

THE INTERNATIONAL STATUS OF TAIWAN IN THE COURTS OF CANADA AND SINGAPORE

by OLUFEMI A. ELIAS*

In this paper, the Canadian case of *Parent v. Singapore Airlines Ltd.* is compared with the Singapore cases of *Anthony Woo v. Singapore Airlines* and the appeal therefrom in *Civil Aeronautics Administration v. Singapore Airlines*. The Canadian and Singapore cases, with almost identical facts, concerned the status of Taiwan as a foreign entity entitled to state immunity pursuant to national legislation. The judgments indicate a difference in the two jurisdictions regarding the relationship between the executive and the judiciary where questions of foreign affairs arise for consideration by national courts. It is argued here that the case for judicial caution in deference to the executive (in the name of the “one-voice” doctrine) is sometimes overstated; that in practice the “one-voice” doctrine cannot easily be invoked as a basis for decisions taken by the courts on entitlement to state immunity in the absence of “clear” guidance from the executive; and that, ultimately, the issue of entitlement to state immunity is a legal one for the courts to decide.

I. INTRODUCTION

The Canadian case of *Parent v. Singapore Airlines Ltd.*¹ was decided between the judgment of the Singapore High Court in *Anthony Woo v. Singapore Airlines*² and the judgment of the Singapore Court of Appeal on appeal in *Civil Aeronautics Administration v. Singapore Airlines*³ in a series of cases decided by national courts arising from the crash on 31 October 2001 of Singapore Airlines flight SQ006 at Chiang Kai-Shek International Airport, Taiwan. In many respects, the judgment in *Parent* appears unexceptional, and the main points of interest arise when it is compared to the judgments of the High Court and the Court of Appeal of Singapore. While the facts and the positions of the parties in both sets of cases were similar in all material respects, the judgments in both jurisdictions reached divergent conclusions with regard to the status of Taiwan. In this note, the approach taken in *Parent* will then be compared to that taken by the Singapore courts in *Anthony Woo* on a number of points relating to the relationship between the executive and the judiciary where questions of foreign affairs arise for consideration by national courts.

II. THE POSITION OF THE PARTIES IN *PARENT*

In *Parent* the plaintiff had brought an action in Canada against Singapore Airlines (SAL), for injuries suffered as a result of the crash. Singapore Airlines, in its turn, commenced an action in warranty against the Civil Aeronautics Administration (CAA), arguing that

* M.A. (Oxon); LL.M. (Cantab); Ph.D. (Lond.). Legal Adviser, UNCC, Geneva; formerly of the School of Law, King's College, University of London.

¹ *François Parent, Specnor Tecnic Corporation et Corporation Specnor Tecnic International c. Singapore Airlines Limited* (22 October 2003), Montreal 500-05-074778-026, (Sup. Ct. Q.), St. Pierre J.C.S.

² [2003] 3 Sing.L.R. 688 (Sing. H.C.).

³ [2004] SGCA 3.

liability for the accident should be borne by CAA as it was responsible for the management of the airport. CAA argued that it was entitled to immunity from the jurisdiction of Canadian courts and presented a motion to the Quebec Superior Court to dismiss the action in warranty on the basis of Canada's *State Immunity Act* of 1982.⁴ As it was not contested that CAA was a department of the Taiwanese Ministry of Transport and Communications,⁵ the pertinent question for present purposes was whether CAA was entitled to immunity under the Act. Central to the resolution of this question was section 14(1) of the 1982 Act, which provides, in pertinent part, as follows:

A certificate issued by the Minister of Foreign Affairs, or on his behalf by a person authorized by him with respect to the following questions, namely (a) whether a country is a foreign state for the purposes of this Act ... is admissible in evidence as conclusive proof of any matter stated in the certificate with respect to that question ...

SAL had written to the Canadian Minister of Foreign Affairs and International Commerce requesting the issuance of a certificate under section 14 of the Act to establish "whether Taiwan is indeed a foreign state" or "whether it can be considered to be a political subdivision of the Republic of China" (presumably the Peoples' Republic of China). The Minister's reply stated,

I wish to inform you that the Department cannot respond positively to your request and no such certificate will be issued at this time. Canada has a one-China policy which recognises the People's Republic of China, with its government located in Beijing, and it has full diplomatic relations with that government. Canada does not have diplomatic relations with 'Taiwan' or the 'Republic of China'.

