Civil Aeronautics Administration v Singapore Airlines Ltd
[2004] SGCA 3

Case Number : CA 92/2003

Decision Date : 14 January 2004

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Woo Bih Li J

Counsel Name(s) : Michael Hwang SC (instructed), Loo Choon Chiaw, Lim Tong Chuan and Goh Hui Nee (Loo and Partners) for appellant; Lok Vi Ming, Ng Hwee Chong and Joanna Foong (Rodyk and Davidson) for respondent

Parties : Civil Aeronautics Administration — Singapore Airlines Ltd

International Law – Sovereign immunity – Entity not recognised by Singapore government as state under State Immunity Act (Cap 313, 1985 Rev Ed) – Whether entity has capacity to be sued in Singapore courts

International Law – Sovereign immunity – Taiwanese civil aviation authority applying to set aside third party proceedings, claiming immunity under the State Immunity Act (Cap 313, 1985 Rev Ed) – Ministry of Foreign Affairs' refusal to issue s 18 certificate under State Immunity Act – Whether court competent to determine on other evidence if Taiwan is state within State Immunity Act – Whether court may grant immunity on ground that Taiwan is recognised de facto as a state – State Immunity Act (Cap 313, 1985 Rev Ed)

International Law – Sovereign immunity – Whether entity within scope of State Immunity Act (Cap 313, 1985 Rev Ed) – Approach of courts where answers from Ministry of Foreign Affairs unclear or Ministry of Foreign Affairs fails to give an answer

14 January 2004 *Judgment reserved.*

Chao Hick Tin JA (delivering the judgment of the court):

Background

2 The circumstances giving rise to this appeal fall within a narrow compass. On 31 October 2000, flight SQ 006, operated by Singapore Airlines ("SIA"), a company incorporated in Singapore, crashed upon taking off, *en route* to Los Angeles, at the Taipei Chiang Kai Shek International Airport. Many passengers either perished or were injured. A number of actions were instituted in Singapore by either the injured passengers or their families (for those who had perished). SIA joined CAA as a third party to those proceedings on the ground that CAA is liable for contribution or indemnity because CAA, being the authority in control of the facilities at the airport, was wholly or partly responsible for the accident.

3 It is not in dispute that CAA is a department under the Ministry of Transport and Communications of the government of Taiwan. Under the laws of Taiwan, some of the functions of CAA are:

(a) planning, supervising and monitoring air traffic control;

(b) planning and construction of civil airports and navigation aids facilities; and

(c) planning, coordinating and promoting the civil aviation information systems.

4 CAA, upon service of the third party notice and after entering provisional appearance, applied to set aside the third party notice on the ground that it is a department of the government of Taiwan and as such is immune from the jurisdiction of the Singapore courts pursuant to the Act. The application first came before the assistant registrar who dismissed it. On appeal, Choo Han Teck J affirmed the decision of the assistant registrar. Being dissatisfied, CAA has appealed to this court.

Statutory provisions

5 The Act sets out the regime relating to state immunity and the relevant provisions are the following:

> 3.—(1) A State is immune from the jurisdiction of the courts of Singapore except as provided in the following provisions of this Part.
>
> 16.—(1) The immunities and privileges conferred by Part II apply to any foreign or Commonwealth State other than Singapore; and references to a State include references to —
>
> (a) the sovereign or other head of that State in his public capacity;
>
> (b) the government of that State; and
>
> (c) any department of that government,
>
> …
>
> 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; …

There is no definition of "State" in the Act.

Communications with Foreign Affairs Ministry

6 Clearly, it was on account of s 18(a), that both CAA and SIA wrote separately to the Singapore Foreign Affairs Ministry ("MFA" or "the Ministry" as may be appropriate) to ask for a certificate under that provision. In order to better appreciate the sense of the reply from the Ministry, it is necessary that we set out *in extenso* the contents of the requesting letters. In CAA's solicitors' letter of 30 May 2003, they wrote:

> We have been instructed to request for a certificate under Section 18 of the SI Act *certifying that Taiwan (the Republic of China) is a STATE for the purpose of Part II of the SI Act*. In this connection and for your easy reference, we enclose an extract of Section 18 of the SI Act. [emphasis added].

