

For Reference Only

**The Explanations on the Draft Interpretation of Paragraph 1,
Article 13 and Article 19 of the Basic Law of the Hong Kong
Special Administrative Region of the People's Republic of China
by the Standing Committee of the National People's Congress**

At the 22nd Session of the Standing Committee of the Eleventh National
People's Congress on 24 August 2011

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Committee of the National People's Congress

Chairman, Vice Chairmen, Secretary-General, Members:

On the instruction of the Council of Chairmen, I would like to make explanations on *the Draft Interpretation of Paragraph 1, Article 13 and Article 19 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China by the Standing Committee of the National People's Congress*.

On 30 June 2011, the Court of Final Appeal of the Hong Kong Special Administrative Region ("Hong Kong CFA") sought, pursuant to Paragraph 3, Article 158 of *the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* ("Hong Kong Basic Law"), an interpretation of Paragraph 1, Article 13 and Article 19 of the Hong Kong Basic Law from the Standing Committee of the National People's Congress.

Having studied the report by the Hong Kong CFA seeking an interpretation of the relevant provisions of the Hong Kong Basic Law, the Council of Chairmen considers that the adjudication of the relevant case by the Hong Kong CFA involves an interpretation of the provisions of the

Hong Kong Basic law concerning affairs which are the responsibility of the Central People's Government and the relationship between the Central Authorities and the Hong Kong Special Administrative Region and that the interpretation of such provisions affects the judgment on the case. The Hong Kong CFA seeking an interpretation of the relevant provisions from the Standing Committee of the National People's Congress before making the final judgment which is not appealable on the case in accordance with Paragraph 3, Article 158 of the Hong Kong Basic Law is consistent with the requirements of the Hong Kong Basic Law and is necessary and appropriate.

The background of the Hong Kong CFA seeking an interpretation of the relevant provisions of the Hong Kong Basic Law from the Standing Committee of the National People's Congress is as follows. In May 2008, FG Hemisphere Associates LLC, a company registered in the United States of America, commenced legal proceedings in the Court of First Instance of the High Court of the Hong Kong Special Administrative Region to seek the execution of two international arbitral awards. The Democratic Republic of the Congo was named as the defendant in the proceedings. The China Railway Group Limited and its three subsidiaries were also named as co-defendants. The contention of the Democratic Republic of the Congo, the China Railway Group Limited and its subsidiaries is that the Democratic Republic of the Congo enjoys state immunity and the courts of Hong Kong have no jurisdiction over the Democratic Republic of the Congo. The Democratic Republic of the Congo has repeatedly made representations to the Central People's Government through the diplomatic channel. Since the case involves state sovereignty and the power of foreign affairs of the Central People's Government, the Ministry of Foreign Affairs, having been duly authorised, issued three letters at different times to the Constitutional and Mainland Affairs Bureau of the Hong Kong Special Administrative Region Government through the Office of the Commissioner of the Ministry of Foreign Affairs in the Hong Kong Special Administrative Region. The three letters stated the position of the Central People's Government as regards the issue of state immunity and

pointed out that the doctrine of state immunity that China has been consistently and firmly adhered to applies uniformly to the whole territory of China, including the Hong Kong Special Administrative Region, and that the application in the Hong Kong Special Administrative Region of a principle of state immunity that is inconsistent with the position of the Central People's Government would prejudice the sovereignty of the state. The said letters were placed before the courts of the Hong Kong Special Administrative Region as evidence by the Secretary for Justice of the Hong Kong Special Administrative Region Government. Since the case involves important legal issues concerning the implementation of the Hong Kong Basic Law, the Secretary for Justice of the Hong Kong Special Administrative Region Government takes part in the proceedings as intervener. The case was heard in the Court of First Instance and the Court of Appeal of the High Court of Hong Kong and the Hong Kong CFA. On 8 June 2011, the Hong Kong CFA made a provisional judgment, holding that the Hong Kong Special Administrative Region should follow the rules on state immunity that the Central People's Government has determined to adopt, that the Democratic Republic of the Congo enjoys state immunity and that the courts of Hong Kong have no jurisdiction over the Democratic Republic of the Congo. Since the said provisional judgment involves an interpretation of the provisions of the Hong Kong Basic Law concerning affairs which are the responsibility of the Central People's Government and the relationship between the Central Authorities and the Hong Kong Special Administrative Region, the Hong Kong CFA considers, in accordance with Paragraph 3, Article 158 of the Hong Kong Basic Law, that it is bound to seek an interpretation of Paragraph 1, Article 13 and Article 19 of the Hong Kong Basic Law before making the final judgment. After the Standing Committee of the National People's Congress has made an interpretation of the provisions concerned, the Hong Kong CFA shall make its final judgment in accordance with the interpretation of the Standing Committee of the National People's Congress. The four questions on which an interpretation is sought by the Hong Kong CFA are:

“(1) whether on the true interpretation of Paragraph 1, Article 13, the Central People’s Government has the power to determine the rule or policy of the People’s Republic of China on state immunity;

(2) if so, whether, on the true interpretation of Paragraph 1, Article 13 and Article 19, the Hong Kong Special Administrative Region (HKSAR), including the courts of the HKSAR:

① is bound to apply or give effect to the rule or policy on state immunity determined by the Central People’s Government under Paragraph 1, Article 13; or

② on the other hand, is at liberty to depart from the rule or policy on state immunity determined by the Central People’s Government under Paragraph 1, Article 13 and to adopt a different rule;

(3) whether the determination by the Central People’s Government as to the rule or policy on state immunity falls within ‘acts of state such as defence and foreign affairs’ in the first sentence of Paragraph 3, Article 19 of the Basic Law; and

(4) whether, upon the establishment of the HKSAR, the effect of Paragraph 1, Article 13, Article 19 and the status of Hong Kong as a Special Administrative Region of the People’s Republic of China upon the common law on state immunity previously in force in Hong Kong (that is, before 1 July 1997), to the extent that such common law was inconsistent with the rule or policy on state immunity as determined by the Central People’s Government pursuant to Paragraph 1, Article 13, was to require such common law to be applied subject to such modifications, adaptations, limitations or exceptions as were necessary to ensure that such common law is consistent with the rule or policy on state

immunity as determined by the Central People's Government, in accordance with Articles 8 and 160 of the Basic Law and the *Decision of the Standing Committee of the National People's Congress* dated 23 February 1997 made pursuant to Article 160."

Pursuant to Subparagraph (4) of Article 67 of *the Constitution of the People's Republic of China* and Article 158 of the Hong Kong Basic Law, the Council of Chairmen has proposed *the Draft Interpretation of Paragraph 1, Article 13 and Article 19 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* by the *Standing Committee of the National People's Congress* and consulted the Committee for the Basic Law of the Hong Kong Special Administrative Region under the Standing Committee of the National People's Congress in accordance with the Hong Kong Basic Law. I would like to explain the content of the Draft Interpretation as follows:

1. State immunity is within the realm of foreign affairs

State immunity is a doctrine of international law widely accepted by the international community. The specific meaning of state immunity is: (1) unless a state waives immunity from jurisdiction, another state shall not entertain and adjudicate legal proceedings in which that state is a defendant; (2) even if a state has waived immunity from jurisdiction, unless it waives immunity from execution, the court of another state shall not impose compulsory measures against the properties of that state. State immunity is based on the principle of state sovereignty and equality. It is a legal issue as well as a policy issue involving the foreign relations of a state. As a legal issue, it concerns whether the courts of a state have jurisdiction over a foreign state and its properties and whether a foreign state and its properties enjoy immunity in the courts of that state. As a policy issue involving the foreign relations of a state, it relates directly to the relationship between a state and foreign states and to the implementation of the foreign policy of that state, and concerns directly the foreign relations and national interests of a state. Every state adopts

a regime of state immunity that is consistent with its own interests, in light of its national circumstances as well as foreign policy. Accordingly, “foreign affairs” stipulated in Paragraph 1, Article 13 of the Hong Kong Basic Law includes affairs relating to determining and giving effect to the rules or policies on state immunity.

2. Determining the rules or policies on state immunity is the power of the Central Authorities

China is a unitary state. The foreign policy has all along been uniform, as necessarily required by the upholding of state sovereignty, national unity and territorial integrity. Therefore, the basic policies of the Government of the People’s Republic of China regarding Hong Kong strongly emphasize the principle that the power of foreign affairs is vested in the Central Authorities. *The Joint Declaration of the Government of the United Kingdom of Great Britain and the Northern Ireland and the Government of the People’s Republic of China on the Question of Hong Kong* signed on 19 December 1984 provides that foreign affairs are the responsibilities of the Central People’s Government. On 6 November 1984, in his *Report on the Agreement Between the People’s Republic of China and the United Kingdom on the Question of Hong Kong* made to the Standing Committee of the National People’s Congress, Wu Xueqian, State Councillor cum Minister of the Foreign Affairs stressed that, “foreign affairs and national defence are important features of state sovereignty. Foreign affairs are the centralized responsibilities of the Central People’s Government.” The issue of which doctrine of state immunity China is to adopt concerns the relationship between China and foreign states as well as China’s international rights and obligations. It is an important component of China’s foreign affairs. Subparagraph (9) of the Article 89 of *the Constitution of the People’s Republic of China* stipulates that the State Council is to conduct foreign affairs. Pursuant to this provision, the Central People’s Government has the power to determine the rules or policies on state immunity of China and to be implemented uniformly in the whole territory of China. Paragraph 1, Article 13 of the Hong Kong