SAL argued that CAA was not entitled to immunity given the Minister's refusal to *recognise* CAA *officially* by issuing a certificate in accordance with his powers under the Act. CAA, for its part, argued that the section 14 certificate was at best but one means of establishing the juridical status of any entity seeking immunity under the Act. For them, a section 14 certificate was evidence—conclusive when forthcoming—of such status, but that status remained distinct from the evidence therefor. Accordingly, the absence of such a certificate was not the same as the issuance of a certificate stating that the relevant entity was *not* a State, and the Minister's letter was to be interpreted within the diplomatic context in which the Minister functions; it was, according to CAA, for the court to determine the juridical status of Taiwan on the basis of all the evidence available in the absence of the conclusive proof of that status by the section 14 certificate.

III. THE DECISION IN *PARENT*

For the Court, two issues arose for determination as a result of the foregoing. The first question was to determine the effect of the absence of a certificate pursuant to section 14 of the 1982 Act. The second was whether Taiwan was a "foreign state" for the purposes of section 3 of the Act.

The Court found that, since section 14 provided that a certificate from the Minister was "admissible in evidence" as conclusive proof of any matter stated in that certificate, the certificate was one means of proving any such matter—but that the legislator's intent was not to make the certificate the *only* means of proving that matter. The certificate was not

⁴ Section 3 of the Canadian *State Immunity Act* R.S.C.1985, c. S-18, provides that "Except as provided by the Act, a foreign state is immune from the jurisdiction of any court in Canada".

⁵ *Supra* note 4, s. 2(b) of the Canadian *State Immunity Act* provides that the term "foreign state" includes "any government of the foreign state or of any political subdivision of the foreign state, including any of its departments, and any agency of the foreign state".

required but admissible; in other words, it was sufficient but not necessary to establish the status of the foreign entity as a state for the purposes of the Act. Accordingly, the absence of a certificate was not tantamount to a denial of immunity. The Court went on to find that, on a proper construction of the Act, the responsibility for determining whether a foreign entity is a “foreign state” for the purposes of the Act was not exclusively for the executive, and, had that been the legislator’s intent, it would so have been provided clearly in the Act. In the absence of a certificate, it fell to the courts to determine whether immunity should be accorded, on the basis of all the available evidence. Drawing on a line of English cases, the Court noted that the legislator had in effect separated the political and diplomatic spheres on the one hand from the juridical sphere on the other, so that where politics and diplomacy constrained the Minister from issuing a certificate, it was for the courts, as matter of “*ordre public*”, to draw their own *legal* conclusions as to whether the foreign entity in question should properly be accorded immunity. Finally, the Court stated that, thus interpreted, the Act achieved its objective, namely to incorporate into Canadian law the principle of immunity from jurisdiction, with the exceptions thereto, in accordance with customary international law, in compliance with the principles of public international law (sovereignty, independence, dignity and equality of states) upon which immunity is based.⁶ Having determined that the absence of a certificate meant that it was for the courts to undertake their own enquiry, the Court went on to consider whether Taiwan was indeed a “foreign state” for the purposes of the Act.⁷ The Court found that since the law had incorporated into Canadian law the customary international law principle of immunity from jurisdiction, it was in public international law that the definition of a “state” was to be found. The Court referred in this respect to Canadian case law affirming the familiar rule of interpretation according to which the legislator is presumed not to intend to violate international law. The Court found that Taiwan fulfilled the criteria for statehood set out in Article 1 of the Montevideo Convention of 1933,⁸ namely a defined territory, a permanent population, an effective government and the capacity to enter into relations with other states. The Court quoted a number of authorities in favour of the declaratory theory of recognition, according to which statehood is a more or less objective fact to be determined by established criteria, rather than by subjective views of other states. As is to be seen below, this was taken by the Singapore Court of Appeal to be an indication that the “one voice” doctrine,⁹ according to which, for present purposes, both the executive and judicial arms of the government of a state should take the same view of the status of the foreign entity in question, was not accorded a great deal of importance, at any rate not to the same degree as would the Singapore courts. However, the extent to which the Court adopted this view is not clear, given that numerous examples of official dealings between Canada and Taiwan, including exchanges of letters and agreements on co-operation in diverse fields between the governments of Canada and Taiwan and, in particular, one statement made in 1968 by the Foreign Minister of Canada recognizing the “effective political independence” of Taiwan (to which the Court appeared to have attached some importance), had been submitted in evidence. The Court found that Taiwan was a “foreign state” for the purposes of the Act and, accordingly, dismissed SAL’s action in warranty.

⁶ *Supra* note 1 at para. 55.

⁷ *Ibid.* at paras. 56-65.

⁸ *Convention on Rights and Duties of States adopted by the Seventh International Conference of American States*, 26 December 1933, 165 U.N.T.S.