7 This letter was followed by a second letter of 2 June 2003 from CAA's solicitors which reads:

> Further to our letter of 30 May 2003 …

We confirm that we act for the Civil Aeronautics Administration (the "CAA") of the Ministry of Transportation and Communications ("MOTC"), Taiwan, the Republic of China, relating to a claim by the Singapore Airline Limited ("SIA") against the CAA for indemnity and/or contribution in respect of the legal proceedings between the families of the deceased passengers and SIA arising from the SQ006 Air Accident occurred in Taipei on 31 October 2000.

We have been instructed by the CAA (and the MOTC) *to request for a Certificate pursuant to Section 18* of the SI Act *certifying that Taiwan* (the Republic of China) *is a State for the purpose of Part II of the SI Act* …

[emphasis added]

8 After several reminders, MFA eventually replied to CAA on 24 June 2003 as follows:

Further to our interim reply of 5 June 2003 in response to your letter of 30 May 2003, I regret to inform you that we are unable to accede to your request for a certificate pursuant to Section 18 of the State Immunity Act.

9 As regards the request made by SIA's solicitors, the contents of their letter dated 20 June 2003 are as follows:

We are representing Singapore Airlines in Third Party actions against the Taiwan Civil Aeronautics Administration (CAA) … 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 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.

In a similar application by CAA before the Canadian court, the Department of Foreign Affairs and International Trade of Canada has informed our Canadian counterparts that a certificate cannot be issued to establish that Taiwan is a foreign state for the purpose of the Canadian State Immunity Act. A copy of the Canadian State Immunity Act and the response from the Canadian Department of Foreign Affairs and International Trade are also annexed for your reference.

We would be required to appraise the Court at the hearing of the application *whether your Ministry is prepared to issue a certificate confirming Taiwan* (the Republic of China) *is indeed a state for the purposes of the State Immunity Act.*

[emphasis added]

10 The Ministry's reply dated 24 June 2003 was brief and to the point, stating:

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

11 From both sets of correspondence, it will be seen that the request was for a certificate under s 18 stating that Taiwan is a State for the purposes of the Act and the reply in each instance was

specific to the request, namely, that the Ministry was unable to issue the certificate requested for. To our mind, the effect of the negative answer from the Ministry is clear, *ie*, Taiwan is not a State for the purposes of the Act. If she is, the certificate would have been issued by the Ministry. The Act does not lay down the form in which the certificate should take. It could well take the form of a letter, as in the present case. In each reply, the Ministry has made a statement. Pursuant to s 18, the two replies by the Ministry to the parties are therefore conclusive on the point in issue, that is, that Taiwan is not a State to which the Act would apply. Thus, we agree with the judge who stated at [7] of his judgment (see *Woo Anthony v Singapore Airlines Ltd* [2003] 3 SLR 688) that:

> [T]he application for a certificate under s 18 was made in very explicit terms leaving the reader no doubt as to what was sought and why. The reply to that application, couched in polite and diplomatic terms, was nonetheless equally clear. It said "no" in effect. There is no ambiguity in the answer from the Ministry of Foreign Affairs that the Republic of China is not a state, whether *de facto* or *de jure*, for the purposes of the Act. No reasons were given and none is required under the Act. There being no ambiguity, in my view, there is therefore no need to proceed further, either to make a determination on the court's own accord, or to refer the matter back to the Ministry.

12 CAA argued that the reply was ambiguous. It said that if the Ministry had intended its reply to have the meaning attributed to it by the judge, the Ministry would have expressly stated that Taiwan is not a State for the purposes of the Act. While we agree that the reply from the Ministry could have been worded differently and in the way CAA suggested, the answer must be viewed in the context of the request. When so viewed, the meaning is clear. Nourse LJ observed in *GUR Corporation v Trust Bank of Africa Ltd and the Government of the Republic of Ciskei* [1986] 2 Lloyd's Rep 451 at 464:

> The rule that the judiciary and the executive must speak with one voice presupposes that the judiciary can understand what the executive has said. … [W]here there is a doubt, the judiciary must resolve it in the only way they know, which is to look at the question and then construe the answer given. It is not for the judiciary to criticize any obscurity in the expressions of the executive, nor to enquire into their origins or policy. They must take them as they stand.

