ARTICLES

NON-RECOGNITION OF PUTATIVE FOREIGN STATES (TAIWAN) UNDER SINGAPORE'S STATE IMMUNITY ACT

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1. INTRODUCTION

The power to conduct the foreign affairs of Singapore is vested in the President yet may be exercised by the Executive.¹ To that extent, Parliament in Singapore exercises ultimate control over the conduct of Singapore's external relations. Much else also remains the same as the case in the United Kingdom. The Government of the day cannot seek to alter the laws of Singapore; only Parliament can. Treaties entered into by the executive branch cannot, therefore, be applied by the courts without an enabling Act.² Thus, where a treaty may have as one of its effects an

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¹ Constitution of the Republic of Singapore, Articles 23 & 24.

² *Taw Cheng Kong v Public Prosecutor* [1998] 1 SLR 943, para. 74 ("...until ratified and enacted as an Act of Parliament, no international treaty can be binding on our courts", *per* Karthigesu J.A.); *Re Letter of Request from the Court of New South Wales for the Prosecution of Peter Bazos (Deposition Proceedings)* [1989] SLR 591 (Singapore, High Court) ("It is not disputed that the word 'agreement' used as an alternative to the word 'treaty' ... refers to an agreement between states that creates obligations in international law and not under the domestic laws of the countries concerned", *per* Chan Sek Keong J., as he then was). See also *PP v Salwant Singh s/o Amer Singh* [2003] SGDC 146 (Singapore Subordinate Courts, unreported), para. 36, citing *JH Rayner (Mincing Lane) Ltd v Dept of Trade and Industry* [1990] 2 AC 418. Mention should be made that, in respect of the decision in *Salomon v Commissioners of Customs & Excise* [1967] 2 QB 143, 144 (*per* Diplock L.J., as he then was), the position in Singapore is that the Act must *expressly* refer to the treaty in question for the latter to be called upon in aid of the interpretation of the former; Interpretation Act (Cap. 1), section 9A(3)(e); Lim, C.L., "Executive lawmaking in compliance of international treaty", [2002] *Singapore Journal of Legal Studies* 73, at 88, note 31.

alteration in the laws of Singapore, Parliamentary sanction would be required.³

Conversely, the courts cannot exercise the power to conduct Singapore's external relations, for the courts do not have that power. It is in light of this rule, and the rule that the power to conduct Singapore's external relations is vested in and is exercisable by the executive branch, that we might best approach the recent case of *Anthony Woo v Singapore International Airlines*.⁴ This is the first substantive judicial pronouncement by the Singapore courts on the scope, effect and role of executive certification under Singapore's State Immunity Act of 1979,⁵ which resembles closely the United Kingdom's State Immunity Act of 1978.

Singapore Airlines had sought to join the Civil Aeronautics Administration (CAA) of Taiwan⁶ as a third party in proceedings brought by the plaintiff, Anthony Woo. The circumstances leading to the case concern the crash of Singapore Airlines flight SQ006 in Taipei's Chiang Kai Shek Airport. Before Choo Han Teck J., the Taiwanese CAA argued either (a) that it was entitled to state immunity should Taiwan be a recognized state *de jure* for the purposes of Singapore's 1979 State Immunity Act, or (b) that if it is not recognized *de jure*, then the courts should nonetheless enquire whether it is at least recognized *de facto* for the purposes of the Act.⁷ The case was brought on appeal to Singapore's Court of Appeal in *Civil Aeronautics Administration v Singapore Airlines Ltd*,⁸ and it raises the question of what principles of construction the English courts would ordinarily apply to an executive certificate under Section 21 of the United Kingdom's State Immunity Act of 1978, a provision substantially similar to Section 18 of the Singapore Act of 1979. More specifically, should the Executive be taken, ordinarily, to wish to determine the availability of immunity to a putative foreign state from domestic legal process?

2. THE "CARL ZEISS" DOCTRINE REVISITED

It is said that the state must speak with one voice; meaning that the courts ought not to contradict the view of the executive branch in conducting the external relations

³ In the context of English law, this last statement of doctrine has caused a further distinction to be drawn between treaties which have the incidental effect of altering English law and treaties which are intended to alter English law. It is said that only the latter sort of case would require Parliamentary sanction, and that is presumably also why such treaties are invariably to be brought before Parliament today under the Ponsonby Rule. See Mann, F.A., *Studies in International Law* (Oxford: Clarendon, 1973), at 393-394.

⁴ [2003] 3 SLR 688.

⁵ (Cap. 313).

⁶ This is how I shall hereafter refer to the Republic of China to avoid confusion with the People's Republic of China.

⁷ [2003] 3 SLR 688, para 4.

⁸ *Civil Aeronautics Administration v. Singapore Airlines Ltd.*, [2004] 1 SLR 570 (C.A.) (Chao Hick Tin J.A.; Woo Bih Li J.).

of the nation.⁹ However, today, English law is more unclear on this point of singular importance. In the *Carl Zeiss* case, in response to the then German Democratic Republic's attempt to apply its own legislation, the question there was whether the GDR could make such laws as would be recognized in the eyes of the English courts. The simple answer, taking as an example the conduct of Her Majesty's Government, was clearly "no". The Foreign and Commonwealth Office (FCO) had left a loophole, if only a slight one, through which the courts were subsequently to enter. That "loophole" was couched in the following words of Lord Reid, paraphrasing the certificate of the FCO in that case:¹⁰

"From the zone allocated to the USSR Allied forces, under the Supreme Allied Commander ... withdrew at or about the end of June, 1945. Since that time and up to the present date Her Majesty's Government have recognized the state and government of the USSR as *de jure* entitled to exercise government authority in respect of that zone ... and ... have not recognized either *de jure* or *de facto* any other authority purporting to exercise governing authority in or in respect of the zone."

The House of Lords could have inferred both from the terms of the certificate and from the nature of the relationship between HMG and the Government of the GDR that HMG did not at all, either *de jure* or indeed *de facto*, recognize any authority other than the USSR purporting to exercise governing authority in the particular zone. This the House of Lords did. The House could have adhered also to the spirit of the "one voice" doctrine, which no one seemed to question at that time. It could have concluded that the GDR Government was therefore not an "independent" governing authority. This the House of Lords also did. The difficulty that arose instead was that the House of Lords had also gone on to conclude that while the Government of the GDR was not an independent Government, it was nonetheless the *delegatus* of one; the *delegans* being the Government of the USSR.

With this fiction of a delegation of governmental authority, the House proceeded to recognize the legislation in question as, in the ultimate analysis, that of the Government of the USSR itself, and therefore valid. That decision has rather severely been criticized for the alleged mockery it makes of the doctrine that judicial notice will be taken of executive certificates.¹¹ According to this criticism, if the "one voice" doctrine is (truly) to be upheld, such certificates should in almost all cases be treated as conclusive on the question asked, barring a few well-known exceptions today, such as where the matter is not truly one within the sole knowledge of the executive branch, or where the construction of a statutory term is therein involved, for example. At the very least, this must be so in respect of the British Government's view on

⁹ *Republic of Spain v SS "Arantzazu Mendi"* (*The Arantzazu Mendi*) [1939] A.C. 256, 264 ("Our state cannot speak with two voices on such a matter, the judiciary saying one thing, the executive another").

¹⁰ [1966] 2 All E.R. 544 (*per* Lord Reid).

¹¹ See for example Greig, D.W., "The Carl-Zeiss case and the position of an unrecognised government in English law", 83 *LQR* (1967), at 96.

whether it recognizes a foreign state (and until 1980, in respect of the recognition of foreign governments, too), for the simple reason that no one ought to know better than HMG.

Yet we will recall that the House was undaunted when, subsequently, it faced a similar situation in 1986, this time involving the “Bantustanization policy” of the Government of South Africa.¹² In *GUR Corporation v The Trust Bank of Africa Ltd*,¹³ the Government of South Africa had sought to alleviate criticism of its apartheid policies by granting “independence” to the several “Bantustans”, one of which was to have been the “Republic of Ciskei”. The plaintiff had built a hospital and two school buildings on behalf of the Department of Public Works of the Republic of Ciskei (DPWRC) and sought the return by the defendant (the Trust Bank of Africa) of a deposit given by it to the building owners (DPWRC). The defendant bank sought to join the building owners as third parties. Steyn J. (as he then was) adhered to the “one voice” doctrine in holding that the building owners could not by virtue of being the apparatus of an unrecognized Government be sued in the English courts. Nor was common sense abandoned here, for it is well understood that businessmen should be wary even in their dealings with a *de facto* Government, let alone one that was recognized as neither *de facto* nor *de jure*.¹⁴ The Court of Appeal reversed the decision and applied the “*Carl Zeiss* doctrine”; namely, that the DPWRC was acting on behalf of the Republic of South Africa itself. That the facts (namely, the terms of South Africa’s 1981 Status of Ciskei Act) did not bear this out (purporting, after all, to have granted the Republic of Ciskei independence) was considered inconsequential to the point. Again, criticism followed, and justifiably so,¹⁵ notwithstanding that in both this case and in *Carl Zeiss*, the result was in all probability highly convenient for all concerned, including the UK’s Foreign and Commonwealth Office (FCO). Dr. Lawrence Collins has recently highlighted this convenient outcome in *Carl Zeiss*.¹⁶ Similarly, the late F.A. Mann had, in the past, pointed out the convenient outcome in the *GUR Corporation* case.¹⁷

In any event, the form of judicial activism witnessed in both *Carl Zeiss* and *GUR* appears to have caught on. The fact that judges both within and outside the United Kingdom closely examine executive certificates today should not surprise us.¹⁸ In

¹² For that policy, see Heunis, Jan C., *United Nations versus South Africa: A Legal Assessment of United Nations and United Nations Related Activities in respect of South Africa* (Johannesburg: Raand Afrikaans University, 1986).

¹³ [1986] 3 WLR 583.

¹⁴ More will be said below.

¹⁵ See Mann’s case-note on this, reprinted as “The judicial recognition of an unrecognized state” in Mann, F.A., *Further Studies in International Law* (Oxford: Clarendon, 1990), at 386; 36 *ICLQ* (1987), at 348.

¹⁶ Collins, Lawrence, “Foreign relations and the judiciary”, 51 *ICLQ* (2002), at 485, 491-492.

¹⁷ Mann, *op. cit.*, n. 15, at 388.

¹⁸ *Re Al-Fin Corporation’s Patent*, [1970] Ch 160; *Reel v Holder*, [1981] 1 WLR 1226, 1228 (*per* Lord Denning MR). A recent example from Malaysia is *MBF Capital Bhd & Anor v Dato’ Param Cumaraswamy*, [1997] 3 *MLJ* 300 (“I find that there is compelling ground to resist judicial self-restraint”, *per* Zainun Ali J.C.).