⁹ See F.A. Mann, *Foreign Affairs in the English Courts* (Oxford: Clarendon Press, 1986) at 38, for a discussion of nineteenth century English case law on this doctrine. See also the *Arantzazu Mendi* [1939] A.C. 256 (Eng. H.L.) at 264. See further, F.A. Mann, “The Judicial Recognition of an Unrecognised State” in *Further Studies in International Law* (New York: Oxford University Press, 1990) at 386 and L. Collins, “Foreign Relations and the Judiciary” (2002) 51 I.C.L.Q. 485.

IV. THE POSITION OF THE SINGAPORE COURTS IN *ANTHONY WOO*¹⁰

In the Singapore litigation, both parties had separately requested a certificate pursuant to section 18 of the *State Immunity Act*¹¹ of 1985, “certifying” (CAA) and “confirming” (SAL) that Taiwan was a state for the purposes of the Act. Section 18 provides 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 [the Act] ...”. The Ministry’s brief reply was that it was “unable to accede to [CAA’s] request for a certificate”, and in response to SAL’s request, that it was “unable to issue the certificate” pursuant to section 18. The Court made a number of rulings that are pertinent for present purposes.

First, the High Court found that this refusal to issue a certificate amounted to a statement from the Ministry of Foreign Affairs that Taiwan was not a state for the purposes of section 18.¹² The Court of Appeal affirmed this ruling.¹³ It found that both requests were for a “positive” certificate, seeking certification or confirmation that Taiwan was a state for the purposes of the Act. Since the Ministry was not able to accede to those requests, it was giving a clear, unambiguous and conclusive negative answer to the question contained therein; had Taiwan been a state for the purposes of the Act, the Ministry would have issued the requested certificate. In other words, the two replies from the Ministry were certificates saying that Taiwan was not a state.

Secondly, the Singapore courts held that it was “eminently... within the exclusive province of the executive” to determine the questions such as whether a foreign country is a state so as to enjoy sovereign immunity, and that, as recognized by section 18 of the Act, the courts are ill-equipped to deal with international relations.¹⁴ In an adversarial system of adjudication where questions are determined wholly on the basis of evidence adduced by the parties, to allow matters such as the status of a foreign country to be determined by the courts would not only protract a trial, it was possible that all the pertinent facts and circumstances might not be before the court. The Court held that where the Ministry had expressed a clear view as in the present case, the courts should not conduct their own independent enquiry based on other evidence, because it was fundamental that the executive and the judiciary should speak with one voice, irrespective of the views of the courts as to the status of the foreign country under the general principles of international law. The Court stated that even in cases where the reply of the executive was ambiguous, the proper procedure was for the court to revert to the Ministry for a more specific answer, and only where the executive refused may the courts properly undertake their own independent enquiry.

Thirdly, even if, as counsel for CAA had argued, the replies of the Ministry were vague or inconclusive, and the courts are entitled to undertake their own independent enquiry, the Court of Appeal found that the facts and circumstances did not indicate that Taiwan had been recognized by Singapore as a sovereign state. Singapore’s “one China” policy had always been clear, and too much should not be read into the close co-operation between the two countries in those circumstances in various fields such as taxation, investment, tourism and air services. The Court of Appeal stated that “[f]or there to be implied recognition, there should be no doubt as to the intention to grant it”.¹⁵

¹⁰ See C.L. Lim, “Non-Recognition of Putative Foreign States (Taiwan) under Singapore’s State Immunity Act”, [unpublished, on file with author].

¹¹ Singapore *State Immunity Act* (Cap. 313, 1985 Rev. Ed. Sing.).

¹² *Supra* note 2 at paras. 4 and 7.

¹³ *Supra* note 3 at paras. 11-14.

¹⁴ *Ibid.* at paras. 15-28.

¹⁵ *Ibid.* at para. 36.

V. A COMPARISON OF THE TWO CASES

The opposite conclusions reached in *Parent* and in *Anthony Woo* raise some interesting questions relating to the basis for the different approaches adopted in those cases. The judgment of the Court of Appeal of Singapore sheds much light on the considerations leading to the different results (as the Court had the benefit of the Canadian judgment which had been decided a few months earlier), and these considerations raise a number of interesting points of the law and practice of state immunity.