13 We do not share the view that the answers indicated that the Ministry was unable or unwilling to take a position. The Ministry was effectively saying that it would not certify that Taiwan is a State for the purposes of the Act. The only logical conclusion from that is that Taiwan is not a State within the meaning of the Act. We do not see how it could be asserted that, in refusing to issue a "positive" s 18 certificate, what MFA was saying was that the matter was one for the court to decide.

14 The principle on sovereign immunity is based on mutual respect and international comity which requires that every sovereign State should respect the independence and dignity of every other sovereign State and should decline to exercise by means of its courts, territorial jurisdiction over, for example, the person of any sovereign and the public property of that sovereign. A sovereign State could not be sued in the courts of another State unless the former submits to the jurisdiction of the latter. Where, as in the present case, the MFA says that Taiwan is not a State for the purposes of the Act, the court should fall in line, no matter what its views are as to the status of Taiwan under general principles of international law: see *Duff Development Company, Limited v Government of Kelantan* [1924] AC 797.

Question within the exclusive province of the Executive

15 The above should dispose of this appeal. However, even if one were to take the view that the replies from the Ministry were ambiguous, it is not for the court to embark on an independent examination of the evidence adduced to determine whether Taiwan is a State for the purposes of the Act. The correct approach would be for the court to revert to the Ministry for a more specific answer. On a question such as this, which is a matter wholly within the Executive's domain, it is essential that the Judiciary does not act in a manner inconsistent with the approach of the Executive. We recognise that there are passages of Lord Sumner in *Duff Development*, where the issue was whether the State of Kelantan was a sovereign State, which suggested that the court could do otherwise (at 824–825):

> There may be occasions, when for reasons of State full, unconditional or permanent recognition has not been accorded by the Crown, and the answer to the question put has to be temporary if not temporising, or even where some vaguer expression has to be used. In such cases not only has the Court to collect the true meaning of the communication for itself, but also to consider whether the statements as to sovereignty made in the communication and the expressions "sovereign" or "independent" sovereign used in the legal rule mean the same thing. Best CJ says in *Yrisarri v Clement* that recognition is conclusive, but, if there is no recognition yet given, the independence becomes matter of proof. I conceive that, if the Crown declined to answer the inquiry, as in changing and difficult times policy might require it to do, the Court might be entitled to accept secondary evidence in default of the best, subject, of course, to the presumption that, in the case of a new organization, which has de facto broken away from an old State, still existing and still recognized by His Majesty, the dominion of the old State remains unimpaired until His Majesty is pleased to recognize the change.

16 However, the other Law Lords in the case did not go as far as Lord Sumner had. On the contrary, it seems, Viscount Cave did not think that such questions should be determined by the courts. He said (at 808):

> But where such a question arises it is desirable that it should be determined, not by the Courts, which must decide on legal principles only, but by the Government of the country, which is entitled to have regard to all the circumstances of the case. Indeed, the recognition or non-recognition by the British Government of a State as a sovereign State has itself a close bearing on the question whether it is to be regarded as sovereign in our Courts.

17 A similar judicial attitude was also demonstrated by Viscount Finlay (at 813):

> It is settled law that it is for the Court to take judicial cognizance of the status of any foreign Government. If there can be any doubt on the matter the practice is for the Court to receive information from the appropriate department of His Majesty's Government, and the information so received is conclusive. … It has long been settled that on any question of the status of any foreign power the proper course is that the Court should apply to His Majesty's Government, and that in any such matter it is bound to act on the information given to them through the proper department. Such information is not in the nature of evidence; it is a statement by the Sovereign of this country through one of his Ministers upon a matter which is peculiarly within his cognizance.