Chen Li Hung & Others v Ting Lei Miao & Others, involving the recognition of a judicial order of the Taiwanese courts, the Hong Kong Court of Final Appeal may be seen recently to have chosen to follow the broad approach taken in *Carl Zeiss and GUR*.¹⁹ *Chen* had also resulted in a highly pragmatic result as a factor that would otherwise have been disastrous, namely, the non-recognition by Hong Kong Courts of the orders of the (non-recognized) Taiwanese courts involving private rights, was thereby avoided. The reasons given by the Hong Kong Court were that the recognition issue can be side-stepped where private rights are concerned, or where justice, the dictates of common sense, and the needs of law and order require to be met, and (finally) where giving effect to such orders would not be inimical to the forum state's sovereign interests or would otherwise be contrary to public policy.²⁰ Lord Cooke also went further, pointing out that the outcome in *Chen* was, in fact, entirely in the sovereign interests of the People's Republic of China, saying:²¹

"I think that reunification will tend to be promoted rather than impeded if people resident in Taiwan, one part of China, are able to enforce in Hong Kong, another part of China, bankruptcy orders made in Taiwan."

Turning to our present case, the first question before the Singapore court in *Anthony Woo* was how far it would be willing to see beyond a certificate issued by the Singapore Ministry of Foreign Affairs. In this article, I shall generally refer to this last as the question of "*de facto*" recognition, by which I mean the implied recognition of the Singapore Government. Purists may object that there is no such thing as "*de facto* recognition" as such, but simply recognition of the *de facto* existence of a foreign state. Nevertheless, most would admit that in practice the term "*de facto* recognition" has not been used with total strictness, and it does not seem to have been used in this way by the Singapore courts. Where such reference is intended to mean recognition of *de facto* statehood, the context in which the particular reference appears should reveal the intended meaning. I would also argue that *de facto* recognition of Taiwanese statehood by Singapore would be sufficient to show the acknowledgement of the authority in Taipei as an entity that currently exercises effective governmental authority over the territory in question.

3. "NON-CERTIFICATION" AND "NON-RECOGNITION"

The facts are as follows. A request was made of the Singapore Ministry for a certificate under section 18 of the Singapore State Immunity Act; namely, for a "con-

¹⁹ [2000] HKLRD 252; Collins, *op. cit.*, n. 16, at 492-493. See also *Re James (an insolvent) (A-G intervening)*, [1977] Ch 42, 70G, quoted with approval by Bokhary P.J. in *Chen*, at 261E-G and Lord Cooke of Thorndon NPJ, at 265F-I.

²⁰ *Ibid.*, at 262J-263D.

²¹ *Ibid.*, at 267D.

clusive” view by the Executive of the status of Taiwan as a “state” defined therein. The Ministry replied in the following terms:

“I wish to inform you that we are unable to issue the certificate pursuant to S. 18 of the State Immunity Act.”

There were, in theory, two broad approaches open to the learned judge, Choo J., at this juncture. One was the view taken by Dr. Lawrence Collins, and indeed the UK and Singapore Acts, that the enforcement of private rights (in this case, a tort action) should not be held hostage to public international law principles, and the other that of the late F.A. Mann, who would tend to favour close adherence to the “one voice” doctrine instead. Without over-simplification, the former view would generally involve a greater tendency to see beyond the executive certificate, or to side-step it in some other way, whereas the latter would be minded to steer the courts away from what is properly seen to involve the exercise of the prerogative in foreign affairs. The real achievement, however, is to serve both ends, which I believe is what the Singapore courts have done ultimately.

Much turned on the precise formulation adopted by the Singapore Ministry in its reply, and it is of course a matter usually of decisive importance in these sorts of cases. For example, Dr. Mann saw the matter in *GUR* simply as one requiring a different formulation in future FCO certificates should the FCO wish to avoid the outcome therein and *Carl Zeiss*,²² to wit:²³

“No State is recognized by Her Majesty’s government as exercising any governing authority in the territory occupied by the organization describing itself as the Republic of Ciskei.”

In the context of the *Carl Zeiss* case, the words “no State” (if used instead) would similarly have precluded the authority both of the GDR *and* the USSR to legislate in respect of the territory in that case. There would have been no loophole for the courts.

In *Anthony Woo*, Choo J. concluded on the terms of the Ministry’s reply that “couched in polite and diplomatic terms”, the answer given by the Singapore Ministry was, in effect, that Taiwan was not a “state” for the purposes of the Act.²⁴ Did the certificate actually say that and, if it is unclear what the Ministry has said, should not the question have been returned to the Ministry for clarification? Choo J. expressed his preference for this latter suggestion only over that of counsel that, alternatively, the court should independently inquire into the facts of the relationship between Singapore and Taiwan. In any event, the learned judge did not think such a return of the question to the Ministry necessary in this case.²⁵

²² Which is not to say that the FCO necessarily did; Collins, *loc. cit.*, n. 16, at 492.

²³ Mann, *op. cit.*, n. 15, at 388.

²⁴ [2003] 3 SLR 688, para. 7.

²⁵ *Ibid.*, paras. 4 and 7.

It would have been helpful at least to know what policy on the recognition of governments Singapore follows here if the conclusion drawn by Choo J. should be seen to have been unarguably justified. For example, if it were established in curial terms that the Singapore Government considers no state to be recognized unless it is formally recognized, then it would have provided a more solid basis for the inference drawn here that the Singapore Government was really, in a diplomatic manner of speaking, saying, “No, Taiwan is not recognized by Singapore”. As I shall discuss below, Choo J. went on instead to pursue a different course of reasoning based on the determination that the reply of the Ministry was, in fact, clear.

4. DECLINING THE “CARL ZEISS” DOCTRINE

Counsel had raised the first of a two-pronged argument.²⁶ The first “prong” is essentially an argument based on the *Carl Zeiss* doctrine. The argument goes: Even if it cannot be said (which Choo J. did say, however) that a Section 18 certificate under Singapore’s State Immunity Act of 1979 is available in respect of the putative Taiwanese state, it is at least uncontroversial that the People’s Republic of China is a “state” for the purposes of Section 3(1) of the Singapore Act (i.e., a state entitled to the protection of the Act). This was nothing short of an invitation to the judge to follow the precedent in *Carl Zeiss*, *GUR* and, most recently, *Chen* in the Hong Kong courts. In response, the judge asked simply if that was, in fact, Taiwan’s (or at least the Taiwanese CAA’s) argument – that the Government of Taiwan was merely the *delegatus* of the Government of the PRC (the *delegans*). Unsurprisingly, counsel clarified that this was not the Taiwanese Government’s position. This clarification, as far as Choo J. was concerned, dispensed with the first argument raised by counsel, but it leaves another and more serious difficulty.²⁷

Counsel had also asked (the second “prong”): What if, clearly, the Taiwanese Government and state were recognized, albeit simply *de facto*, by the Singapore

²⁶ I have, for the sake of clarity of presentation, inverted the actual order of the two “prongs” of the argument as they appear in the judgment of Choo J.

²⁷ [2003] 3 SLR 688, para. 8. As Choo J. observed: “First ... [counsel, Mr. Loo, had] ... argued that if Taiwan is not a state because, in Mr. Lok’s submission, the Singapore government recognizes it as part of the People’s Republic of China (Mainland China), then it must have immunity under the Act since the People’s Republic of China has immunity and it is a recognized state, *de jure* and *de facto*. If the third party, claiming to be a department of the government of the Republic of China (Taiwan) advances this as a serious argument then it will obviously be a strong argument, but unless it does so, I am not bound to consider this argument seriously. Mr. Loo prefaced this submission with a strong *caveat* that that was not Taiwan’s stand.” It may be observed that in the *Carl Zeiss* and *GUR* cases, too, the parties would have disagreed with the position that they were mere subordinate bodies of the USSR and South Africa, respectively. It may therefore be contended against the view taken by Choo J. that it is not ultimately the position of the parties that is relevant. Instead, it is the factual situation in the eyes of the court that would be relevant. The conclusion drawn by Choo J. is instead consistent with his view that an independent judicial inquiry was not warranted as to the situation existing *de facto* in the *Anthony Woo* case.

Government? Should the Singapore courts not look into this, *independently* of what the Executive says in its certificate? Alternatively, should not a certificate be constructed in light of what is known (through independent judicial inquiry) about the policy of the Singapore Government (thus ensuring adherence to the “one voice” doctrine)?²⁸ According to counsel, Taiwan and Singapore had entered into a bilateral tax treaty, for example. Is this not proof of *de facto* recognition? The answer, according to Choo J. was “yes, but *only if* the executive should so certify” (i.e., in express terms).²⁹ The learned judge added that the suggestion that *de facto* recognition is of “equal importance” for the purposes of the Act may also be something of “an exaggerated idea”.³⁰ With respect, it is not clear that Choo J. would have had the last word on this, for here we enter treacherous waters.

5. CERTIFICATION OF *DE FACTO* STATEHOOD

Choo J. had in effect, though not expressly, chosen the “one voice” doctrine as his guide. Having, as we have seen, expressed some scepticism towards the entity of a *de facto* recognized state, the learned judge was nonetheless reluctant to preclude the executive branch from ever wishing to certify that a state is only recognized *de facto* (i.e., should the Executive ever wish to do so).

On the face of it, this sentiment is understandable to the extent that the Singapore courts could otherwise be in danger of usurping the executive function. It is the Executive, after all, whose function it is under Section 18 of the Singapore Act (couched in terms similar to those in Section 21 of the UK Act) to provide a certificate on the recognition issue. Moreover, Section 18 says that such a certificate “shall be conclusive evidence”, and thus if a Singapore judge were to preclude the mere possibility of the Executive wanting perhaps to distinguish between *de facto* and *de jure* recognition of a foreign state or government, that would be unwarranted.

It is nonetheless hard to imagine that the executive branch would normally be minded to distinguish expressly between certification of recognition as amounting only to recognition of the putative foreign state as a *de facto* state and not a state existing *de jure*, and indeed *vice versa*.³¹ Having said that, cases of the sort Choo J. may have had in mind could exist, even if they may be very rare. An apparent example is the certificate given in *Luther v Sagor* where, having said that the USSR Government was indeed a “State Government of Russia”, the letter went on to say:

²⁸ Section 3(1) is in *pari materiae* with the UK’s State Immunity Act of 1978, section 1(1).

²⁹ [2003] 3 SLR 688, paras. 7, 10, 11.

³⁰ *Ibid.*, para. 6.

³¹ See Talmon, Stefan, *Recognition of Governments in International Law* (Oxford: OUP, 1998), at 90. In effect, this may also be due to the fact that, logically speaking, recognition is best considered recognition of a state of affairs that exists either *de jure* or *de facto*, and that it is not the recognition itself that distinguishes between the two situations; McNair, Sir Arnold Duncan, *The Legal Effects of War* (Cambridge: CUP, 1944), at 353, note 1; Chen, Ti-Chiang, *The International Law of Recognition* (London: Stevens, 1951), at 274.

"I am also to add that His Majesty's Government have never officially recognized the Soviet Government in any way."³²

However, that case can be distinguished. In *Luther v Sagor*, the British Government had not sought to preclude recognition of *de facto* governmental authority, but simply to preclude any intimation of recognition of *de jure* governmental authority. Moreover, *Luther v Sagor* was concerned with the recognition of a foreign government. As we shall see, matters become far more complicated if what is (in actual fact) sought to be precluded by the Executive is *also* recognition of *de facto* statehood. In principle, however, I accept that there is no logical reason for thinking that the Singapore Government could be precluded from recognizing a putative foreign state only as a *de facto* state under Section 18 of the Singapore Act.