A. *The Wording of the Applicable Statutory Provisions
and the “One Voice” Doctrine*

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*”.¹⁶ 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. That is the case whether the certificate is stated by statute to be conclusive evidence or that it is admissible in evidence as conclusive proof. There is no obligation on the Minister to issue a certificate in either case, and there are no special requirements as to the form of the certificate. Nevertheless, the Singapore Court of Appeal found that the wording of section 18 of the Singapore Act is narrower and did not properly allow for the courts to undertake their own independent enquiry, because the wording of section 14 of the Canadian Act (“is admissible in evidence”) “clearly contemplates that other forms of evidence may be admissible to determine the issue”. With the greatest respect, it is not clear how this indicates that there is a material difference between the two Acts. To say that the certificate is “conclusive evidence”, as it is under the Singapore Act, is surely to say that it is “admissible in evidence as conclusive proof”, as it is under the Canadian Act—no more and no less. It is conclusive in either case, it is admissible in evidence in either case, and the difference between conclusive proof and conclusive evidence,¹⁷ in the present circumstances, does not seem obvious, and certainly does not appear to be enough to suggest that there is any significant difference in the purport of both Acts in this respect. The Singapore Court of Appeal appeared to be stating that the “one voice” doctrine, which was of the first importance to the Singapore courts, required it to adopt this stricter approach in deference to the executive.¹⁸ But the Canadian Court also accepted the “one voice doctrine” explicitly, stating that, under the Canadian Act, the statute confers on the Minister the power to issue a certificate pursuant to section 14, and that such a certificate being conclusive proof, the tribunal is bound by the contents of the certificate, except where its contents are vague or where the certificate is not issued, in which case the courts may interpret the certificate or conduct their own enquiry as necessary.¹⁹ In other words, where the voice of the executive is clear from the certificate, the courts in Canada are also to speak with that same voice. The Singapore Court of Appeal said very much the same thing when it stated that,

[t]he situation would be the same if the Executive were to refuse to give a reply or gives a reply which does not answer the query and leaves it in no doubt that the court is to make its own determination based on customary international law.²⁰

¹⁶ Emphasis added.

¹⁷ If anything, “proof” (used in the Canadian Act) is more conclusive than “evidence” (used in the Singapore Act) because the purpose of evidence is proof.

¹⁸ *Supra* note 3 at paras. 40 and 41.

¹⁹ *Ibid.* at paras. 40-55.

²⁰ *Ibid.* at para. 41.

The position thus seems to be the same under both jurisdictions. It is therefore not clear how adherence to the “one voice” doctrine necessarily requires a stricter interpretation in one jurisdiction of provisions that are identical to all intents and purposes.

In distinguishing the Canadian situation from that in Singapore, the Court of Appeal stated that the Court in *Parent* noted the different wording of the two Acts, stating that,

[t]he judge there was of the view that, in the context of their section 14, a certificate from the Canadian Ministry was only one means of determining whether Taiwan was a State for the purposes of their Act. As the reply from the Canadian Ministry was vague, the court was therefore entitled to come to its own conclusion based on the evidence placed before it.²¹

This was supposed to indicate a difference between the positions in both jurisdictions, but is the approach of the Canadian court really different from the position taken by the Court of Appeal itself regarding the position in Singapore? This issue will be referred to again in the following subsection. For the moment, what can be said is that the Court of Appeal appears to have conflated two rather separate issues, namely (a) a perceived difference between the wording of the Acts, which as we have seen is somewhat difficult to sustain, and (b) the fact that the Singapore courts had reached a different conclusion—regardless of any distinction relating to the wording of the Acts—as to the meaning to be read into the replies of the executive. What the Court of Appeal was really saying was that it was not open to the courts in Singapore to enter into their own independent enquiry where the executive had issued a clear reply in response to the requests. But the Canadian judge had not claimed an inherent judicial right or duty to conduct its own enquiry in all cases, but only when, as it found to be the case here, the reply from the executive either was not forthcoming or was vague. That is precisely what the Court of Appeal had found to be the position in Singapore. It would accordingly not appear that the judgement in *Parent*, as far as it related to a difference between the two Acts, bears out the characterization ascribed to it by Court of Appeal. The difference between the Canadian and the Singaporean approaches lies not as much in the wording or the requirements of the statute, but in the effect ascribed to the Ministry’s replies, and it is to this that we shall now turn.