A little later at 814, Viscount Finlay added,

> We were asked to say that it is for the Court and for this House in its judicial capacity to decide whether these restrictions were such that the Sultan had ceased to be a sovereign. We have no power to enter into any such inquiry.

18 It is of particular interest to note that in the later case of *Government of the Republic of Spain v SS "Arantzazu Mendi" (The Arantzazu Mendi)* [1939] AC 256, the more expansive approach advocated by Lord Sumner in *Duff Development* was expressly disapproved of by the entire quorum of the House. Lord Atkin, who delivered the leading judgment in the case, and with which the other Law Lords agreed, said (at 263–264):

> On the question whether the Nationalist Government of Spain was a foreign sovereign State, Bucknill J took the correct course of directing a letter, dated May 25, 1938, to be written by the Admiralty Registrar to the Secretary of State for Foreign Affairs, asking whether the Nationalist Government of Spain is recognized by His Majesty's Government as a foreign sovereign State. I pause here to say that not only is this the correct procedure, but that *it is the only procedure by which the Court can inform itself of the material fact whether the party sought to be impleaded, or whose property is sought to be affected, is a foreign sovereign State*. This, I think, is made clear by the judgments in this House in the *Kelantan* case. With great respect I do not accept the opinion implied in the speech of Lord Sumner in that case that recourse to His Majesty's Government is only one way in which the judge can ascertain the relevant fact. The reason is, I think, obvious. Our State cannot speak with two voices on such a matter, the judiciary saying one thing, the executive another. Our Sovereign has to decide whom he will recognize as a fellow sovereign in the family of States; and the relations of the foreign State with ours in the matter of State immunities must flow from that decision alone. [emphasis added]

19 Lord Wright, while pointing out that there might appear to be a difficulty in respect of the final paragraph in the letter from the Foreign Office in relation to the matter there, said that it was sufficiently clear. He also stated (at 267–268) that:

> The Court is, in my opinion, bound without any qualification by the statement of the Foreign Office, which is the organ of His Majesty's Government for this purpose in a matter of this nature. Such a statement is a statement of fact, the contents of which are not open to be discussed by the Court on grounds of law. But I do not think that in this case the Foreign Office meant that they should be so open.

20 The position enunciated by Lord Atkin in *The Arantzazu Mendi* was reiterated in subsequent cases *eg*, *Sayce v Ameer Ruler Sadig Mohammad Abbasi Bahawalpur State* [1952] 2 QB 390.

21 In fact, the position propounded by Lord Atkin was very much earlier advanced by Roche J in *Aksionairnoye Obschestvo Dlia Mechanicheskoyi Obrabotky Diereva A M Luther v James Sagor and Company* [1921] 1 KB 456, where he said (at 473–474):

> The proper source of information as to a foreign power, its status and sovereignty is the Sovereign of this country through the Government: *Mighell v Sultan of Johore*; *Foster v Globe Venture Syndicate*. In the case of *The Charkieh* Sir Robert Phillimore had recourse to other sources of information in order to determine a question arising in the year 1873 as to the status and sovereignty of the Khedive of Egypt, but in the opinion of Lord Esher, expressed in his judgment in *Mighell v Sultan of Johore*, this course was wrong.

22 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 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. This explains why Parliament had by s 18 in the Act conferred upon the Executive the power to make a conclusive determination whether a State is recognised for the purposes of the Act. In our adversarial system of

administration of justice, evidence is adduced by the parties. But even as regards facts, there may be matters of fact which are not within the public domain but which may be known only to the Executive. Therefore, to allow such a question to be determined wholly on the basis of evidence adduced by the parties not only protracts a trial, it also leaves much to be desired as it could very well be that all pertinent facts and circumstances might not be before the court.