In any event, could Choo J. have straightforwardly assumed "*obiter-wise*" that returning the issue to the Executive for a clearer certificate is likely in future to produce the results required? In the present case alone, it is difficult to see how else the Ministry could be approached so as to elicit a more useful response. There will almost certainly be cases in the future where the Singapore courts may therefore have to do just what counsel in this case sought, which is to enter into the facts of the relationship between the forum state and the foreign state, the consequent risks inherent therein to the "one voice" doctrine notwithstanding.³³ Indeed, the Singapore Court of Appeal, while agreeing with Choo J. that such an independent judicial inquiry was not necessary in the *Anthony Woo* case, went on to conduct just such an inquiry on appeal in a lengthy aside.

The potential difficulty with the construction ultimately placed on the "non-certificate" by Choo J. is the inherent distinctively legal point. One recognizable exception to the "one voice" doctrine in England (ostensibly because Parliament is supreme) is that the English courts will not always accept a statutory construction proposed by the executive branch.³⁴ To put it differently, this is because provisions such as Section 18 of the 1979 Singapore Act cannot ultimately be construed by the

³² Quoted in Symmons, C.R., "U.K. abolition of the doctrine of recognition of governments: A rose by another name?" [1981] *Public Law*, at 249, note 51, 256. An incidental point here is that the certificate pertained to the recognition of a foreign Government, not a foreign state, but, simply put, we should be satisfied with the observation that there is, simply, no state if there is no Government (as there is no Government if there is no state, as Mann observed. Mann, *op. cit.*, n. 15, at 388). At the very least, even if we could contend against Mann that the conclusion that there is no state without a Government is generally untrue, Mann would nonetheless be correct if the issue that arises is one of state immunity, for who then would press that right? See further, on recognition of statehood taking the form of the recognition of a foreign government, Brownlie, Ian, *Principles of Public International Law* (Oxford: OUP, 6th ed, 2003), at 90, citing the 1919 recognition by the British Government of the Estonian National Council.

³³ It still remains to be seen whether, should a suitable test case present itself, the Singapore courts would be willing to adopt the approach suggested recently by Dr. Collins, and even earlier by Lord Denning, or would be willing instead to stick to the view long held by the late F.A. Mann. See further, *Rahimtoola v Nizam of Hyderabad*, [1958] AC 379, 418 (PC, *per* Lord Denning).

³⁴ See *Re Al-fin Corporation's Patent*, [1970] Ch 160.

Executive, or even by reference to the Executive; this can be done only by the courts acting alone (with no reference at all to the Executive).

6. SOME LIMITATIONS ON EXECUTIVE CONTROL

Arguably, the very enactment of the State Immunity Act in Singapore shows a clear Parliamentary intent, in line with that which other countries who have thought fit to enact similar legislation have done: that the *substantive* legal issue of immunity should be removed from Executive hands altogether. As far as Sections 18 and 21 of the Singapore and United Kingdom Acts, respectively, are concerned, they lie at odds with the remainder of the Singapore and United Kingdom Acts since they encapsulate the view that there are some questions of fact nonetheless peculiarly within the knowledge of the executive branch – and not of the courts. Therein lies the problem although, in practice, any real tension between Section(s) 18 (and 21) and the remainder of the Singapore (and United Kingdom) Act(s) is avoided where the United Kingdom FCO is known, for example, to therefore steer clear of what could be pronouncements not on questions of fact, but on questions of law.³⁵ This

³⁵ Evidence of this view, taken by the British Foreign Office (hereafter, “FCO”), may be found in various places. Most recently, Dr. Lawrence Collins reported that the records made available under the United Kingdom’s thirty-year rule for declassifying documents show a conversation taking place between Dr. F.A. Mann, who was representing the *Stiftung* in the *Carl Zeiss* case and who had pressed the FCO for help when he anticipated the judgment of the House of Lords going against the *Stiftung* on the non-recognition point (that the East German decrees were really decrees of the USSR as the *de jure* authority in the territory) and the FCO. The Foreign Office official wrote: “On 15 December, Dr. F.A. Mann, a senior partner in the firm of solicitors acting for the West German Zeiss, came to see me late in the evening, told me that the House of Lords seemed very much against his clients on the ‘non-recognition’ point and left with me a note of certain questions which it was proposed to move the House of Lords to address the Foreign Secretary next day. I may say that the proposed questions went to the very limit (if not over it) of the matters which the Foreign Secretary can properly certify to a court”; Collins, *loc. cit.*, n. 16, at 491. It seems from the nature of the FCO memorandum to have survived that what Dr. Mann wished the FCO to pronounce upon would have been to seek to dissuade the House of Lords from the view that “the acts (legislative, judicial and administrative) of the East German authorities will be held to be legally valid acts, at least within their proper sphere...”, while allowing the Foreign Office to maintain nonetheless “that the East German authorities are merely puppets of the Soviet Union”; *ibid.*, at 492. See further, for the proposition from the viewpoint of an FCO Legal Adviser that there are cases involving questions of law therein that the FCO will, by virtue of its prerogative power, refuse to issue a certificate at all, Wilmshurst, Elizabeth, “Executive certificates in foreign affairs: the United Kingdom”, 35 *ICLQ* (1986), at 157, 168. The proposition is a sound one, so that in *Carl Zeiss*, the House of Lords spoke of the “conclusive information provided by Her Majesty’s Government”, for example ([1966] 2 All ER 536, 544), and even in cases such as *Luigi Monta of Genoa v Cechofracht Co. Ltd.*, which appear to go against the conclusiveness of an FCO certificate, Sellers J. had simply considered there that the evidence furnished by Her Majesty’s Government (attesting to the non-recognition of the “Formosa Government”) would nonetheless permit the phrase “any government” in a clause in a charter party to be construed according to evidence other than an FCO certificate; [1956] 2 Q.B. 552; discussed in Symmons, *loc. cit.*, n. 32, at 255. But compare the

distinction between questions of law and of fact in executive certificates has thereby caused *Oppenheim*, for example, to observe that where the issue is not purely one of fact, an executive certificate is not necessarily conclusive for the purposes of the English courts.³⁶ Moreover, in the Singapore context, the Constitution (in Article 93) clearly differentiates between executive and judicial powers, causing a recent pronouncement by a District Judge that he cannot take judicial notice of a purported agreement between the Singapore and Indian Governments that may affect the sentencing discretion of the courts.³⁷ If all of this is correct, we should therefore conclude that the “one voice” doctrine ceases to have the same significance where there is an Act such as the current one in place, placing the substantive question of legal immunity in the hands of the courts.

The letter from Singapore Airlines to the Ministry in *Anthony Woo* reads, for example:³⁸

The CAA made an interlocutory application to set aside the action on the basis that, as a department of the Ministry of Transport and Communication of the Republic of China, it is immune from the jurisdiction of Singapore courts pursuant to Section 3 of the State Immunity Act (Chapter 313)(“the Act”)

Under Section 18 of the Act, a certificate by or on behalf of the Minister for Foreign Affairs is necessary to conclusively indicate whether any country is a ‘state’ for the

somewhat different approach taken by the U.S. State Department to certification involving questions of law in *The Republic of Vietnam v Pfizer, Inc. et al*, 556 F.2d 892, C.A. Minn. 1977, June 15, 1977 (United States Court of Appeals, Eighth Circuit, Gibson, Chief Judge; Bright and Henley, Circuit Judges). In *Pfizer*, the State Department, after certifying that: “[t]he Government of South Vietnam has ceased to exist and therefore the United States no longer recognizes it as the sovereign authority in the territory of South Vietnam” and that “[t]he United States has not recognized any other government as constituting such authority”, went on to state that “[t]he Department of State would not advise any requests to the Court to suspend, rather than dismiss, the proceedings”.

³⁶ Jennings, Sir Robert and Watts, Sir Arthur (eds.), *Oppenheim’s International Law*, Vol. 1 (Harlow: Longman, 9th ed, 1992), at 1049. For what is perhaps a slightly different view, however, see Vallat, Sir Francis, *International Law and the Practitioner* (Manchester: University Press, 1966), at 54 where he says: “It is believed that the test of a true certificate is not whether the facts are peculiarly within the knowledge of the Foreign Office or such as the Foreign Office may reasonably be expected to know or which the Foreign Office ought to know in the conduct of its business, but the presence of some element of recognition by Her Majesty’s Government... When, however, it comes to a matter of recognition, there is no source which can state with equal authority what is or is not recognized by the Government.” This last must be true, but only provided the FCO actually states its policy in clear terms – which I argue here that the Singapore Ministry did not do.

³⁷ *PP v Salwant Singh s/o Amer Singh*, [2003] SGDC 146 (Singapore Subordinate Courts, unreported). Article 93 of the Constitution of the Republic of Singapore reads: “The judicial power of Singapore shall be vested in a Supreme Court and in such subordinate courts as may be provided by any written law for the time being in force.”

³⁸ [2003] 3 SLR 688, para 3. We are told simply in the judgment of Choo J. that: “The third party had, similarly, applied for a s 18 certificate and was also given the same reply”.

purposes of Part II of the Act. Enclosed herewith are extracts of Part II and Section 18 of the said Act for your easy reference.

That letter is, therefore, concerned with whether Taiwan would *qualify* for treatment under the Act, and not whether if Taiwan did qualify it would (necessarily) possess such immunity. Consider two points, both of which, I consider, suggest that Choo J.'s comments on the intended import of the Executive (i.e., that Taiwan is not recognized internationally by Singapore), even if correct as a matter of construction, could not have led automatically to the conclusion that the Executive has thereby determined the legal conclusion to be reached.

Firstly, the Singapore Act, following the UK Act, has adopted the approach of stating a complex number of sometimes interlocking rules intended to determine the question of immunity by way of the application of legal principle. It cannot, for example, be supposed then that the Taiwanese CAA in *Anthony Woo* was asking the Ministry in Singapore to apply the law to the facts.³⁹ If this is correct, even if the Executive had pronounced on non-recognition *de jure*, it remains open to the Singapore courts to find that an entity such as the Taiwanese CAA was, in fact, exercising *de facto* sovereign authority. Coupled with the fact that subject-matter jurisdiction over the kind of exercise of power in this case would more likely than not be precluded under the Act (see below – personal injury occasioned outside Singapore), the courts should be cautious about short-circuiting the entire process by their simply finding that the foreign state is not even recognized *de facto*.

As Professor Ian Brownlie and others have observed in the English context, the rise of the restrictive theory of immunity (which the Singapore Act embodies) has since encroached on immunity *ratione personae* and consequently brought greater attention to bear on subject-matter jurisdiction instead (i.e., immunity *ratione materiae*). Accordingly, there has, in this regard, been a noticeable tendency for the English courts on occasion to reduce the effect of the restrictive theory of immunity simply by declining to find subject-matter jurisdiction instead. While this remains an admittedly controversial proposition,⁴⁰ Brownlie has suggested that:

³⁹ Generally speaking, the Singapore and UK Acts, as does the Australian Foreign States Immunities Act 1985, take the approach of having a general rule of immunity first (i.e., that sovereign states are accorded immunity), and only thereafter listing a number of exceptions to that general rule. Ordinarily, in cases involving commercial disputes, the courts would still have to determine whether, for example, a “commercial transaction” within the meaning of the Act is involved, in which case the courts may have to decide whether the “transaction” or “activity” is one “into which a State enters or in which it engages otherwise than in the exercise of sovereign authority”. See Section 5(3)(c) of the Singapore Act, which is almost identical to Section 3(3)(c) of the UK Act. For the immunity of “separate entities”, see section 16(2) of the Singapore Act and section 14(2) of the UK Act, and *Kuwait Airways Corporation v Iraqi Airways Co.* [1995] 1 WLR 1147 (HL). In *Anthony Woo*, however, the Taiwanese CAA claimed to be a department under the Taiwan Government, and this claim was not contested.