Basic Law stipulates that, “[t]he Central People’s Government shall be responsible for the foreign affairs relating to the Hong Kong Special Administrative Region.” It is a manifestation of the principle that the power of foreign affairs is vested in the Central Authorities. The conduct of foreign affairs does not fall within the scope of the high degree of autonomy of the Hong Kong Special Administrative Region. Accordingly, the conduct of the foreign affairs relating to the Hong Kong Special Administrative Region, according to Paragraph 1, Article 13 of the Hong Kong Basic Law, falls within the power of the Central People’s Government. The Central People’s Government has the power to determine the rules or policies on state immunity that apply in the Hong Kong Special Administrative Region. This understanding is entirely consistent with the power of the Central People’s Government in this regard provided for in the Constitution of China.

3. The rules or policies on state immunity that China currently implements

China firmly adheres to the important legal doctrine of state immunity which protects the normal development of the relations among states. It means that the courts of China have no jurisdiction over, or in practice have they ever entertained, any case in which a foreign state is sued as a defendant or any claim involving the properties of any foreign state. At the same time, China has never accepted any foreign courts having jurisdiction over cases in which the State of China is sued as a defendant, or over any cases involving the properties of the State of China. This position on state immunity adopted by China is usually referred to as “absolute immunity”. China’s position as regards state immunity is manifested in the formal public statements and the practice of our Government. This is a legal fact and has been widely understood by the international community. In practice of state immunity among states, some states make exceptions to state immunity and exclude commercial activities of states and their properties used for the purpose of commercial activities, etc. from the scope of state immunity. This practice is usually

referred to as “restrictive immunity”. In this regard, the following explanation should be made. On 14 September 2005, China signed *the United Nations Convention on Jurisdictional Immunities of States and Their Property*. The Convention confers on foreign states and their properties immunity from court jurisdiction and execution and provides, at the same time, for certain exceptions to state immunity by excluding commercial activities of states and their properties used for the purpose of commercial activities from the scope of state Immunity. However, the Convention has not yet entered into force. The Standing Committee of the National People’s Congress has not yet ratified the Convention. At present, China still implements the rules and policies on state immunity to which it has consistently and firmly adhered.

4. The Hong Kong Special Administrative Region must follow the uniform rules or policies on state immunity of the State

According to the provisions of Paragraph 1, Article 13 of the Hong Kong Basic Law, the Central People’s Government has the power to determine the rules or policies on state immunity that apply in the Hong Kong Special Administrative Region. According to the provisions of Article 19 of the Hong Kong Basic Law, the courts of the Hong Kong Special Administrative Region have no jurisdiction over the act of the Central People’s Government to determine the rules or policies on state immunity. Therefore, the Hong Kong Special Administrative Region, including the courts of the Hong Kong Special Administrative Region, must follow the rules or policies on state immunity as determined by the Central People’s Government. This is a necessary consequence of the resumption of the exercise of sovereignty over Hong Kong by the Government of China on 1 July 1997. It is dictated by the status of the Hong Kong Special Administrative Region provided for by Articles 1 and 12 of the Hong Kong Basic Law and is an inherent requirement of the full implementation of Paragraph 1, Article 13 of the Hong Kong Basic Law. Based on the above, the Hong Kong Special Administrative Region, including the courts of the Hong Kong Special Administrative Region, must, pursuant to the

provisions of Paragraph 1, Article 13 and Article 19 of the Hong Kong Basic Law, apply and give effect to the rules or policies on state immunity that the Central People's Government has determined to adopt and must not depart from such rules or policies nor to adopt rules that are inconsistent with them.