23 CAA has cited to us the case of *In re Al-Fin Corporation's Patent* [1970] Ch 160 to argue that the courts have an independent role to determine whether an entity is a State. In that case, the issue related to determining the meaning of the word "state" in s 24 of the UK Patents Act 1949 and whether North Korea was a "state". The UK Foreign Office in its certificate stated that "Her Majesty's Government did not recognise the existence of an independent sovereign state in the area of Korea north of the 38th parallel either *de facto or de jure*". Notwithstanding this definitive answer, the court in that case held that the term "state" in s 24 of the UK Patents Act could be read in a broader sense without the necessity for the qualification of recognition. The court then examined the available evidence to see whether North Korea satisfied the objective conditions of statehood and held that it did.

24 It is important not to lose sight of the context in which the decision was made. That was a patent case and it involved a construction of the word "state" in the UK Patents Act. The court held that the word "state" as referred to in that Act did not depend on recognition. The court also acknowledged that the interpretation of the word "state" could be different in other contexts.

25 But, as mentioned before, the question of sovereign immunity is special and should be treated differently from the general question whether a State has come into being. 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.

26 Even *Starke's International Law* (11th Ed, 1994), which is relied upon by counsel for CAA in support of their argument, recognises that the question of state immunity is special. In discussing the UK State Immunity Act 1978, the author states (at 136):

> However, a statement by the executive that a particular government is *not* treated as such does not preclude a British court from holding that such government is a sovereign government, or is in control of the territory concerned, especially in relation to questions not involving jurisdictional immunity. [emphasis in original]

Later, at the same page, the author acknowledges the difficulties of the courts acting independently based on other evidence:

> On the other hand, it is difficult to see how, on a contested issue of this nature, a court could take evidence or obtain the necessary materials for forming its judgment in any more satisfactory way.

27 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. This is the most expedient and sensible option, an option resorted to by Roche J in *Aksionairnoye*. See also *Carl-Zeiss-Stiftung v Rayner and Keeler, Ltd (No 2)* [1966] 2 All ER 536 at 546 *per* Lord Reid. The court

should not, on its own, reach a conclusion which is inconsistent with the answer given by the Executive.

28 The position would be different if the Executive refuses to respond to the request. In which event, the remarks of D J Harris in *Cases and Materials on International Law* (5th Ed, 1998) at 331 are valid:

> The statements *obiter dicta* in that case [*Duff Development*] to the effect that if the Foreign Office did not respond to a request for a certificate, the courts would have taken their own decision presumably still apply.

While we are conscious that this statement by Dr Harris is based on the *dicta* of Lord Sumner, we should not be taken to have endorsed the wider proposition advocated by Lord Sumner which we have indicated above is not tenable.

Position under customary international law

29 We now move to another aspect upon which submissions have been made by the parties. Assuming the reply of MFA is vague and, contrary to the views we have earlier expressed, the court has the competence to independently determine whether Taiwan is a State, has Singapore, through various transactions with Taiwan, in fact, regarded the latter as a State? In short, is there *de facto* recognition by conduct?

30 It is clear that under customary international law, four conditions must exist for there to be a State. First, there must be a defined territory. Second, there must be a permanent population. Third, there must be an effective government. Lastly, the entity must have the capacity to enter into relations with other States.

31 It is also true that under the declaratory theory of customary international law, recognition is not essential for a State to come into being. Recognition is no more than an acknowledgment of a state of fact. But it seems to us that in relation to a matter such as sovereign immunity, recognition is vital. There would be no basis for one State to accord dignity and respect to another State where the former does not recognise the latter. In such circumstances, there would be no comity to talk about.

32 The starting point in considering whether Singapore has, in fact, regarded Taiwan as a sovereign State, must be the sort of representation which each country has, by mutual consent, established in the territory of the other. In the bundle of materials furnished by counsel for CAA to the court is a copy of the website relating to Taiwan. The following is a description of the representation of Taiwan in Singapore:

> In March 1969, the Republic of China on Taiwan established a Trade Mission in Singapore, which was later re-named Taipei Representative Office in Singapore. It is to promote bilateral links in the areas of economics, science, media, tourism, military and education between the two countries.