⁴⁰ Fox, Hazel, *The Law of State Immunity* (Oxford: Oxford University Press, 2002), at 477-502. In any event, Lady Fox's criticism appears to be based on the continued utility of status-based immunity, something which is not denied here.

“A connected question of considerable significance [therefore] is the distinction ... between immunity as a plea based upon the status of the defendant as a sovereign state (*ratione personae*), and immunity *ratione materiae*, which affects the essential competence of the local courts in relation to the particular subject-matter. The immunity *ratione personae* (procedural immunity) is a bar to the jurisdiction of the state of the forum which would exist (or be presumed to exist) but for the existence of a title of immunity. In fact the proponents of the principle of restrictive immunity, by reducing the role of status as a basis for conferring a title to immunity, have inevitably given greater prominence to the nature of the subject-matter and the issue of the essential competence of the judicial organs of the forum state.”⁴¹

This question of subject-matter jurisdiction may be considered relevant where, as I shall further maintain below, the Singapore courts are ordinarily to be precluded from questioning the acts or omissions of a sovereign authority abroad by the courts of the forum state. While this might appear subject to qualification as a state under the State Immunity Act, there is room for debate in respect of the way the Singapore (and United Kingdom) Acts have been drafted. Singapore’s 1979 State Immunity Act speaks in Section 18 of conclusive certification of recognition by the executive branch for the purposes of the application of the Act, but one wonders if the Act is comprehensive in this regard; by this, I mean to ask whether it has replaced every aspect of the common law previously existing. In the case of personal injury occurring abroad, clearly the State Immunity Act 1979 envisages that a state for the purposes of the Act would enjoy immunity for such acts occurring abroad – indeed the fact that the Act in stating that personal injuries occurring in Singapore would not enjoy immunity would suggest this (Section 7). Under the Act, such immunity may seem to be tied to the question of status under Section 18. However, if the State Immunity Act seeks merely to codify the common law previously existing then, where the government is silent, the rule against entertaining actions for personal injury brought before the forum state’s courts for acts or omissions of a (*de facto* or *de jure*) foreign sovereign occurring abroad becomes not simply a matter of whether the status of a foreign sovereign is one expressly recognized by the state of the forum courts as such.

As Lord Wilberforce famously pointed out in *Buttes Gas and Oil Co v Hammer* there is a *separate* element of immunity *ratione materiae*, for which *Buttes Gas* has since stood as good authority. Indeed, Lord Wilberforce emphasizes the distinction, where he says of the rule in *Duke of Brunswick v Hanover* that there were “two elements in this case, not always clearly separated”: namely, the question *ratione personae* and the question *ratione materiae*. If we accept that a foreign “sovereign authority” may, for example, be acknowledged as such by way of an independent

⁴¹ Brownlie cites, *inter alia*, the Court of Appeal’s decision in *Kuwait Airways Corporation v Iraqi Airways Company*, 71 BYIL (2000), at 408 (CA), as an example. The case is one part of a string of such decisions following *Littrell v United States*, (No. 2) [1995] 1 WLR 82 (CA). See Brownlie, *op. cit.*, n. 32, at 326–327. But compare the view taken by the House of Lords in the *Kuwait* case, [1995] 1 WLR 1147.

judicial inquiry where the Executive is simply silent (which I maintain was the case in *Anthony Woo*), the fact that the present case involved “acts ... performed in the territory of the sovereign concerned” (*per* Lord Wilberforce) should perhaps have been taken perhaps to suggest that an independent inquiry into the sovereign status of Taiwan was especially important in the present case (I propose to return to this issue in Section VIIB, below).⁴²

Secondly, the “certification clause” in Section 18(a) of the Singapore Act and 21(a) of the UK Act does not preclude the earlier (pre-State Immunity Act) *dicta* in *Duff Development v Kelantan*.⁴³ According to the *Kelantan* doctrine, at common law the courts would still decide on the question of the status of the foreign putative state in the event of non-certification by the executive.⁴⁴

What is striking is that Choo J. had gone on to construe the “non-certification” in that case to mean that the putative foreign state *cannot* be immune. Arguably, this last is properly a question of law for the judge, not a question of fact suitable for Executive determination. Choo J. had reasoned that:⁴⁵

“... [T]he definition of a *de facto* state is necessary solely for the purposes of giving effect to the State Immunity Act. The incongruous situation of having an entity that looks like a state, behaves like a state, and yet not be recognised by a court of law as a state, is in my opinion, the lesser contradiction. It is a greater contradiction to have an entity given immunity when its existence is recognised *de jure* or *de facto*, and also when it is not recognised at all.”

Singapore’s Court of Appeal appears, on the other hand, to have come closer to addressing these issues on appeal in *Civil Aeronautics Administration v Singapore Airlines Ltd*.⁴⁶ While the Court of Appeal affirmed the learned High Court judge’s view that, in effect, the Ministry of Foreign Affairs was saying that Singapore does not recognize Taiwan,⁴⁷ Chao Hick Tin J.A. (who delivered the judgment of the court) went on to provide two notable clarifications.

Firstly, the Court of Appeal appears to have acknowledged that certification under the Singapore Act is merely certification *as to whether* Taiwan is a recognized State *for the purposes (only) of the application of the Act*. In other words, the Executive

⁴² *Buttes Gas and Oil Co. and Another v Hammer and Another*, [1982] AC 888 (*per* Lord Wilberforce).

⁴³ [1924] AC 797 (HL).

⁴⁴ Professor David Harris must be correct in this regard; Harris, D.J., *Cases & Materials on International Law* (London: Sweet & Maxwell, 5th ed, 1998), at 331.

⁴⁵ [2003] 3 SLR 688, para. 10.

⁴⁶ *Civil Aeronautics Administration v. Singapore Airlines Ltd*, [2004] 1 SLR 570 (C.A.) (Chao Hick Tin J.A.; Woo Bih Li J.).

⁴⁷ *Ibid.*, paras. 13-14.

cannot certify the point of law therein involved; ultimately, whether Taiwan was immune under Singapore law.⁴⁸

The terms of Section 18 of the Singapore Act (Section 21 of the UK Act), properly construed, militate against allowing the Government such power of “substantive” certification.⁴⁹ Section 18 (Section 21 of the UK Act) states that a certificate “shall be conclusive evidence” only as to “whether any country is a State” for the purposes of the Act.⁵⁰ These words could in the particular manner in which a request is framed refer to the general rule granting immunity, to one of the “exceptions”, or indeed to both. It is also worth recalling that, if the purported views of the Ministry are put aside, subject-matter jurisdiction would arguably have been absent under the Singapore and UK Acts on the facts of the *present* case, since damage to or loss of tangible property and personal injury caused outside Singapore would *ordinarily* attract immunity by falling outside one of the “exceptions” to immunity under the Act.⁵¹ This is simply a legal question that, even if the executive branch could have decided indirectly by expressing its policy of recognition, need not perhaps be taken as one which the Executive would ordinarily wish to decide.

True, Section 18 speaks of the conclusiveness of a certificate on “any question ... whether any country is a State for the purposes of Part II...”, but here the words “any question” must refer to a question of fact and not of law, since a certificate shall be conclusive “evidence” only. The courts must still decide the legal consequences flowing from such “evidence”, conclusive though that evidence may be, since it is precisely where such (legal) questions are involved: wherein what is to be attested to is not a question of fact about the Government’s policy but a question of law, that Parliament by virtue of its statutory enactment should be taken to have preferred to have it brought to the courts instead.⁵² In sum, the Executive can certify as to whether a putative foreign state qualifies for treatment under the Act; in other words, whether that foreign state is recognized *de jure*, or even in those exceptional cases that it does not recognize the *de facto* statehood of a putative foreign state,

⁴⁸ Although this clarification arose in the context of the question of whether Taiwan can be sued before the Singapore courts. The Court of Appeal relied heavily on the persuasive force of American authorities to the effect that the non-recognition doctrine cannot be taken to its full logical conclusion, and that non-recognition did not (therefore) mean that the Taiwan CAA could not therefore be sued before the Singapore courts; *Civil Aeronautics Administration v. Singapore Airlines Ltd.*, [2004] 1 SLR 570, paras. 43, 50 (*per* Chao Hick Tin J.A.).

⁴⁹ According to section 18: “A certificate by or on behalf of the Minister for Foreign Affairs shall be conclusive evidence on any question –

(a) whether any country is a State for the purposes of Part II, whether any territory is a constituent territory of a federal State for those purposes or as to the person or persons to be regarded for those purposes as the head or government of a State;

(b) whether, and if so when, a document has been served or received as mentioned in section 14 (1) or (5).”

⁵⁰ Part II of the Singapore Act, and Part I of the UK Act.

⁵¹ Section 7 of the Singapore Act, and Section 5 of the UK Act.

⁵² Wilmshurst, *loc. cit.*, n. 35, at 168.

but beyond that it is a matter for the courts alone (i.e., without necessarily referring back to the Executive).⁵³

Secondly, Chao J.A. also considered (*obiter*) that, in any event, the dealings between Singapore and Taiwan do not, on the facts, evince the *de facto* recognition by Singapore of Taiwan. According to Justice Chao, Singapore's "one China" policy is clear: Singapore had never intended to afford Taiwan international recognition, including *de facto* recognition.⁵⁴ If the inquiry shows that there is not even *de facto* recognition, then, arguably, no question of immunity in the form "either of a privilege derogating from a subject-matter jurisdiction which would otherwise exist or a privilege to be recognized on a contingency basis *in case* subject-matter jurisdiction exists"⁵⁵ could arise under the Singapore and UK Acts. While this is a more attractive view than that of Choo J., the Court of Appeal's clarification still falls short, for the reasons discussed below.

7. IS STATE IMMUNITY ABOUT STATUS (ONLY)?

Brownlie has argued further that:⁵⁶

"Even if there is no basis for immunity *ratione personae*, and a basis for subject-matter jurisdiction exists, the question still remains whether the courts of the forum have an essential competence (in terms of general international law) in respect of the issue."

For example, since general international law probably precludes the arrest, attachment or execution of the property of a foreign sovereign,⁵⁷ the courts would

⁵³ The only exception to this appears to be that stated in section 17 of the Singapore Act. That provision appears to be an exception to the general scheme of the Act which in any event is not to be found in the United Kingdom Act. Compare, however, *Praptono Honggopati Tjitrohupojo & Ors v His Royal Highness Tunku Ibrahim Ismail Ibni Sultan Iskandar Al-Haj*, [2002] 4 SLR 667, para. 36 (*per* M.P.H. Rubin J.).

⁵⁴ *Civil Aeronautics Administration v. Singapore Airlines Ltd.*, [2004] 1 SLR 570, paras. 15-16 (*per* Chao Hick Tin J.A.).

⁵⁵ Brownlie, *op.cit.*, n. 32, at 327.