B. *The Effect of the Replies of the Executive and the Relationship between Non-Certification and Non-Recognition*

As seen earlier,²² the Singapore Court of Appeal noted that the requests made by both CAA and SAL in *Anthony Woo* were “positive” requests for certificates “confirming” or “certifying” that Taiwan was a state for the purposes of the Act. Since the Ministry replied that it could not accede to those requests, the Court of Appeal concluded that this was a clear and unequivocal denial of the status of Taiwan as a “foreign state” for the purposes of the Act, affirming the ruling of the High Court to the same effect.²³ This ruling underlies the position adopted by the Singapore courts as discussed in the preceding subsection. The reasoning is compelling if the basic premise is accepted—since the executive had replied with a resounding “no” to the question whether Taiwan was a state for the purposes of the Act, the courts were bound by that certificate as provided by the Act, and, furthermore, in keeping with the “one voice” doctrine, it was not open to the courts to enter into any enquiry that could lead to a result that was at variance with the position of the executive regarding the status of the foreign state. The Court of Appeal distinguished the ruling in

²¹ *Supra* note 3 at para. 40.

²² See section IV above.

²³ *Supra* note 3 at paras. 6-14.

Parent from the situation before it.²⁴ In that case, the request for a certificate by SAL was not “positive”, as they had not asked for a certificate confirming or certifying that Taiwan was a state. Rather, they had requested a section 14 certificate “to establish whether Taiwan is indeed a foreign state for the purposes of the Act”. The reply of the Canadian Ministry was that “the Department cannot respond positively to [your] request and no such certificate will be issued at this time”, and this, coupled with the different wording of the Canadian Act, was interpreted by the Canadian court to be inconclusive, which allowed it to enter into its own independent enquiry to determine the status of Taiwan. In Singapore, the position was clear both from the wording of the statute and more importantly, the reply of the executive.

The interesting point in this conclusion is that the Singapore judgments appear to have treated the refusal to issue a certificate as the issuance of a certificate. Perhaps support for this position was to be found in the fact that there is no prescribed form for an executive certificate in this context, so that even that letter stating that the Ministry was unable to issue a certificate was actually in itself a certificate (or more properly, certification) concerning the status of Taiwan, albeit one “couched in polite and diplomatic terms”.²⁵ The Ministry, according to the courts, was saying that it could not say that Taiwan was a state for the purposes of the Act *because* it considered that Taiwan was not a state for the purposes of the Act. It was of course open to the Court, as it is to any court, to determine the relevance, weight and interpretation to be applied to any document submitted in evidence, and this was the interpretation for which it opted in the circumstances.

C. *The Conclusiveness of the Replies in Anthony Woo*

But there are surely good grounds for maintaining that this was but one of a number of possible interpretations that could be ascribed to the reply of the Ministry. For example, counsel for CAA, relying on *Parent*, based their appeal from the High Court judgment partly on the contention that the replies of the Ministry were not conclusive, and that had the Ministry intended its reply to have the meaning attributed to it by the judge, it would have stated expressly that Taiwan is not a state for the purposes of the Act. Even if it is unlikely that the Ministry would have been minded to be so explicit, the fact remains that the conclusiveness of the reply in *Anthony Woo* may not have been quite so obvious, precisely because the Ministry may not have wished to have been explicit.

Similarly, the judgment in *Parent* stated, after referring to the Singapore High Court’s ruling that appeared to indicate that the certificate is the only means of proof of statehood, that “[t]he situation is not the same in Canada: the absence of a certificate issued pursuant to section 14 of the Act does not necessarily mean the absence of a right to immunity”.²⁶ In the Canadian judge’s view, the Singapore Ministry’s reply in *Anthony Woo* was non-certification—the absence of a certificate—rather than non-recognition, and even less so a denial of immunity. The executive had just not given a clear reply. The fact that the Canadian’s Ministry *said* it would not issue a certificate was taken literally by the Court, and surely that would appear to be true deference to the executive. It should be recalled that after saying it would not respond to the request, the Canadian Ministry’s reply then went on to say that Canada (like Singapore), also has a “one-China” policy, and that Canada recognized and had diplomatic relations with Beijing but not with Taipei, which would more evidently tend towards non-recognition. The actual relationship and dealings between Taiwan and Canada do not appear from the judgments in both *Parent* and *Anthony Woo*

²⁴ *Supra* note 3 at para. 40.

²⁵ The words used by Choo Han Teck J. of the High Court; see *supra* note 3 at para. 11.

²⁶ *Supra* note 1 at para. 42 (translated by author). The French text reads, “La situation n’est pas la même au Canada: absence d’un certificat émis aux termes de l’article 14 de la loi ne veut pas nécessairement dire absence de droit de l’immunité”.

to be significantly different. The more plausible effect to be attributed to the kind of reply in *Parent* is to treat it as ambiguous, which is what the judge did. The reply first stated that it would not issue a certificate as requested, but nevertheless went on to provide pertinent, and perhaps rather telling information that was surely relevant for the court's own determination. The point is that a reply from the Ministry saying that it declines to issue a certificate cannot be considered to be a certificate, and is at best non-conclusive evidence to be taken into account by the courts—non-conclusive under the terms of the Act because it is not a certificate. One interpretation might even be to say that the replies in *Parent* were of the same purport as that in *Anthony Woo*. But of course, that was Canada, and the position, as set forth in *Anthony Woo*, is different in Singapore.