33 It would be noted that, unlike other sovereign States, Taiwan does not have a diplomatic representation in Singapore. It only has a trade representation here, or as the representation was earlier called, "Trade Mission". It is not an Embassy. As the website indicated, the functions of the Representative Office are only in respect of specific areas of co-operation. There is no exchange of "ambassadors". This use of the institution of trade representation is wholly in line with the practice

among States of dealing with a political subdivision of another State. It is significant to note that when Singapore established a mission in Taiwan in 1979, it was a Consulate Office to deal with consular and trade matters.

34 This approach reflects the one-China policy which has been adopted by Singapore even before formal relations were established with mainland China, the People's Republic of China ("PRC") in 1990. Singapore has not treated Taiwan in the same manner as other sovereign States. That has been its consistent stand. Thus, in 1989, when President Lee Teng-Hui of Taiwan was in Singapore for a visit, there were no flags, no guard of honour, no ceremonial trappings which would normally come with a visit by a head of State. Of course, he was accorded other courtesies of a guest. Later, in 1990, when Singapore established diplomatic relations with the PRC, the Taiwan mission in Singapore was no longer allowed to use the title "the Republic of China".

35 Counsel for CAA is quite right to point out that Singapore has, through its departments and agencies, entered into 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. There is no denying that in those areas there is close co-operation between the two territories. But co-operation with an entity in a specific area does not imply recognition as sovereign State. *Oppenheim's International Law* (9th Ed, 1992) states at 169–171:

> 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; … In the absence of an unequivocal intention to the contrary, no recognition is implied in participation in an international conference in which the unrecognised authority takes part; in the conclusion of a multilateral treaty to which that authority is a party, or even of a bilateral agreement with that authority for limited purposes; …

36 We agree with the submission of SIA's counsel, that what emanates from the dealings between Singapore and Taiwan is 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". For there to be implied recognition, the acts must leave no doubt as to the intention to grant it.

Canadian decision

37 At this juncture we would refer to the recent Canadian decision in *Parent v Singapore Airlines Limited* (judgment of Marie St-Pierre JSC of the Superior Court of Quebec dated 22 October 2003) with CAA being cited as the defendant in warranty). The claim in that action arose out of the same air accident. First, it should be noted that while there are similarities between our State Immunity Act and that of Canada, there are also some important differences. Their s 14(1), which is the equivalent of our s 18, reads:

> A certificate issued by the Minister of Foreign Affairs, or on his behalf by a person authorized by him, with respect to any of 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, without proof of the signature of the Minister of Foreign Affairs or other person

…

38 The Canadian court also had before it the correspondence between the solicitors for SIA and the Canadian Department of Foreign Affairs ("Canadian Ministry"), the pertinent parts of which are:

> We represent the interests of Singapore Airlines Ltd concerning a lawsuit against the Civil Aeronautics Administration … The attorneys representing the Civil Aeronautics Administration have alleged that it being a department of the Ministry of Transportation and Communication of the Government of Taiwan and having no separate juridical existence, is immune from the jurisdiction of Canadian courts further to the State Immunity Act.
>
> As we are uncertain as to the official recognition by the Government of Canada of the Government of Taiwan, we request an issuance of a certificate under Section 14 of the State Immunity Act *to establish whether* Taiwan is indeed a foreign state for the purposes of the State Immunity Act *or whether it can be considered to be a political subdivision* of the Republic of China for the purposes of the State Immunity Act.
>
> As the attorneys representing Civil Aeronautics Administration will be presenting a Motion to Dismiss our client's claim on the basis of the application of the State Immunity Act on April 2 next, we would appreciate receiving written confirmation from you before that date as to whether Taiwan is indeed to be considered a foreign state or a political subdivision pursuant to Section 14 of the State Immunity Act.
>
> [emphasis added]

39 The reply from the Canadian Ministry was:

> This is in response to your letter of March 19, 2003, in which you requested that a certificate be issued by the Minister or his authorized person under s 14 of the State Immunity Act to establish whether "Taiwan" is a foreign state for the purposes of that Act.
>
> 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".