⁵⁶ *Ibid.*

⁵⁷ It appears that the practice of domestic courts generally would uphold this rule under international law. In his discussion of section 13(4) (exception to non-attachment of state property rule in section 13(2)(b)) of the UK State Immunity Act of 1978, Professor Greig points out, after surveying the legislative provisions in various countries that would appear to uphold the distinction drawn in section 13 between (1) property used exclusively for settling liabilities incurred in the course of commercial transactions which would fall within the exception in section 13(4), and (2) those which in the words of Lord Diplock in the *Alcom* case and non-earmarked accounts ([1984] AC 580, 604), that: "In countries where there is no legislation specifically defining the status of a foreign property of a foreign state in relation to execution, the purpose to which the property might be put is often a crucial issue" for the purposes of applying the restrictive theory of immunity; Greig, D.W., "Forum state

lack subject-matter jurisdiction in such cases. The Act in fact recognizes the situation just described, and also precludes penalties, injunctions and orders for specific performance, excepting only enforcement of property for the time being in use or intended for use for commercial purposes with the further exception of the property of a central bank or monetary authority.⁵⁸ Yet another sort of situation is that found in *Alcom Ltd. v Republic of Colombia*, concerning the bank account of the Colombian Embassy in London.⁵⁹ In *Alcom*, Lord Diplock drew the court's attention to Article 25 of the Vienna Convention on Diplomatic Relations of 1961, concerning the obligation of host states to accord full facilities for the performance of the functions of foreign missions. Clearly, such a rule of diplomatic immunity could also preclude the competence of the forum courts, especially where the status of the foreign sovereign is recognized by the forum state. Another example given by Professor Brownlie involves a pronouncement on the Constitution of Sierra Leone in *Buck v A-G*.⁶⁰ Similarly, we might add, the Singapore Court of Appeal has had occasion to consider it inappropriate to pronounce on what the Malaysian Constitution might be taken to mean in a case involving the constitutional competence of Parliament in Singapore to legislate extra-territorially.⁶¹ It must be asked whether *all* these examples depend necessarily on the availability of the recognition of the forum state.

The question is concerned in part with whether the State Immunity Act, when properly construed, grants such extensive discretion to the executive branch beyond stipulating that a foreign state is recognized for the purposes of the application of the Act, or that it is not so recognized. If not, would the Executive always be able to preclude legal immunity in this way? If the Government can do that, would it always wish to do so? Clearly, *Anthony Woo* shows that there are instances wherein the Government may wish to have the entire matter put before the courts, and would also seem to suggest that the executive branch is not always as keen on Lord Atkin's "one voice" doctrine as the courts may have assumed insofar as the Government (arguably) opted for non-certification. What this leaves the courts with is essentially an issue of judicial policy. The difficulty here is highlighted by the fact that the Act speaks only of whether a foreign state enjoys the recognition of the Singapore Government for the purposes of (the application of) the Act. It does not say that the Executive can determine what it means in law to enjoy such recognition. Conversely, it could (and, I think, should) mean that the Executive cannot in strict legal terms

jurisdiction and sovereign immunity under the International Law Commission's draft articles", 38 *ICLQ* (1989), at 243, 264-265.

⁵⁸ See sections 15(1), (2) and (4) and 16(4) of the Singapore Act, and sections 13(1),(2) and (4) and 14(4) of the UK Act. Sir Hersch Lauterpacht first brought the matter to light; 28 *BYIL* (1951), at 220, 241. See Fox, Hazel, "State immunity: The House of Lords' decision in *I Congreso del Partido*", 98 *LQR*. (1982), at 94, 99 *et seq.*

⁵⁹ [1984] 2 WLR 750. See Jones, David Lloyd, 43 *CLJ* (1984), at 222; Gandhi, Sandy, 47 *MLR* (1984), at 222. See further Fox, Hazel, "Enforcement jurisdiction, foreign state property and diplomatic immunity", 34 *ICLQ* (1985), at 115.

⁶⁰ [1965] Ch 745, 770, 771 (*per* Diplock L.J.).

⁶¹ *Public Prosecutor v Tan Cheng Kong*, [1998] 2 SLR 410, 422E-F.

determine what it means *not to* enjoy such recognition. As we shall see, this last reflects the approach taken by the American courts towards recognition since the 1930s, an approach that merits serious consideration.⁶²

8. EXECUTIVE (NON-) RECOGNITION UNDER THE SINGAPORE ACT

8.1. The test of “effective control”

The straightest route, it would seem, is that the Singapore Act (and the UK Act, too, for that matter) should ordinarily be read to permit the Executive to say only that a foreign state is not recognized by it *de jure*; however, it should not usually be read, or at least should not lightly be read, so as to suggest that the Executive would typically be assumed to be saying that it does not also recognize the foreign state *de facto*.⁶³ This last typically requires a separate and independent inquiry by the courts.

The Court of Appeal had noted that a Canadian court had, in a similar application by Taiwan in Canada, inquired into whether Canada affords *de facto* recognition to Taiwan and found that the Canadian Government did.⁶⁴ Significantly, Chao J.A. distinguished that case by saying that while such an inquiry into *de facto* recognition may be open to the Canadian courts, it would not similarly be open to the Singapore courts to do the same.⁶⁵

(a) The Canadian Ministry’s response was vague, while the Singapore’s Ministry of Foreign Affairs’ response was not;

(b) The terms of Singapore’s statute do not permit the Singapore courts as much latitude, since the certification of the Executive is conclusive, whereas this is not the case under the Canadian statute, properly construed.

With the highest respect, it is not wholly apparent that there is a substantial difference in terms of the (proper) construction of the two Acts,⁶⁶ even if the letter

⁶² *Salimoff v Standard Oil Company*, 262 N.Y. 220; 186 N.E. 679 (1933) (Court of Appeals of New York).

⁶³ Sir Francis Vallat took the opposite view. Vallat, *op. cit.*, n. 36, at 54.

⁶⁴ *Parent v Singapore Airlines Limited* (judgment of Marie St-Pierre JSC of the Superior Court of Quebec dated 22 October 2003).

⁶⁵ *Civil Aeronautics Administration v. Singapore Airlines Ltd*, [2004] 1 SLR 570, paras. 40-41 (*per* Chao Hick Tin J.A.).

⁶⁶ As Olufemi Elias has argued: “While section 14 of the Canadian Act provides that a certificate from the Minister ‘is admissible in evidence as conclusive proof as to whether a country is a foreign state’, section 18 of the Singapore Act states that a certificate ‘shall be conclusive evidence on any question ... whether any country is a state for the purposes of the Act’. It would appear that the effect of both provisions is the same in the most important respect; namely, that the certificate, where issued by the Minister, is conclusive evidence”; Elias, O.A., “The International status of

from the Ministry may be considered clear and unequivocal. It is therefore important to note Justice Chao's caveat in this regard. After saying that "the wording in our Act is narrower", Chao J. added nonetheless that:⁶⁷

"This is not to say that under our Act, the approach taken by the Canadian court may not be adopted in our courts in any circumstances."

A more attractive reading of what the Court of Appeal has said *obiter* would therefore be that where an independent judicial inquiry is called for, *the absence of legal immunity need not "automatically" be determined by what the Ministry did or did not say*. Granted, the actual basis on which the Court of Appeal's decision rests in the present case is on the terms of the Ministry's letter, and which the court took to mean non-recognition. Yet all that the Court of Appeal has said here is that, as a result, "[i]t is incongruous to say that a State is required to accord sovereign immunity to another State when the latter is not recognised by the former".⁶⁸ That would be right, but in the *Arantzazu Mendi* the English House of Lords also went so far as to consider that an authority recognized only *de facto* can mount a claim of immunity even against the *de jure* sovereign as plaintiff.⁶⁹ Incongruous though that, too, may seem at first sight, no less an authority than the then Judge Cardozo (and whose sentiments the Singapore Court of Appeal itself has accepted in approving terms) has acknowledged in another (American) case, *Sokoloff v National City Bank*, that while "[j]uridically, a government that is unrecognized may be viewed as no government at all, if the power withholding recognition chooses thus to view it", it should also (always) be considered that "[i]n practice, however, since juridical conceptions are seldom, if ever, carried to the limit of their logic, the equivalence is not absolute, but is subject to self-imposed limitations of common sense and fairness".⁷⁰ Perhaps this has since reflected a distinctively American view of the matter. Beginning with a line of cases in the late nineteenth century where the rigidity with which the English courts had held to the "one voice" doctrine was questioned, those exceptions had by the 1920s become the rule instead. Thus, in *Nankivel et al. v Omsk All-Russian Government et al.*, the New York Court of Appeals upheld its earlier pronouncement in the *Wulfsohn* case, and said:⁷¹

Taiwan in the courts of Canada and Singapore", 8 *Sing.YBIL* (2004), at 93, 97.

⁶⁷ *Civil Aeronautics Administration v. Singapore Airlines Ltd*, [2004] 1 SLR 570, para. 41 (*per* Chao Hick Tin J.A.).

⁶⁸ *Ibid.*, para. 25 (*per* Chao Hick Tin J.A.).

⁶⁹ *Republic of Spain v SS "Arantzazu Mendi" (The Arantzazu Mendi)*, [1939] A.C. 256.

⁷⁰ *Sokoloff v National City Bank* 145 N.E. 917 (1924); (1923-4) 2 A.D., Case No. 19; cited with approval in *Civil Aeronautics Administration v. Singapore Airlines Ltd*, [2004] 1 SLR 570, para. 44 (*per* Chao Hick Tin J.A.).

⁷¹ (1923) 237 N.Y. 150; *Wulfsohn v Russian Socialist Federated Soviet Republic*, (1923) 234 N.Y. 372.

“Lack of recognition by the United States Government, we have recently held, does not permit an individual suitor to bring a *de facto* Government before the bar...To sue a sovereign state is to insult it in a manner which it may treat with silent contempt. It is not bound to come into our courts and plead its immunity.”

In case there is any doubt as to what is meant by “*de facto* Government” in this case, the New York Court of Appeals went on in *Salimoff v Standard Oil Company* to say:⁷²

“The courts may not recognize the Soviet Government as the *de jure* Government until the State Department gives its word. They may, however, say that it is a government, maintaining internal peace and order, providing for national defense and the general welfare, carrying on relations with our own government and others. To refuse to recognize that Soviet Russia is a government regulating the internal affairs of the country is to give to fictions an air of reality which they do not deserve.”

The test is almost singularly one concerned with the exercise of effective control over the territory in question.⁷³ The suggestion here involves the extent to which the matter is one of law and not executive policy. *Prima facie*, the Act grants executive policy some measure of weight. The key question, however, is this: How much weight should be accorded to the Executive’s views?

8.2. Is state immunity a special case?

According to Justice Chao:⁷⁴

“A question such as that which arises in the present case, whether an entity is a State so as to enjoy sovereign immunity in Singapore, is eminently a matter within the

⁷² (1933) 262 N.Y. 220. This and the other cases I have just mentioned are discussed in these terms by Sir Hersch Lauterpacht in his influential work on the subject. Lauterpacht, H., *Recognition in International Law* (Cambridge: CUP, 1948), at 146-150. See, however, the discussion by Jaffe, who seeks to reconcile this latest turn with a perceived change of heart in the Administration, with direct communication having been established at the highest level, and a change in the composition of the court. Jaffe, Louise L., *Judicial Aspects of Foreign Relations, in particular of the Recognition of Foreign Powers* (Cambridge, Mass.: Harvard University Press, 1933), Appendix.