Regardless of what the “correct” interpretation of the replies in *Anthony Woo* might be, and as stated above, in the circumstances it was for the Court of Appeal to choose its own interpretation, the point is that it is still an interpretation, one influenced by the express reluctance of the courts in Singapore to enter into their own independent enquiry. Would the reply of the Ministry in Singapore have been different had the question asked of it been merely to provide a certificate *to establish whether Taiwan was a state*, as distinct from the request for a “positive” certificate from the executive *stating or confirming that Taiwan was a state*? Of course this is idle speculation, but it might seem unlikely that the reply of the Ministry would have been any different. And if this speculation is correct, it would be interesting to see what interpretation the Singapore courts would have put on that, seeing as they placed great emphasis on the manner in which the requests had been formulated.

Should the determination of matters as important as the status of a foreign country and its consequent entitlement to immunity be left to the vagaries of the manner in which the request for certificates are formulated? It will be recalled that the Court of Appeal—correctly, it is submitted—had warned against the pitfalls of leaving important questions of foreign relations to be determined by the workings of the adversarial system; if such questions are to be determined solely on the evidence adduced by the parties, important considerations might not come before the court because they may not have been raised by the parties.²⁷ It would appear that the same reasoning should apply here. A judicial decision as to the status of a foreign country should not be left to be determined by the manner in which requests by the parties for certification are formulated, as that might result in important considerations not being made available to the courts. This problem might be avoided if there was an obligation on the executive to give full and clear certificates in all cases where requests for certification are made. But such a duty, for obvious reasons, does not exist. Accordingly, the pitfalls of the adversarial system in this respect would appear not to be avoided by the approach taken in *Anthony Woo*.

*D. The Relation between Judicial Interpretation of Executive Replies
and Independent Judicial Enquiry into the Status of the Foreign Country
in light of the “One Voice” Doctrine*

If the view expressed earlier, *i.e.* that the decision to treat non-certification as non-recognition is itself but an interpretation of the non-certification, is correct, then the extent of adherence by the Singapore courts to the consideration that the judiciary must defer to the executive is open to question. The point is that even where the reply of the executive is “clear” and “unambiguous”, it is still susceptible of interpretation by the courts,²⁸ and even more so where the reply may appear to some to be as laconic and elliptical as the reply to the requests in *Anthony Woo*. The choice made by the Singapore courts in that case is then

²⁷ See text accompanying fn. 13 above.

²⁸ See, generally, O.A. Elias & C.L. Lim, *The Paradox of Consensualism in International Law* (Hague/London/Boston: Kluwer Law International, 1998) at Chapter IX.

perhaps properly to be characterized as a conclusion based not on executive certification as such, but rather, one based on all the facts and circumstances available to the courts, including the judicial appreciation of the Ministry's replies. The refusal to issue a certificate is not in itself a certificate—after all, the reply of the Ministry stated that it was unable to issue the certificate “pursuant to Section 18 of the *State Immunity Act*”—so it can be inferred that whatever that reply was, it was not a certificate under the Act. Conclusions were drawn from the reply—not from any certificate—as to what the Ministry was really saying, because what the executive was saying was hidden in “polite and diplomatic terms” (which is again explicit recognition by the courts of the fact that they were interpreting the evidence as they saw fit, rather than following a conclusive certificate). Can we speak of “conclusive” certification if the reply of the executive does not say “the Government recognizes X” or “the Government does not recognize Y”? In addition, it should be noted that the ruling of the Singapore courts was not based on the courts' own express interpretation of what section 18 of the Singapore Act required. It will be recalled that according to the Singapore courts, Section 18 provided that an executive certificate was conclusive evidence. There was, however, no certificate in this case, so that what the court was treating as a conclusive certificate, in avowed deference to the executive, was at best the position that the court ascribed to the reply from the executive, which was not a certificate too. It can be argued plausibly that the extent to which such an approach upholds the “one voice” doctrine is debateable.

