Basic Law provides that the judicial system enforced prior to 1997 must be maintained[74] and that the organization and functions of the HKSAR courts must be stipulated by the law.[75] The law hereof refers to the laws defined in Article 8 of the Basic Law, which includes the ordinances and common law existent prior to 1997. As the "colonial courts" had jurisdiction to judicially review the acts of the Colonial Legislative Council, such jurisdiction should be extended to the Provisional Legislative Council which had replaced the colonial Legislative Council. This is so despite the fact that the Provisional Legislative Council was established through an act of state.[76] The ground is that although the HKSAR courts have no jurisdiction to judicially review an act of state under the Basic Law, they should not be barred from exercising jurisdiction over an act done by a body that is established through an act of state.

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[72] *Id.*, at pp. 779-80.

[73] *Id.*, at p. 780.

[74] See the Basic Law, Art. 81, Paragraph 2.

[75] *Id.*, Art. 83.

[76] The Provisional Legislative Council was established by the Preparatory Committee. As the creation of the Provisional Legislative Council had the approval of the NPC, it should be regarded as an act by the NPC, i.e., an act of state.

The Court of Appeal's holdings in both the David Ma case and Cheung Lai Wah case are subject to further deliberations. First, in the view of the Court, the Basic Law is the "Constitution of the HKSAR".[77] It is therefore worth noting that the Court of Appeal made no reference to the "Constitution" when determining the jurisdiction of the courts of the HKSAR.[78]

Secondly, the legality of the Provisional Legislative Council concerns an action taken by the Preparatory Committee, which was approved by the NPC. As discussed earlier, legislative actions by the central government are acts of state. In the case of the Provisional Legislative Council, it was done for the purpose of setting up the first government of the HKSAR in accordance with the Basic Law.[79] The setting up of the Provisional Legislative Council was hence an act of the state as well as an act concerning the relationship between the central government and the HKSAR government. In deciding the validity of such an act, the Basic Law should have been referred to and the mechanisms stipulated in Articles 19 and 158 of the Basic Law should have been called into operation. Then the basis on which the court decided that it had no jurisdiction would have been clear and strong.[80] The court however decided to rely on the practice of the colonial court in the David Ma case and then changed its position in the Cheung Lai Wah case. The practice of the colonial court in

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[77] As China is an unitary state and the HKSAR is part of China, there cannot be a constitution for the HKSAR. Nevertheless, for purposes of easy reference, the term "mini-constitution" has been adopted by some scholars to refer to the Basic Law. So far at least in a formal document, it is first time to call the Basic Law "Constitution of the HKSAR".

[78] Although under both the Basic Law and British common law, the courts in the HKSAR have no jurisdiction over an act of the legislature of its sovereign state, the legal ground under the Basic Law is different. As the Basic Law is authorized by the Constitution, its authority is higher than the common law.

[79] As the NPC is the highest organ of the state power, its actions are acts of the state. The word government used hereof should be given a broader meaning to include all the three branches of the government.

[80] The legal basis for regional courts not to pass judgement on acts of the legislature is a common law tradition whose application is restricted to legislative acts. The Basic Law however restricts the courts in the HKSAR from exercising jurisdiction over any act of state, which covers administrative, legislative and judicial acts according to international practice. See discussion of the state practice in Section II hereof.

respect of its jurisdiction over an act of the Sovereign was established out of the context of the relationship between the former colony and Britain. The relationship between the HKSAR and the central government or the Sovereign is different from that between the former colony and Britain, as China is a unitary state and the HKSAR's high degree of autonomy and related rights and powers are governed by the Basic Law. Under the Basic Law, the HKSAR courts must obtain an interpretation from the Standing Committee of the NPC before an unappealable ruling is made. Needless to say, both the HKSAR courts and the Standing Committee of the NPC may apply the doctrine of necessity and the principle of "generous and purposive" interpretation and other relevant principles discussed above.[81] If however, a HKSAR court decides, like the Court of Appeal held in the David Ma case, that an act in question is an act of state, it should not extend its jurisdiction to such an act. Thus the ruling of the Court of Appeal in David Ma case with regard to the legality of the Provisional Legislative Council is not appropriate and may constitute a violation of the Basic Law unless the court honestly believed that the approval by the NPC for the establishment of the Provisional Legislative Council was not an act of state or sovereign.