⁷³ If it is objected that these examples involve the question of the recognition of a *de facto* government of an existing and recognized sovereign State, that the question of the statehood of (Soviet) Russia was never in question, and that the same is not true, however, of Taiwan (which has never been recognized as a sovereign State), it may, I think, be replied that Taiwan had for long (i.e., for the better part of Singapore state practice) claimed to be a government of an existing and recognized sovereign state. As Professor John Dugard wrote in 1987: “Taiwan has many of the attributes of statehood but prefers to see itself as simply part of greater China”. Dugard, John, *Recognition and the United Nations* (Cambridge: Grotius, 1987), at 77.

⁷⁴ *Ibid.*, para. 22.

exclusive province of the Executive to determine, as what are involved in the question are not only matters of fact but also matters of policy. The courts are not in the best position to decide such a question.”

I have argued that there remains a line to be drawn nonetheless between the conclusiveness of an executive certificate on a question of fact (whether or not a foreign state is recognized explicitly by the Executive) and the legal consequences that should flow from that. It would have been less than extraordinary to assume that Singapore’s State Immunity Act of 1979 was not actually intended to regulate the status of legally anomalous entities like Taiwan. If we are prompted to think that it does, a conservative approach to statutory construction could become hostage to every drafting ambiguity and would eschew perspectives based on judicial policy instead, whereas the truth may simply be that the (British) draftsman’s elliptical language about that of which an executive certificate is *truly* conclusive leaves a residual role for cautious but informed judicial development of the law in the future. However, Singapore’s Court of Appeal took the view instead that:⁷⁵

It is really not for the courts to get themselves involved in international relations. The courts are ill-equipped to deal with them. If the answer of the Executive to a query is not clear enough, the proper recourse would be for the court to seek further clarification and not to second-guess the Executive or to determine the answer independently based on evidence placed before it.

The Court of Appeal appears, therefore, to have considered that Parliament intended from the outset that the Executive should play a decisive role in determining whether events occurring within the territory of a putative foreign state should be amenable to Singapore’s domestic judicial process.⁷⁶ It appears to have relied on Lord Esher’s *dictum* in *Mighell v Sultan of Johore*, which is that “once there is the authoritative certificate of the Queen through her minister of state as to the status of another sovereign, that in the courts of this country is decisive”.⁷⁷ They were words that have unfortunately become an immovable starting-point of analysis in this area of law in England, including the decision in *Duff Development v Kelantan* wherein what the Executive said there was given to prevail even over clear evidence of Kelantan’s patently subservient status. Similarly, in *R v Secretary of State for Foreign Affairs, ex parte Trawnik*, Forbes J. considered that: “The fact that the certificate is conclusive marks its content out as the exclusive sphere of the Foreign Secretary and prohibits the courts from intruding into that sphere”.⁷⁸

⁷⁵ *Civil Aeronautics Administration v. Singapore Airlines Ltd.*, [2004] 1 SLR 570, para. 27 (*per* Chao Hick Tin J.A.).

⁷⁶ *Ibid.*, see generally paras. 15-28.

⁷⁷ [1894] 1 QB 149, 158.

⁷⁸ The case involved an action for nuisance on account of the noise arising from a shooting range employed by the British armed forces in Berlin. There, the Secretary of State had certified that “Germany is a State for the purposes of Part I of the State Immunity Act of 1978” and that the

All of this nevertheless rests more on hallowed doctrine than anything else. The Vice-Chancellor, Sir Lancelot Shadwell, had taken the view in 1828 that “sound policy requires that the courts of the King should act in unison with the Government of the King”, and the English common law has not looked back since.⁷⁹ While that has cast a long shadow, our Act says (in Section 18) only that:

A certificate by or on behalf of the Minister for Foreign Affairs shall be conclusive evidence on any question –

(a) whether any country is a State for the purposes of Part II...

Could the Singapore Act, then, be taken to mean that the Executive shall have the last word on non-immunity through the simple device of non-recognition? Following from our earlier discussion (above), where death or personal injury, or damage to or loss of tangible property are involved, the Singapore and United Kingdom Acts both *preclude* the enjoyment of state immunity where it is caused by an act or omission “in Singapore” or “in the United Kingdom” under Sections 7 and 5, respectively. Conversely, the intent (it could be argued) appears to have been not to preclude immunity where the events occur outside the forum state, presumably because this was the common-law position before the United Kingdom Act was passed and remains the position under customary international law.⁸⁰ Still, this was precisely the outcome in *Anthony Woo*, on the considered basis that the Executive had actually said so. The Court of Appeal had based its conclusion (that the Taiwanese CAA is not immune) on the construction of the executive certificate; specifically, that the Government of Singapore does not recognize Taiwan. In consequence, the Singapore Act is now read so as to tie the rule in Section 7 of the Singapore Act to the enjoyment of formal recognition. One wonders therefore whether it could have been argued that the position at common law and under public international law is that the Singapore courts would not have subject-matter jurisdiction in such cases, or would lack com-

British Military commandant was a part of the Government therein. *The Times*, 18 April 1985 (QBD).

⁷⁹ *Taylor v Barclay*, [1828] 2 Sim. 213. On these older cases, see Mann, F.A., *Foreign Affairs in English Courts* (Oxford: Clarendon, 1986), at 38 *et seq.*

⁸⁰ For the customary position, see Article 11 of the European Convention on State Immunity, 16 May 1972, Cmd 5081; ETS No. 74; Article 12 of the ILC Final Draft Articles and Commentary on Jurisdictional Immunities of States and their Property (1991), *YBILC* (43rd session, 1991), Vol. II, Pt. 2, 13; Article 12 of the Draft Articles on Jurisdictional Immunities of States and their Property, Annex I, Report of the Ad Hoc Committee on Jurisdictional Immunities of States and their Property, 24-28 February 2003, GAOR, Fifty-eighth Session Supplement No. 22 (A/58/22); Article III.F of the International Law Association’s Revised Draft Articles for a Convention on State Immunity, 14-20 August 1994, ILA, *Report of the Sixty Sixth Conference* (1994), 21-27, 452-499; Article 2(2)(e) of the Resolution of l’Institut de Droit International on Contemporary Problems Concerning the Immunity of States in Relation to Questions of Jurisdiction and Enforcement, 2 September 1991, at <<http://www.idi-iil.org/index.html>>. For these and accompanying commentary on the UK provision, see Dickinson, Andrew, Lindsay, Rae and Loonam, James P., *State Immunity: Selected Materials and Commentary* (Oxford: Oxford University Press, 2004), paras. 1.036 and 1.102, 2.025-2.026, 2.064, 2.081, and 2.116, respectively.

petence in some other way, regardless of the question pertaining to Taiwan's status.⁸¹ Traditionally, the recognition aspect has not been as widely concerned with when there would *not* be immunity, but whether immunity would be available. In respect of this last, the courts would (because of the "one voice" doctrine) say "yes" if the Government of the forum state were, for example, expressly to recognize the foreign state as a sovereign. However, the Act of 1979 does not today encourage judicial rule application. Whether the established practice of deferring to the Executive should remain wholly unchanged is certainly an interesting issue now confronting us. Would it, with the greatest respect, be "incongruous" to say – as does the Court of Appeal (below) – that "a State is required to accord sovereign immunity to another State when the latter is not recognised by the former"? At the very least, the question may be seen to be inseparable from that of whether the courts should entertain a suit brought in respect of a governmental act or omission to have occurred in the territory of that which, to all appearances, is a foreign state.⁸² Would it be true to say that if the answer should be "no" that should in turn be due *only* to the fact that the specific foreign state is formally recognized by the Singapore Government (i.e., solely a question of status)? After all, it is not to be supposed that non-recognition here must mean that all Taiwanese marriages should be treated as being invalid, for example. The law must draw a line somewhere, but, unlike the marriage example in private international law, should not the application of public international law principles in the Singapore courts draw a similar line? Viewed from where a foreign court stands, there seems no logical basis for accepting the validity of legislative, judicial and administrative acts done by an effective governmental authority within its own territory while, at the same time, upholding the liability (non-immunity) of such an authority for acts or omissions committed within its own territory.⁸³

⁸¹ It may be countered, however, that the Canadian courts appear recently to have considered the personal injury rule to be a purely legislative device and (therefore) does not reflect a previous common-law position; *Schreiber v Canada (Attorney-General)*, 2002 SCC 62; [2002] 3 S.C.R. 269 (Canada), para 31; Sienho Yee, "Foreign Sovereign Immunities, *Acta Jure Imperii* and *Acta Jure Gestionis*: A Recent Exposition from the Canadian Supreme Court", 2 *Chinese JIL* (2003), at 649, 651. Nonetheless, it appears that the point was not fully argued there. The Canadian court was concerned with whether the *acta jure gestionis/acta jure imperii* distinction applied in that context. At the very least, the Canadian pronouncement is not conclusive of the position at common law in England and Singapore, and of the position under customary international law.

⁸² It may also be countered here that such questions go to the merits of the case and need not occupy a court which is merely called upon to consider the point of certification. However, it may be replied that the 1979 Act should be taken as a whole in considering what its true intent might be.

⁸³ See *Adams v Adams*, [1971] P. 188; 3 All. ER 572. See also the view taken by Lord Denning MR in *Hesperides Hotels v Aegean Holidays Ltd.*, [1978] QB 205 (CA). But this case admits the problem with which Choo J. was faced in the lower court in *Anthony Woo*. Choo J. had said ([2003] 3 SLR 688, para. 9):

"In the present case, there is, in my view, no danger of deracinating Taiwanese companies trading here. Nonetheless, the fears expressed by the Law Lords in *Carl-Zeiss-Stiftung*, particularly Lord Reid and Lord Upjohn, who said at 569 that it would be 'a most deplorable result in respect of any highly civilized community, with which we have substantial trading relationships I believe, which should be avoided unless our law compels that conclusion' need to be

addressed. In short, if the CAA is a department of a government that is not given *de jure* or *de facto* recognition by this state, then what is it? It is an entity that is real but is not a state recognizable for the purposes of the State Immunity Act.”