Further, the restrictive conception of the nature of the “one voice” doctrine by the Singapore courts is worthy of comment. In *Parent*, the Court concluded in effect that the position of the executive was not evident from the reply of the Ministry since no certificate was issued, and proceeded to consider all the evidence available to it. The point of that exercise was surely to discover the nature of the dealings between Canada and Taiwan. Does this differ from an enquiry to find out the position of the executive—*i.e.* the “voice” of the executive with which the courts must also speak? If the executive does not issue a certificate, its voice must be determined by independent judicial enquiry. But the aim of that enquiry surely remains the discovery of the executive's voice. In *Anthony Woo*, the Singapore courts appeared to be of the view that the executive and judiciary could speak with one voice only where the executive certificate was as explicit as they considered it to be in that case. The Canadian court, according to the Court of Appeal, appeared not to have attached sufficient importance to the “one voice” doctrine. The assumption appears to be that an independent enquiry by the courts did not guarantee that the “one voice” doctrine would be upheld, and for that reason independent enquiries were not to be encouraged. As the Court of Appeal stated,

[t]he situation would be different if the Executive were to refuse to give a reply or gives a reply which does not answer the query and leaves it in no doubt that the court is to make its determination based on customary international law.

But this kind of reference to customary international law is perhaps misleading, because customary international law is not the sole basis upon which a court can conduct its own enquiry, where appropriate, as to whether a foreign country is a state. While (objective) criteria for statehood exist in customary international law, there is also always the further and ultimately more pertinent question of (subjective) bilateral recognition. In other words, the courts should and do also look to the nature of the dealings between their own state and the foreign country in order to determine whether that foreign country has been recognized by their own state. It is doubtful whether customary international law prescribes the kinds of relations that amount to recognition for the purposes of domestic law. Most importantly, for the purposes of cases such as *Parent* and *Anthony Woo*, the results of the enquiry as to the nature of dealings between the forum state and the foreign country, which has little to do with customary international law, is a more important issue than the fulfilment of

criteria for statehood under customary international law. In *Anthony Woo*, for example, the Court of Appeal had set out the criteria for statehood as if it would consider Taiwan's position against those criteria. In the event, the Court focused on whether Taiwan had or had not been recognized by Singapore, without drawing any conclusions as to whether Taiwan met those conditions for statehood.²⁹ This underscores the fact that (objective) customary international law has, at best, very little to do with a finding as to (subjective) recognition. There is no duty as such to recognize a foreign state under customary law.³⁰ The point is that the ultimate objective of any independent enquiry is to find out the position of the forum state, which to all intents and purposes means the position of the executive branch of the forum state, in relation to the foreign country in question; in other words *de facto* recognition.³¹ Thus an independent judicial enquiry is not supposed to be inimical to the "one voice" doctrine, as *Anthony Woo* may be seen to suggest, because the aim of such enquiries is precisely to ensure that the "one voice" doctrine is maintained. In any event, the view could justifiably be held that treating non-certification as negative certification is possibly more inimical to the "one-voice" doctrine than an even-handed independent judicial enquiry into all the relevant circumstances (including the position of the executive).

VI. CONCLUSION

As noted by the judge in *Parent*,³² the principle of state immunity in international law is based on a familiar catalogue of considerations (sovereignty, independence, dignity and equality of states).³³ It would be plausible to assume that the Singapore *State Immunity Act* is at best based on these considerations and at worst takes them into account. The approach taken in that Act, as reflected in its section 2, is to establish a general rule of immunity with specific exceptional situations in which that immunity will not be accorded, rather than a general rule of non-immunity. This would suggest that a premium is to be placed on circumspection in denying immunity to a foreign country, without, of course, ignoring the other side of the balance, namely that due account must also be taken of private rights that must be protected by the judiciary as far as possible. The approach taken by the Singapore courts in *Anthony Woo* appears to lean in favour of the view that, in effect, states are *not* immune unless and until the executive says they are. And the Court of Appeal, as seen above, also stated that even if the executive reply was vague or ambiguous, the proper procedure would be to revert to the executive for a clearer answer. But the problem is that it is unlikely that the executive will be minded to provide a different answer the second time, unless political circumstances have changed in the interim to allow for more explicit certification; there is no obligation on the executive to provide a clear answer, or any answer at all.³⁴ As it

²⁹ *Supra* note 3 at paras. 29-36.

³⁰ See, e.g., I. Brownlie, *Principles of Public International Law*, 6th ed. (Oxford: Oxford University Press, 2003) at 89.

³¹ Brownlie, *ibid.* at 91.

³² *Supra* note 1 at para. 55.

