

## COMMENT



## The Joint Declaration and the CFA Agreement

Although centred mainly on one provision in the Joint Declaration,<sup>1</sup> the ‘CFA debate’ — triggered by the ‘agreement’ reached in 1991 in the Sino-British Joint Liaison Group (JLG) on the composition of the Court of Final Appeal<sup>2</sup> and a later Agreement between the British and Chinese Sides on the Question of the Court of Final Appeal in Hong Kong<sup>3</sup> (seeking to limit to one the number of overseas judges on the five-member court) — may serve to illustrate the parties’ (mis)perceptions and (mis)understandings of key elements in the treaty.

Under applicable international rules of treaty interpretation,<sup>4</sup> the respective terms in the Joint Declaration must be interpreted ‘in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of the treaty’s object and purpose.’ Thus approached, it is doubtless that the ‘ordinary meaning’ to be assigned to the relevant article<sup>5</sup> confers on the Court of Final Appeal discretion to decide *when* a requirement arises to invite judges from other common law jurisdictions, and *whom* and *how many* to invite. There is no qualification or proviso which could support an intention other than to grant the court full discretion regarding the exercise of its power. Such an interpretation is also demanded by the principle of ‘institutional effectiveness,’ favouring wide powers for institutions to perform their functions in the most effective manner.

Further substantiation is equally drawn when the terms are examined in the light of the ‘object and purpose’ of a treaty aimed at preserving the stability and prosperity of a region endowed with a high degree of autonomy, including the power of final adjudication. Indeed, the importance to Hong Kong’s stability and prosperity of maintaining the current advantages, derived from an international judicial link and ensuring the CFA’s true independence and membership of the highest standard, has also been recognised by the drafters of the Basic Law, who reaffirmed that the court ‘may as required invite judges from other common law jurisdictions.’<sup>6</sup> Basically, as stated by one observer,

<sup>1</sup> JD, Annex I, Art III, para 4.

<sup>2</sup> Hereafter ‘the 1991 agreement.’ A text of the agreement has not been published.

<sup>3</sup> The agreement, concluded on 9 June 1995 (hereafter ‘the 1995 agreement’), consists of five clauses, reaffirming *inter alia* the four to one formula. Reprinted in (1996) 35 *International Legal Materials* 207.

<sup>4</sup> See 1969 Convention on the Law of Treaties, Arts 31-3. Note that these rules of treaty interpretation are considered customary international law and as such are binding on all states regardless of whether or not they are parties to the Convention: *Guinea-Bissau v Senegal* [1991] ICJ Reports 53, 70.

<sup>5</sup> Stipulating that ‘The power of final judgment of the Hong Kong Special Administrative Region shall be vested in the court of final appeal in the Hong Kong Special Administrative Region, which may as required invite judges from other common law jurisdictions to sit on the court of final appeal.’

<sup>6</sup> BL82.

[t]he setting up of a Court of Final Appeal in Hong Kong was to provide for continuity in the legal system and the rule of law even while ending the link to the Privy Council, ensuring the territory's stability. The provision for overseas judges to serve on the Court of Final Appeal was clearly intended to lend that court greater stature, so that domestic and foreign investors would continue to have confidence in the judicial system, thus ensuring the territory's prosperity. That being the case, too great a restriction on the court's right to invite overseas judges — both when they might be invited and how many might be invited — would work against giving the court the independence it is meant to enjoy and could, in fact, detract from the territory's stability and prosperity.<sup>7</sup>

Whether account should be taken of the 1991 or 1995 agreements hinges on either constituting an 'agreement between the parties regarding the interpretation or the application of its provisions,' under the Convention on the Law of Treaties, Article 31(3)(a). Arguably, the 1991 agreement is more appropriately viewed as a 'deal,' reflecting compromises designed to diffuse political tension that had developed between the parties (following the 'Tiananmen crackdown'),<sup>8</sup> and justified on pragmatic grounds (such as 'workability' and the benefits of erecting the Court of Final Appeal before 1997<sup>9</sup>).