With respect, this still begs the question in so far as the common law (as applied in Singapore) would still require a logical basis for treating an “unrecognized” state as a source of the validity of private law rights. According to Singapore’s Companies Act (Cap. 50), the word “corporation” is simply defined as:

“any body corporate formed or incorporated or existing in Singapore or outside Singapore and includes any foreign company but does not include –

(a) any body corporate that is incorporated in Singapore and is by notification of the Minister in the *Gazette* declared to be a public authority or an instrumentality or agency of the Government or to be a body corporate which is not incorporated for commercial purposes;

(b) any corporation sole;

(c) any co-operative society; or

(d) any registered trade union;”

What would the words “formed or incorporated or existing ... outside Singapore” mean in this context? In the United Kingdom, Parliament has since sought to avoid the problem with the Foreign Corporations Act of 1991; see Chedyne, Ilone, “The Foreign Corporations Act”, 40 *ICLQ* (1991), at 981. In Singapore, the courts would have to turn to the common law. According to Lord Denning in *Hesperides*, for example, the proper view, more broadly, is that “If it were necessary ... I would unhesitatingly hold the courts of this country can recognize the laws or acts of a body which is in effective control of a territory even though it has not been recognized by Her Majesty’s Government *de jure* or *de facto*: at any rate, in regard to the laws that regulate the day to day affairs of the people, such as their marriages, their divorces, their leases, their occupations and so forth.” [1978] QB 205 at 218. According to Professor Dugard, “[s]uch actions are designed to do justice in individual cases affecting the ordinary lives of citizens and are not intended to imply recognition of a State by the judicial arm of government”; Dugard, *op. cit.*, n. 73, at 124. What is clear from Lord Denning’s and Professor Dugard’s statements here, however, is that there nonetheless would exist a legal anomaly at common law to be addressed in the present type of situation. The difficulty as far as Singapore is concerned appears to be this. In *Hesperides*, Lord Denning had made it plain where his preference lay in terms of the proper courses of action, but these courses of action had been rejected by Choo J. in *Anthony Woo* since the executive certificate was clear. Lord Denning had said in *Hesperides*: “The court may consider several possibilities: (1) that the autonomous body is not recognized, so that our courts pay no regard to it or its laws; or (2) put further questions to Her Majesty’s Government about the present state of affairs; or (3) look at the new evidence and make up its own mind”. [1978] QB 205, 213. One argument that could be advanced in the sort of case envisaged by Choo J. in *Anthony Woo* is that the statement of the International Court of Justice in the *Namibia* Advisory Opinion, that (compulsory) non-recognition of South-Africa’s official acts “cannot be extended to ... the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory” forms a common-law rule by reception. *South West Africa Cases (Second Phase, Ethiopia v South-Africa/Liberia v. South-Africa)*, ICJ Rep. 1966, at 6, para. 125. The recent approach of the Hong Kong courts in the *Chen* case, discussed earlier, could also point to a principled exception to the seemingly logical view that an unrecognized entity cannot ultimately be a source of recognizable legal rights and obligations. [2000] HKLRD 252, 262J-263D (i.e., where justice, the dictates of common sense and the needs of law and order require to be met, and where giving effect to private rights would not be inimical to the forum state’s sovereign interests, or would otherwise be contrary to public policy). See also *post*, note 90. Nonetheless, how this matter is to be resolved *logically* as a matter of common law doctrine, and how, for example, the *Namibia* Opinion and the Hong Kong doctrine could be

8.3. The clear policy of the United States Act of 1976: a comparison

A strong policy consideration which, on the other hand, clearly underlies the United States Foreign Sovereign Immunities Act of 1976 was well-expressed by the US State Department's then Legal Advisor, Mr. Monroe Leigh. A future Singapore court, as I shall argue further below, may wish to consider its application in the Singapore context regardless of the true scheme of the United Kingdom legislation which the Singapore Act resembles so closely.

Leigh had explained, in connection with the line to be drawn between commercial and governmental acts, that “[w]e ... thought it was the better part of valour ... to have it to the courts with very modest guidance”.⁸⁴ More generally, however, the Act was also intended to “depoliticize” claims to immunity, and Monroe Leigh testified that the prime object of the Act was really to “return decisions of legal questions of sovereign immunity to the courts where they properly belong”.⁸⁵ Subsequent judgments in the United States courts have considered that Leigh's sentiment was upheld by Congress with the passage of the Act.⁸⁶

This theory of absolute sovereign immunity remained in force until 1952 when the now-famous Tate Letter was issued by the Department of State. The Tate Letter expressed a “restrictive” theory of sovereign immunity ... This theory of restrictive

reconciled in logical terms with the apparent rule that an unrecognized entity cannot enjoy immunity, remain open questions in the absence of legislative intervention. Professor Greig has argued instead that the English courts should either limit such cases as *Adams v Adams* above and *Madzimbamuto v Lardner-Burke*, [1969] 1 AC 645 to their facts, or explore the possibilities of the *Carl Zeiss* doctrine. Greig, D. W., *International Law* (London: Butterworths, 1976), at 145. Yet more important than that is the need (as the judge in *Anthony Woo* appears also to agree with) to question the “misleading generalization, which becomes even more inaccurate when used as the premise for logical reasoning, to base the rules of private international law on mythical “recognition” by the United Kingdom Government of the rights of other Governments to legislate with regard to matters occurring within their territory”. See Greig, *loc. cit.*, n. 11, at 113-114. Still, I propose to take the entire question one step further – should we treat questions involving sovereign immunity differently, on account here of an arbitrary distinction between private and public international law? I do not believe so for, in the eyes of a foreign court, there seems no logical basis for accepting the validity of legislative, judicial and administrative acts done by an *effective* governmental authority within its own territory while, at the same time, upholding the liability (non-immunity) of such an authority for acts or omissions committed within its own territory.

⁸⁴ *Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearing on H.R. 11315 before the Subcommittee on Administrative Law and Governmental Relations of the House Committee of the Judiciary, 94th Cong., 2^d Sess. (1976) (Testimony of Monroe Leigh), at 31, 53.*

⁸⁵ *Ibid.*, 29.

⁸⁶ *Frolova v. Union of Soviet Socialist Republics, United States District Court*, 558 F. Supp. 358, ND Ill, 26 January 1983 (United States District Court, ND Illinois, E.D. Roszkowski, District Judge), citing H.R.Rep. No. 94-1487, 94th Cong., 2d Sess., 7 (1976) (“House Report”), U.S. Cong. & Admin. News 1976, at 6604. See also *Behring Intern., Inc. v. Imperial Iranian Air Force*, 475 F.Supp. 383, DNJ, 24 July 1979 (United States District Court, D. New Jersey, Clarkson S. Fisher, Chief Judge).

sovereign immunity was adopted by the United States courts, but difficulties arose ... courts tended to decide questions of sovereign immunity based on State Department suggestions rather than treating the question of immunity as a purely judicial function. With these problems in mind, the United States Congress passed the Foreign Sovereign Immunities Act of 1976 ... the bill insured that immunity would be strictly a judicial rather than an executive determination.

The continued significance of a “one voice” doctrine, particularly where the Executive has in the plain terms of its letter said that it has felt “unable” to issue a certificate, would therefore bear close judicial scrutiny. Parliament itself has after all provided scant guidance. On the one hand, the Singapore Act was “based on the United Kingdom State Immunity Act, 1978” (albeit “modified to suit our needs and circumstances”). On the other hand, Parliament in Singapore was clearly aware of and referred also to the United States legislation, and indeed the Singapore Act was motivated by the perceived need to address the fact that “[a]s there are certain provisions in the United Kingdom Act which are not appropriate to Singapore ... it is preferable to enact our own legislation so as to preclude the application of the United Kingdom Act to Singapore”.⁸⁷ Admittedly, too much cannot be read into these statements, especially since there is no evidence that the last statement concerns the provision presently in question. Indeed, the provision in question (Section 18) is virtually identical to the equivalent United Kingdom provision (Section 15 of the United Kingdom Act). Moreover, the explanatory statement in respect of Clause 18 of the Bill (Section 18 of the Act) fails also to shed further light in respect of the matter. It states only that: “Clause 18 provides that a certificate by or on behalf of the Minister for Foreign Affairs is to be conclusive evidence for certain purposes”.⁸⁸ But what are these purposes?

Such legislative ambiguity arguably leaves room for judge-made law. How much room is a matter for the courts, but the courts may have reason in future to treat the present case as limited to its extraordinary facts, and in future to consider that having the 1979 Act is (arguably) the antithesis of a felt need to adhere rigidly to a “one voice doctrine”, considering after all that codification indicates a preference for principled rule application in place of executive determination.

8.4. The tension between doctrine and realism

Admittedly, Chao J.A. took a diametrically opposed view in distinguishing a notable English case which was cited by the CAA to demonstrate the distinction just referred to between questions of law and those of fact, saying that:⁸⁹

⁸⁷ Singapore Parliamentary Debates, Official Record, 7 September 1979, Co. 409 (Mr. E.W. Barker).

⁸⁸ Explanatory Statement, State Immunity Bill, Bill No 20/79.

⁸⁹ *Civil Aeronautics Administration v. Singapore Airlines Ltd.*, [2004] 1 SLR 570, para. 25 (*per* Chao Hick Tin J.A.).

“It is incongruous to say that a State is required to accord sovereign immunity to another State when the latter is not recognised by the former. Bearing in mind the pre-eminence given to recognition by virtue of s 18 of the Act, the question of sovereign immunity clearly stands on a different footing from other questions in which the existence of a State comes into issue.”

This passage seems almost to suggest that the policy of the Executive in respect of Taiwan has thus far actually been concerned with the rights and duties of private litigants in the Singapore courts, which if true must mean that the Singapore Government considers Taiwanese marriages to be invalid, too.⁹⁰ A strong reason for actually thinking so in the case of Taiwan’s present claim rests, of course, on the fact that the response of the Executive (which the Court of Appeal construed to be a negative response) was a response to the request by the Taiwanese CAA for a certificate under the State Immunity Act. That may be sufficient for us to conclude that the decision in this case is unassailable as far as legal principle was concerned. Still, the sort of approach taken by Choo J. and with which the Court of Appeal remained largely in agreement does present greater risks in venturing into matters of executive policy by attributing non-recognition of sovereign immunity to the Executive in the present sort of situation (even admitting that Choo J. is to some extent supported by the late F.A. Mann in this respect).⁹¹ Perhaps, and I say this with the highest respect, the Court of Appeal should have been slow to confirm the reading given by Choo J. to the letter from the Ministry, who took it in fact to be a negative certification. The Court of Appeal had taken the view of counsel for Singapore Airlines that Singapore “has always been careful to maintain the stand of not recognising, whether formally or informally, Taiwan’s status in any way that may suggest that it is a State, consistent with its one-China policy”.⁹² Could it not perhaps be said, equally, that for

⁹⁰ See further the Northern Cyprus cases in the United Kingdom – *DAG v Secretary of State for the Home Department*, [2001] Imm. AR 58 (citizenship of Northern Cyprus unrecognized); *contra B v B (Divorce: Northern Cyprus)*, [2000] 2 FLR 707 (non-recognition of Northern Cypriot divorce); *Caglar v Billingham (Inspector of Taxes)*, [1996] STC (SCD) 150 (claim to diplomatic immunity in respect of income tax not upheld); but compare *Emin v Yeldag*, [2002] 1 FLR 956 (Northern Cypriot divorce decrees should nonetheless be recognized unless contrary to statute). See n. 83 above.

⁹¹ Mann, *op. cit.*, n. 15, at 401–405. However, compare Collins, *loc. cit.*, n. 16, at 510 for the sharper distinction drawn here between “sensitivity to foreign policy interests” and “the views or objectives of the executive” than does Mann, who at 404 merely acknowledges that “While it is certain that the practice of applying to the Executive is in many respects a useful device, it should not be overlooked that it may sometimes be more embarrassing to the Executive than an independent decision of the courts ...”). This is but another way of asking the uncomfortable question here: Does the Singapore Government not recognize Taiwan as a *de facto* State, and that the Taiwan Government at least the *de facto* authority in those territories? See further the highly practical approach taken by Hobhouse, J. in *Somalia (A Republic) v Woodhouse Drake & Carey (Suisse) SA*, [1993] 1 All ER 371 (HC), albeit a case that takes place in light of the current policy of the UK Government of not according formal recognition to any foreign government.