³³ But see R. Jennings & A. Watts, *Oppenheim's International Law Vol. 1*, 9th ed. (United Kingdom: Longman, 1992) at 341 for the view that it is doubtful whether the principles of equality, independence and of dignity of states provide a sufficient basis for the doctrine of immunity—"There is no obvious impairment of the rights of equality, or independence, or dignity of a state if it is subjected to ordinary judicial processes within the territory of a foreign state—in particular of that state, as appears to be the tendency in countries under the rule of law, submits to the jurisdiction of its own courts in respect of claims brought against it. The grant of immunity from suit amounts in effect to a denial of a legal remedy in respect of what may be a valid legal claim; as such, immunity is open to objection". While this reasoning is compelling, the practice of states over a long period, as the authors go on to point out, supports a certain degree of immunity, as does the law in both Singapore and Canada.

³⁴ See Lim, *supra* note 10, for the view that the courts in *Anthony Woo* should perhaps have considered what would happen where the executive says, as appears to be the case here, that a foreign state is not a state for the purposes of the Act only.

stands, the logical conclusion of the judgment in *Anthony Woo* is that, should CAA be found responsible for the losses on which the plaintiff's action was based, that judgment could be executed against the property of the government of Taiwan located in Singapore.³⁵ But there is a certain degree to which international law, and the status of Taiwan thereunder, has a bearing on the matter, even if the matter is conceived of as being one of domestic law.³⁶ The *judicial* (because that is what it is, as argued thus far) determination of the status of a foreign country should not be taken lightly.

As it stands, it is submitted that the more convincing basis for the decision in *Anthony Woo* is the same as that in *Parent*, namely, the conclusion reached as to the nature of the dealings between the forum state's government and Taiwan, even if, in *Anthony Woo*, only secondary importance was attached to this issue. To base the decision in *Anthony Woo* on the executive's reply (which was not a certificate) while invoking the "one voice" doctrine risks doing too much and too little at once. It risks too much in possibly "venturing into matters of executive policy by attributing non-recognition to the executive",³⁷ and too little in possibly not allowing the courts to entertain fully all the matters that could be pertinent to a proper *judicial* determination of the question. The Court of Appeal affirmed the decision of the High Court regarding the conclusiveness of the "certificate", and it did go further to look into the nature of the dealings between the governments. But those dealings were not a necessary basis for the decision—they were considered for the sake of CAA's argument only, after the Court's decision had already been made to affirm the High Court's judgment. That, it is respectfully submitted, does not take matters much further.

In order to allow the judiciary to reach the right balance, it is important to have clear or at least helpful executive replies to enquiries as to the status of a foreign country. In the absence of such replies, it may be difficult to uphold the "one voice" doctrine, and the judiciary, whether they acknowledge it or not, will be left to reach their own conclusions as to what the position of the executive is.³⁸ A clear or helpful reply in this context could mean either a reply stating clearly what its position is regarding the foreign country, or, where, as will normally be the case, considerations of diplomacy constrain the executive from giving such explicit certification, a reply that makes it clear that the matter is being left to the courts to determine.³⁹ The reply in *Parent* clearly did just that.

³⁵ See ss. 15(1), (2) and (4) and 16(4) of the Singapore *State Immunities Act*, *supra* note 11.

³⁶ An interesting question here is whether the responsibility of a state in international law can be engaged where that state (including its courts and its executive) does not accord immunity to a foreign entity that is a state under international law. Where there is a treaty obligation to accord such immunity (e.g. The *European Convention on State Immunity*, 16 May 1972, U.K.T.S. No. 74), responsibility for breach of an obligation under the treaty can arise. In the absence of a treaty obligation establishing such immunity, the answer would depend on whether there is a general rule of international law requiring that immunity be accorded. According to *Oppenheim's International Law* (*supra* note 31 at 343), "customary international law admits a general rule, to which there are important exceptions, that foreign states cannot be sued". On this view, a strong case could be made that a state could be responsible if this rule is breached.

³⁷ Lim, *supra* note 10, at Section VII, speaking in a slightly different context.

³⁸ See the passage cited by the judge in *Parent* from H. Kindrer, "Foreign Governments Before The Courts" (1980) 58 Can.Bar Rev. 602: "In pursuing this objective, the courts may find themselves granting a degree of respect or even immunity for a foreign regime that superficially may seem wholly out of accord with the government's declarations of diplomatic distance. But the illusion will be in the denials of recognition by the government for diplomacy's sake and longer in the fictions of the courts".

³⁹ Lim (*supra* note 10) concludes his paper by suggesting the following model for executive certificates in such circumstances, specifically in the case of Taiwan: "I 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". See also F.A. Mann, *supra* note 9, at p. 388.