5. The act of determining the rules or policies on state immunity is an act of state

As a sovereign state China enjoys state immunity. At the same time, foreign states and their properties enjoy state immunity in China as conferred by China. The act of the Central People's Government determining the rules or policies on state immunity is a manifestation of state sovereignty and is an act of state involving foreign affairs. Determining the rules or policies on state immunity that apply in the Hong Kong Special Administrative Region is within the scope of the functions and powers conferred by *the Constitution of the People's Republic of China* as well as an act of the Central People's Government to exercise the power to conduct foreign affairs relating to the Hong Kong Special Administrative Region under *the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*. Paragraph 3, Article 19 of the Hong Kong Basic Law stipulates that, "[t]he courts of the Hong Kong Special Administrative Region shall have no jurisdiction over acts of state such as defence and foreign affairs." In that paragraph "acts of state" includes the act of the Central People's Government in determining the rules or policies on state immunity. As a local administrative region of China, the Hong Kong Special Administrative Region enjoys a high degree of autonomy according to law but does not have the power to determine the rules and policies on state immunity. It should be underlined that the specific provision of Paragraph 3, Article 19 of the Hong Kong Basic Law that the courts of the Hong Kong Special Administrative Region shall have no jurisdiction over acts of state such as defence and foreign affairs is closely connected with the delineation of the power relationship between the Central Authorities and the Hong Kong

Special Administrative Region under the Hong Kong Basic Law. Mr. Ji Pengfei, Chairman of the Drafting Committee for the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China pointed out in *the Explanations on "The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China (Draft)" and Its Related Documents* that, "[t]he power to be exercised by, or the affairs which are the responsibility of the Standing Committee of the National People's Congress or the Central People's Government, as prescribed in the draft law, is indispensable to maintaining the state sovereignty". Paragraph 1, Article 13 of the Hong Kong Basic Law specifically stipulates that the responsibility for the foreign affairs relating to the Hong Kong Special Administrative Region falls within the power of the Central People's Government. In line with the above, the courts of the Hong Kong Special Administrative Region have no jurisdiction over acts of state involving foreign affairs.

6. The provisions in the laws previously in force in Hong Kong inconsistent with the rules or policies on state immunity of China have ceased to have force

As regards the laws previously in force in Hong Kong, Article 8 of the Hong Kong Basic Law stipulates that "[t]he laws previously in force in Hong Kong, that is, the common law, rule 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." Paragraph 1, Article 160 stipulates that "[u]pon the establishment of the Hong Kong Special Administrative Region, the laws previously in force in Hong Kong shall be adopted as laws of the Region except for those which the Standing Committee of the National People's Congress declares to be in contravention of this Law. If any laws are later discovered to be in contravention of this Law, they shall be amended or cease to have force in accordance with the procedure as prescribed by this Law." *The Decision of the Standing Committee of the National People's Congress on Treatment of*

the Laws Previously in Force in Hong Kong in accordance with Article 160 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China adopted on 23 February 1997 specifically stipulates that, “[s]uch of the laws previously in force in Hong Kong which have been adopted as the laws of the Hong Kong Special Administrative Region shall, as from 1 July 1997, be applied subject to such modifications, adaptations, limitations or exceptions as are necessary so as to bring them into conformity with the status of Hong Kong after resumption by the People's Republic of China of the exercise of sovereignty over Hong Kong as well as be in conformity with the relevant provisions of the Basic Law,” and that “[a]part from conforming with the above principles, the following shall be observed, that is to say, in the ordinances and subordinate legislation previously in force – (1) laws relating to foreign affairs in respect of the Hong Kong Special Administrative Region which are inconsistent with the national laws applied in the Hong Kong Special Administrative Region shall be subject to the national laws and shall be consistent with the international rights and obligations of the Central People's Government”. Under Paragraph 1, Article 13 and Article 19 of the Hong Kong Basic Law and Articles 1, 2 and 3 of the Draft Interpretation, the Hong Kong Special Administrative Region must apply or give effect to the rules or policies on state immunity as determined by the Central People's Government. If the Hong Kong Special Administrative Region applies or gives effect to the rules that are inconsistent with the rules or policies on state immunity as determined by the Central People's Government, that would contravene Paragraph 1, Article 13 and Article 19 of the Hong Kong Basic Law and incompatible with the status of the Hong Kong Special Administrative Region as a local administrative region of the People's Republic of China. Accordingly, the rules on state immunity in laws previously in force in Hong Kong adopted as the laws of the Hong Kong Special Administrative Region in accordance with the *Decision of the Standing Committee of the National People's Congress on Treatment of the Laws Previously in Force in Hong Kong in accordance with Article 160 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* of 23 February

1997 shall, as from 1 July 1997, be subject to such modifications, adaptations, limitations or exceptions in their application as are necessary so as to be consistent with the rules or policies on state immunity that the Central People's Government has determined to adopt. All the rules on state immunity in the laws previously in force in Hong Kong that are inconsistent with the rules or policies on state immunity that the Central People's Government has determined to adopt shall not continue to apply.