Neither does the 1995 agreement — which contains no direct reference to the Joint Declaration, and has been depicted by British officials as the best possible deal under the circumstances,<sup>10</sup> by political commentators as 'capitulation/acquiescence to Chinese demands,'<sup>11</sup> and by critics as a 'sell-out'<sup>12</sup> — amount to an agreement on interpretation or application of provisions in the Joint Declaration sufficiently authoritative to displace an ordinary meaning that is consistent with the Declaration's object and purpose. In a similar vein, unless expressly provided in a later agreement concluded in accordance with applicable rules, the 'mutuality' of conduct by itself bestows no amending or modifying effect on the subsequent practice of the parties, particularly when it contradicts the clear meaning of the article in question.

<sup>7</sup> Frank Ching, 'The Vienna Convention on the Law of Treaties and the Joint Liaison Group's Agreement on Hong Kong's Court of Final Appeal,' a paper presented at a Zonta Club Forum on the Court of Final Appeal, 21 October 1994.

<sup>8</sup> See Shui-hing Lo, 'The Politics of the Court of Final Appeal Debate in Hong Kong' (1993) 29 *Issues & Studies* 105, 119, 124; Stacy Mosher, 'Court of Contention,' *Far Eastern Economic Review*, 19 December 1991, p 10.

<sup>9</sup> See speech by Secretary for Constitutional Affairs (Mr Michael Sze) on the motion debate on the Court of Final Appeal in the Legislative Council on 4 December 1991. Note that the early establishment of the CFA, regarded as probably the most important consideration underlying the 1991 agreement, forms no part of the 1995 agreement (the agreed date for setting up the court is 1 July 1997).

<sup>10</sup> See Louise de Rosario, 'A Court Too Far,' *Far Eastern Economic Review*, 22 June 1995, p 20.

<sup>11</sup> See 'Britain Gives in on CFA,' *Hong Kong Standard*, 10 June 1995, p 1.

<sup>12</sup> See report by Lily Mak, 'Hong Kong "Sold Out" Says Lee,' *Hong Kong Standard*, 10 June 1995, p 4; see also Martin Lee, 'Courting Disaster,' *South China Morning Post*, 14 June 1995, p 19.

Also of doubtful validity is a line of argument paraphrasing the issue as one, not of interpretation or modification, but of 'subsequent elaboration of a general principle.' Specifically, it has been contended<sup>13</sup> that the Joint Declaration lays down a *general principle* that the CFA is to have a *power* to invite judges from other common law jurisdictions to sit on the court, but leaves the *precise scope of that power* to be defined in the course of implementation of that general principle. In other words, the relevant articles in the Joint Declaration (as well as in the Basic Law) are said to be merely 'framework provisions which are intended to be fleshed out by more detailed legislative provisions.'

Yet it remains true that the mode of implementation (for example, through legislative prescription) must not circumvent the primary international obligation to perform the treaty in good faith (namely in accordance with the 'ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose'). 'An arrangement that denies the Court of Final Appeal flexibility in the choice of judges and unduly inhibits its power to invite overseas judges does not fully comply with one of the Joint Declaration's cornerstone promises of judicial autonomy.'<sup>14</sup>

Of greater concern, perhaps, is the issue of the CFA's jurisdiction, or more specifically, the stipulation inserted into the Hong Kong Court of Final Appeal Ordinance, pursuant to the 1995 agreement, that '[t]he Court shall have no jurisdiction over acts of state such as defence and foreign affairs.'<sup>15</sup> Although this clause merely replicates Article 19 of the Basic Law, its compatibility with the Joint Declaration should still be assessed in light of the applicable international treaty rules. An evaluation conducted within such a framework would, arguably, yield the conclusion that a severe restriction is imposed on the CFA which is inconsistent with both the judicial power postulated in the Joint Declaration and the constitutional doctrines affecting the decision-making process by local judges under a system internationally guaranteed to be maintained.

In particular, the incorporation in the CFA Ordinance of undefined (or loosely defined<sup>16</sup>) constraints, combined with a lack of explicit reference to

<sup>13</sup> In a letter dated 17 November 1994 from the Attorney General (J F Mathews) to the Chairman of the Hong Kong Bar Association, enclosing a British government statement on the Court of Final Appeal.