Thirdly, the Basic Law is a concrete action by China in honoring its international obligations. As such, the Basic Law must have some international dimensions. For instance, the Basic Law does not define what constitute an act of state. Under the policy of "one country two systems", the HKSAR has been delegated a high degree of autonomy with the residual powers retained with the central government. Under the circumstance, when deciding cases concerning the relationship between the central government and the HKSAR and concerning matters which are the responsibility of the central government such as act of state, the court should consider the spirit of the policy of "one country two systems" and the commonly accepted practice by the international community. For the purpose of determining whether the establishment of the Provisional Legislative Council is an act of state, principles recognized through

[81] See David Ma case, and Wang, On Interpretation of the Basic Law, *supra*.

the practice of other states in determining what constitutes an act of state and in what circumstances the doctrine of act of state applies would be helpful. In this regard it is a generally recognized rule that laws and regulations adopted by the legislature of a sovereign state are acts of state.

Fourthly, the Court of Appeal in Cheung Lai Wah case declared that the HKSAR courts had "jurisdiction to examine the laws and acts of the NPC", if such laws and acts affect the HKSAR. The purpose of judicial review is to ascertain whether the said laws and acts are "contrary to or inconsistent with the Basic Law". This approach is to say the least problematic. Assume that the NPC adopts a law that further defines the powers of the HKSAR, it would constitute an act affecting the relationship between the central government and HKSAR. According to the Basic Law, whether the said law is contrary to the Basic Law should be interpreted by the Standing Committee of the NPC following the procedures thereof.[82] If HKSAR courts may examine the laws and acts of the NPC, even though within a limited scope, they would serve as courts of quasi-judicial review for China. This is obviously contrary to the policy of "one country two systems" under which the high degree of autonomy of the HKSAR was granted. It is also contrary to the interpretation principles followed in the mainland of China, i.e., legislative interpretation. In any event, there is no basis for the HKSAR courts to exercise jurisdiction over the laws adopted by the NPC regardless how small the scope of such judicial review is intended to be.

In conclusion, whilst the 21st century is approaching, an important question facing every country is what it could offer to the international community. As a semi-colonial country for a long time, China did not participate in formulating international law rules. After the establishment of the People's Republic of China, it was isolated by the Western powers for more than two decades. This was coupled

[82] Under the Basic Law, such interpretation by the Standing Committee of the NPC can be given *only* after consultation with the Basic Law Committee which is comprised of members from Hong Kong and the mainland of China. See Paragraph 4, Art. 158 of the Basic Law.

with domestic policy of emphasizing class struggle rather than economic development and international cooperation. As a result, China's contribution to the development of international law has not been as much as it should be. The resumption of sovereignty over Hong Kong and the implementation of the "one country two systems" policy in the HKSAR offer a golden opportunity to China. As discussed earlier, although the Basic Law is a domestic law of China and the implementation of the one country two systems policy is a domestic matter, they do have international implications. A successful carrying out of the policy and enforcing the Law will help enrich international economic law. The practice of courts in the HKSAR will help China in understanding the current international trend and foreign countries in learning the Chinese position on such important issues.

Under the Basic Law, common law will continue in the HKSAR for 50 years. But the Law does not define what common law should continue, common law of Britain, common law spirit and tradition, or common law of Hong Kong? The current trend in the world is that common law and civil law systems are moving closer and closer to each other and that countries following the common law tradition have developed their own common law. It hence suffices to say that as Hong Kong's culture, political and economic system, and its relations with its neighboring countries and regions especially the mainland of China are different from that of Britain, it is necessary for the HKSAR to develop its own common law. This task cannot be accomplished without a strong theoretical base and learning the experience of other legal systems in particular common law countries. The starting point for this process is that when deciding legal issues that have an international dimension such as act of state, courts in the HKSAR should take into account relevant international law provisions and practice of other countries.