⁹² *Civil Aeronautics Administration v. Singapore Airlines Ltd.*, [2004] 1 SLR 570, para. 36 (*per* Chao Hick Tin J.A.).

there to be a refusal to recognize a foreign state for the limited purposes of private litigation, there should be no doubt as to the intention to refuse it?

8.5. Bilateral relations as evidence of recognition?

Moreover, it could be asked whether the intent underlying Singapore's actions counts (i.e., whether or not to grant *de facto* or *de jure* recognition), or the fact that "various agreements or memoranda of understanding with similar entities in Taiwan on specific areas, ranging from air services agreements to avoidance of double taxation, the promotion and protection of investment, and tourism" exist.⁹³ As far as international law is concerned, the latter counts,⁹⁴ not the former, yet the Court of Appeal (citing *Oppenheim's International Law*) was apparently concerned with the former question only.⁹⁵

As recognition is a matter of intention and as important legal consequences follow from the grant or refusal thereof, care must be taken not to imply recognition from actions which, although amounting to a limited measure of intercourse, do not necessarily reveal an intention to recognise...

With the greatest respect, the real question in respect of such memoranda, letters and "agreements" ought to be the well-known one instead of whether such a document evinces an intention to conclude a treaty under the law of treaties (not, as the Court of Appeal has suggested, whether there is therein an intention to recognize the other party).⁹⁶

8.6. Distinguishing executive recognition from executive non-recognition

In light of these difficulties of construction, and of possible future difficulties of the same sort, the better view may be to consider that even under the Tate Letter itself,⁹⁷ which had established the restrictive theory in the United States in 1952:⁹⁸

⁹³ *Ibid.*, para. 35.

⁹⁴ See Petersen, M.J., *Recognition of Governments* (Basingstoke and London: MacMillan, 1997), at 111.

⁹⁵ *Civil Aeronautics Administration v. Singapore Airlines Ltd.*, [2004] 1 SLR 570, para. 35 (*per* Chao Hick Tin J.A.), citing Jennings, R. and Watts, A. (eds.), *op. cit.*, n. 36, at 169–171.

⁹⁶ See Aust, Anthony, *Modern Treaty Law and Practice* (Cambridge: CUP, 2000), at 27.

⁹⁷ Letter from Jack B. Tate, Acting Legal Adviser, Department of State, to Acting Attorney General Phillip B. Perlman, 26 *Department of State Bulletin* (1952), at 984, also reprinted in *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 US 682, 711–15 (1976).

⁹⁸ *Connecticut Bank of Commerce v. Republic of Congo*, 309 F.3d 240 (5th Cir. 2002) (United States Court of Appeals, 5th Circuit, Texas, Emilio M. Garza, Circuit Judge).

... [T]he State Department would continue to recommend immunity in suits concerning a foreign state's sovereign, public acts. The Department, however, would recommend denying immunity in suits based on a foreign sovereign's strictly commercial activities.

In other words, the "one voice" doctrine, at least in the United States, was intended to apply to recommendations of immunity in respect of public acts and to recommendations of denial of immunity in respect of commercial activities. It was not – indeed, it seems was never – intended to allow the Executive (as opposed to the courts) to recommend denial of immunity in respect of public or governmental acts.⁹⁹ The United States Act of 1976 was (subsequently) meant to reinforce this sentiment; namely, to shield the Executive from foreign political pressure to grant state immunity and to have this instead for the courts to do so.¹⁰⁰

I would have to say to you in candor that the State Department, being a political institution, has not always been able to resist these pressures. And to my way of thinking, this consideration of political factors is, in fact, the very antithesis of the rule of law which we would like to see established.

In short, the "one voice" doctrine does not really speak to cases of non-recognition as clearly as it might to cases of recognition, and foreign office legal advisors may also feel compelled to steer away from questions concerning the legal consequences of non-recognition.¹⁰¹

⁹⁹ Presumably, it was the Appellant's contention in this case that the conduct called into question did not fall within one of the exceptions to immunity in the Act and therefore involved (loosely speaking) a "governmental act". Why would it matter otherwise whether Taiwan is a recognized state for the purposes of the Act?

¹⁰⁰ Jurisdiction of U.S. Courts in Suits Against Foreign States: Hearing on HR 11315 before the Sub-committee on Administrative Law and Governmental Relations of the House Committee of the Judiciary, 94th Cong., 2^d Sess. (1976) (Testimony of Monroe Leigh), 35. See further Ederington, L. Benjamin, "In memoriam: Monroe Leigh: 1919-2001", 43 *Virg.JIL* (2003) 589, 593-597.

¹⁰¹ It is at least interesting to note, moreover, that the United Kingdom Act does not seem opposed to taking the same view, for at best there is no clearer indication of the intent underlying the enactment of the 1978 UK Act than for a need to "keep up" with New York, and to apply the restrictive theory of immunity by way of statute. As Mr. Gardiner points out, in a revealing passage: "The factors favouring legislation in the UK were a need to make legislative provision if the UK was to become a party to the European Convention and to the Brussels Convention 1926, a desire to respond to the uneven progress towards restrictive immunity through judicial law-making and, perhaps most important, the fear that the financial position of London could be lost to New York if a more stable legal framework there for transactions involving states proved a powerful attraction". Gardiner, Richard K., *International Law* (Harlow: Pearson/Longman, 2003), at 370. Mr. Gardiner was formerly a legal adviser at the UK FCO.

9. CONCLUSION

It may be argued that the Court of Appeal's finding that the facts in any case evince the absence of *de facto* recognition of Taiwan should (1) not have been reached in such a straightforward fashion, and (2) even if it should, need not require the absence of immunity simply because of the "incongruity" of an unrecognized yet immune foreign state, given that non-recognition might be more closely concerned with a range of foreign policy considerations wholly unrelated to the question of private legal rights. The English courts have managed to avoid the issue thus far, due in part to the application of the *Carl Zeiss* doctrine, whose application was declined both by counsel in *Anthony Woo* and, it would appear, by the Singapore courts in the present case. In future cases, however, either the *Carl Zeiss* doctrine, or if not, some of the arguments suggested here could prove to be to the Singapore courts more attractive than the present case has shown. In particular, the seemingly more realistic approach of the United States courts may commend itself.

Firstly, it may be hoped that the Singapore courts would not in any event have become set on the sort of standard witnessed here for a finding of *de facto* non-recognition under Section 18 of the 1979 Act. Should we step away from the long shadow cast by the "one voice" doctrine in Section 18 cases, there is no other reason in legal principle to suppose that *de facto* non-recognition should be discovered through the same route as *de jure* recognition, which is to look at the incidents and behavioural facts of the conduct of Singapore's foreign policy and bilateral relations with the aim of eliciting an "intent" on the part of the Executive "to recognize".¹⁰² An objective test exists under international law for the acquisition of statehood, and it is capable of relatively precise application. To rely on a presumed "constitutive" effect of subjective recognition by the executive branch where the Executive has avoided any direct pronouncement on its own policy would seem to be doing both too little and too much. Close consideration may perhaps also be given to the difference between the case where the Executive has taken a (clear) position in response to a request for a certificate (i.e., a question involving the construction of the terms of such a response), on the one hand, and where an independent inquiry by the court itself is made, on the other. If it is (truly) the latter, an objective test, based on whether the putative foreign state fulfills the international law criteria for statehood, could be applied directly to the case at hand unless manifestly inconsistent with either Singapore law or executive policy.¹⁰³ If it is considered that, in fact, the Taiwanese

¹⁰² *Ibid.*, paras. 29-36.

¹⁰³ This much of a nod should be given in the direction of the "one voice" doctrine. See the discussion of this issue by Dr. Elias in section IV.D of his article, "The International Status of Taiwan in the Courts of Canada and Singapore", *loc. cit.*, n. 66, with which, consequently, I am unable to agree in this small respect. As for which should prevail in the case of conflict between Singapore law and international law, there is no better pronouncement than that of Chao J.C. (as he then was): "I would ... hasten to add that if indeed in a particular case there is a real conflict between international law and national law, national law must prevail ... Lest I give the wrong impression that I am saying a state can flout international law with impunity, I should add that responsibility on

Government effectively controls the territory in question, what reason would there be for thinking that there is any such manifest inconsistency? As Brierly had observed in respect of “the practice of British courts in accepting information from the executive ... In such cases the responsibility for ensuring the Court’s decision conforms to international law rests with the executive and not with the court”.¹⁰⁴ Nevertheless, it must be asked whether this is what the Act, or indeed the Executive, intends.

Similarly, evidence of executive policy has to be weighed and distinguished in appropriate cases. The proper legal question ought to be whether the exchange of letters and conclusion of memoranda of understanding and so forth evince an intention to conclude legally binding agreements, and if the answer is “yes”, it may be considered that the conclusion of such treaties is inconsistent with a refusal to recognize the other party, at least for the purposes of private litigation.

Another possible consideration that ought for completeness to be mentioned is that the Singapore Act also contains a provision not to be found in the United Kingdom Act. Section 17 of the Singapore Act states the following principle of reciprocity:

If it appears to the President that the immunities and privileges conferred by Part II in relation to any State –

(a) exceed those accorded by the law of that State in relation to Singapore ...

... [T]he President may, by order, provide for restricting or, as the case may be, extending those immunities and privileges to such extent as appears to the President to be appropriate.

Prima facie, the Singapore Act, unlike the United Kingdom Act, suggests therefore that Taiwan should at least enjoy such immunities in Singapore as those Singapore presumably enjoys in Taiwan. While the courts may not wish to question the Government’s “one China policy”, the Singapore Act could still require the courts to consider that a “one voice” doctrine could cut both ways in an unintended and far-reaching manner. Valid concern that Taiwanese companies in Singapore should not become “deracinated” stops short of considering this further issue, which does not appear to have been argued.¹⁰⁵

the international plane of a failure by a state to comply with international law is a distinct and separate matter”; *Tan Ah Yeo & Anor v Seow Teck Ming & Another*, [1989] SLR 257, affirmed on appeal in *Seow Teck Ming & Anor v Tan Ah Yeo & Another and another appeal*, [1991] SLR 169 (per Chan Sek Keong J. as the Honourable Attorney-General then was).

¹⁰⁴ Brierly, J.L., *The Law of Nations*, Sir Humphrey Waldock (ed.), (Oxford: Clarendon, 6th ed., 1963), at 90.

¹⁰⁵ For the concern that Taiwanese companies should not be “deracinated”, see [2003] 3 SLR 688, para. 9 (per Choo J.).

Having come this far, I should venture to suggest the following sort of formulation for replies by or on behalf of the Minister in such cases in the future:¹⁰⁶

“I would wish to inform you that it is the view of the Government of the Republic of Singapore that the territories in question currently enjoy the exercise of effective governmental authority. The Government of Singapore considers, however, that the question in your request pertains to a legal issue currently pending before the courts with which it therefore does not consider it appropriate for the Government to enter into.”

And then to have it brought to the courts.

¹⁰⁶ The second sentence is based on the practice, for example, of the United Kingdom Foreign and Commonwealth Office when responding to requests in respect of diplomatic immunity; *see* Wilmshurst, *loc. cit.*, n. 35, at 168.