<sup>14</sup> See conclusion in International Commission of Jurists, *Countdown to 1997, Report of a Mission to Hong Kong* (Geneva: International Commission of Jurists, 1992), p 91 ('the agreement reached by the Joint Liaison Group on the composition of the Court of Final Appeal is contrary to the Joint Declaration and the Basic Law and is constitutionally invalid; the Court of Final Appeal itself should be allowed to determine the number and identity of foreign judges to sit as temporary members').

<sup>15</sup> Hong Kong Court of Final Appeal Ordinance (No 79 of 1995), s 4(2).

<sup>16</sup> In fact, the term 'such as' — rather than illustrate — has introduced an additional element of imprecision and vulnerability to an expansive interpretation. Note also that in the Chinese text of the 1995 agreement, the CFA shall have 'no jurisdiction over acts of state, that is, defence and foreign affairs, etcetera.' See Martin Lee (note 12 above).

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interpretative sources<sup>17</sup> and a failure to identify the determining authorities,<sup>18</sup> casts serious doubts on the implementation of the commitment in the Joint Declaration to vest the court with the 'power of final adjudication.' Whereas under the present common law system, the act of state exclusion is most narrowly construed and rarely invoked,<sup>19</sup> should other reference contexts prevail or defining power be removed from the judicial domain, the act of state exemption may arbitrarily expand at a heavy cost to judicial independence, citizens' rights, and the rule of law in Hong Kong.

Similar misgivings may be directed at any attempt to totally oust the judicial function in respect of 'questions of fact concerning [the undefined] acts of state.'<sup>20</sup> It is generally expected that where certain questions arise in the course of proceedings related to facts, circumstances, or events which are 'peculiarly within the cognisance of the Executive'<sup>21</sup> (for example, extent of territory, existence of a state of war, belligerency/neutrality, determination of status that entitles one to immunity from process, or recognition of a state/government), judges would seek the executive's statement or certification. Yet, the legal effects of the certified 'facts of state' (as well as the interpretation of the certificate itself) are matters that fall solely within the province of the judiciary.<sup>22</sup> Indeed, to preserve the judicial independence bestowed upon them in the Joint Declaration, HKSAR judges must not permit the expression of executive policy to usurp entirely the judicial function and must guard against the 'trap' of 'what may begin by guidance as to the principles to be applied and end in cases being decided irrespective of any principle in accordance with the view of the Executive as to what is politically expedient.'<sup>23</sup>

Independent judges in an autonomous regime may also be trusted not to 'embarrass or interfere with the Executive'<sup>24</sup> or hurt the national interest, by applying 'judicial restraint and abstention' which is said to be 'inherent in the very nature of the judicial process.'<sup>25</sup> That the curtailment of judicial autonomy

<sup>17</sup> It may be queried, for example, whether the term 'acts of state' should be interpreted by reference to English common law or — given its adoption in the present context from the Basic Law — be regarded as a matter of interpretation of the Basic Law.

<sup>18</sup> As a general rule in common law countries, the courts determine what constitutes an act of state. It has been argued, however, that — as in respect of other provisions in the Basic Law — the final arbiter regarding acts of state in the HKSAR would be the Standing Committee of the National People's Congress, in accordance with Art 158 of the Basic Law.

<sup>19</sup> Not even all acts related to foreign affairs and defence are beyond the scope of judicial power. Nor can the act of state exception be relied upon to usurp court authority over events on home territory. Clearly, acts of the executive affecting private rights would be subject to review if they are amenable to the judicial process.

<sup>20</sup> CFA Ordinance, s 4(3).

<sup>21</sup> See F A Mann, *Foreign Affairs in English Courts* (Oxford: Clarendon Press, 1986), p 23.

<sup>22</sup> *Ibid*, p 52. It may also be noted that English courts have tried to mitigate effects of the rigid certification — *ibid*.

<sup>23</sup> Mann, *ibid*, quoting Lord Cross of Chelsea in *The Philippine Admiral* [1977] AC 373, 399.

<sup>24</sup> The rationale underlying the act of state doctrine: see the leading American decision in *Baker v Carr* 369 US 186 (1962).

<sup>25</sup> *Buttes Gas v Hammer* [1982] AC 888, 932 (per Lord Wilberforce).