Based on the above, the Draft Interpretation makes the following interpretation in response to the four questions on which Hong Kong CFA sought interpretation:

1. On question (1) on which an interpretation is sought by the Court of Final Appeal of the Hong Kong Special Administrative Region. According to Subparagraph (9), Article 89 of *the Constitution of the People's Republic of China*, the State Council as the Central People's Government exercises the function and power to conduct the foreign affairs of the State; as the rules or policies on state immunity fall within diplomatic affairs in the realm of the foreign affairs of the state, the Central People's Government has the power to determine the rules or policies of the People's Republic of China on state immunity to be given effect to uniformly in the territory of the People's Republic of China. Based on the above, in accordance with the provisions of Paragraph 1, Article 13 of *the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* that "[t]he Central People's Government shall be responsible for the foreign affairs relating to the Hong Kong Special Administrative Region", the conduct of the foreign affairs relating to the Hong Kong Special Administrative Region falls within the power of the Central People's Government. The Central People's Government has the power to determine the rules or policies on state immunity to be applied in the Hong Kong Special Administrative Region.

2. On question (2) on which an interpretation is sought by the Court of Final Appeal of the Hong Kong Special Administrative Region.

According to the provisions of Paragraph 1, Article 13 of *the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* and Article 1 of this Interpretation, the Central People's Government has the power to determine the rules or policies on state immunity to be applied in the Hong Kong Special Administrative Region. According to the provisions of Article 19 of *the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* and Article 3 of this Interpretation, the courts of the Hong Kong Special Administrative Region have no jurisdiction over the act of the Central People's Government in determining the rules or policies on state immunity. Therefore, when questions of immunity from jurisdiction and immunity from execution of foreign states and their properties arise in the adjudication of cases, the courts of the Hong Kong Special Administrative Region must apply and give effect to the rules or policies on state immunity determined by the Central People's Government as being applicable to the Hong Kong Special Administrative Region. Based on the above, in accordance with the provisions of Paragraph 1, Article 13 and Article 19 of *the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, the Hong Kong Special Administrative Region, including the courts of the Hong Kong Special Administrative Region, is under a duty to apply or give effect to the rules or policies on state immunity that the Central People's Government has determined, and must not depart from the abovementioned rules or policies nor adopt a rule that is inconsistent with the abovementioned rules or policies.

3. On question (3) on which an interpretation is sought by the Court of Final Appeal of the Hong Kong Special Administrative Region. State immunity concerns whether the courts of a state have jurisdiction over foreign states and their properties and whether foreign states and their properties enjoy immunity in the courts of a state. It directly relates to the state's foreign relations and international rights and obligations. Therefore, the determination as to the rules or policies on state immunity is an act of state involving foreign affairs. Based on the above, "acts of state such as defence and foreign affairs" as stipulated in Paragraph 3, Article 19 of *the*

Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China includes the act of determination by the Central People's Government as to the rules or policies on state immunity.

4. On question (4) on which an interpretation is sought by the Court of Final Appeal of the Hong Kong Special Administrative Region. According to the provisions of Articles 8 and 160 of *the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, the laws previously in force in Hong Kong shall be maintained only if there is no contravention of *the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*. In accordance with the provisions of Paragraph 4 of the *Decision of the Standing Committee of the National People's Congress on Treatment of the Laws Previously in Force in Hong Kong in accordance with Article 160 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, such of the laws previously in force in Hong Kong which have been adopted as the laws of the Hong Kong Special Administrative Region shall, as from 1 July 1997, be applied subject to such modifications, adaptations, limitations or exceptions as are necessary so as to bring them into conformity with the status of Hong Kong after resumption by the People's Republic of China of the exercise of sovereignty over Hong Kong as well as to be in conformity with the relevant provisions of the Basic Law. The Hong Kong Special Administrative Region, as a local administrative region of the People's Republic of China that enjoys a high degree of autonomy and comes directly under the Central People's Government, must give effect to the rules or policies on state immunity as determined by the Central People's Government. The laws previously in force in Hong Kong relating to the rules on state immunity may continue to be applied after 1 July 1997 only if they comply with the above requirements. Based on the above, in accordance with the provisions of Paragraph 1, Article 13 and Article 19 of *the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, such of the laws previously in force in Hong Kong concerning the rules on state immunity which have been adopted as

the laws of the Hong Kong Special Administrative Region according to the *Decision of the Standing Committee of the National People's Congress on Treatment of the Laws Previously in Force in Hong Kong in accordance with Article 160 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China*, when applied as from 1 July 1997, must be subject to such modifications, adaptations, limitations or exceptions as are necessary so as to be consistent with the rules or policies on state immunity that the Central People's Government has determined.

Please examine whether the *Draft Interpretation of Paragraph 1, Article 13 and Article 19 of the Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China* by the Standing Committee of the National People's Congress and the above explanations are in order.