40 While the request to the Canadian Ministry is not identical to the requests made to the Singapore MFA, there are similarities. But the point to note is that the request, unlike the request to MFA, did not seek a positive certificate under their s 14. Thus, the Canadian court was of the view that the Canadian Ministry's reply was inconclusive and proceeded on an examination of its own of the objective facts to determine whether Taiwan was a State and entitled to immunity under the Canadian Act. The Canadian court was aware of Choo Han Teck J's decision below but noted that the wording of the Singapore Act was different from theirs. The judge there was of the view that, in the context of their s 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.

41 It seems to us that the wording in s 14 of the Canadian Act, *ie*, "is admissible in evidence",

clearly contemplates that other forms of evidence may be admissible to determine the issue. However, the wording in our Act is narrower. 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. But, as indicated before, we are of the opinion that in an issue such as state immunity, it is vital that the Judiciary and the Executive should speak with one voice. We have earlier indicated the pitfalls in the way of the court making its own determination of the issue and the undesirability of the court making a determination which is at variance with the decision of the Executive, particularly in a case where the Executive has given an answer which is reasonably clear. The 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.

***Locus standi* to be sued**

42 Before we conclude, we ought to address a subsidiary argument raised by counsel for CAA. It is contended that if this court should find that Taiwan is not a State, and does not enjoy sovereign immunity, then it should similarly find that Taiwan has no *locus standi* to be sued here.

43 At first blush, this seems like a valid point. But it is critical to differentiate between the question whether an entity is a State for the purposes of state immunity and the question whether an entity is a State for other purposes. In this instance the reply from MFA merely states that Taiwan is not a State for the purposes of the Act. It does not follow that Taiwan is not a State for other purposes. There is a leap in logic. CAA's capacity to sue and be sued must be determined on the basis of its governing instrument and/or the law of Taiwan. There is no suggestion from CAA that it lacks such a capacity.

44 There is no English authority on point, though in the case of *The City of Berne in Switzerland v The Bank of England* (1804) 9 Ves Jun 347; 32 ER 636, the court ruled that an unrecognised government could not bring an action in England. However, our attention was drawn to the following passage of Cardozo J of the US Supreme Court in the case of *Sokoloff v The National City Bank of New York* 239 NY 158 (1924) at 165:

> Juridically, a government that is unrecognized may be viewed as no government at all, if the power withholding recognition chooses thus to view it. In 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 …

45 In *Upright v Mercury Business Machines Co* 213 NYS (2d) 417 (1961), Breitel J of the Appellate Division of the New York Supreme Court seemed to think that an unrecognised government was not completely without some status when he said (at 419):

> A foreign government, although not recognized by the political arm of the United States Government, may nevertheless have *de facto* existence which is juridically cognizable. The acts of such a *de facto* government may affect private rights and obligations arising either as a result of activity in, or with persons or corporations within, the territory controlled by such *de facto* government.

46 Counsel for CAA relied on the case *GUR Corporation* ([12] *supra*) where Steyn J, at first instance, said that it was an established principle that an unrecognised State could not sue or be sued in an English court. The first instance decision was overturned by the Court of Appeal on a different basis, *ie*, that while the Republic of Ciskei was not recognised by the UK government, it was, in fact, a subordinate body of the Republic of South Africa which was recognised by the UK

government and, accordingly, the government of the Republic of Ciskei could be sued in the UK. None of the appellate judges explicitly approved the principle stated by Steyn J that unrecognised States could not sue or be sued in the English courts. Indeed, Sir Donaldson MR seemed to think the question required further consideration.

47 In *Carl-Zeiss-Stiftung v Rayner* ([27] *supra*), the Law Lords kept the question open for future consideration. As an illustration of the thinking of the House, we would cite the following passage of Lord Wilberforce (at 577):

> [I]f the consequences of non-recognition of the East German "government" were to bring in question the validity of its legislative acts, I should wish seriously to consider whether the invalidity so brought about is total, or whether some mitigation of the severity of this result can be found. … In the United States some glimmerings can be found of the idea that non-recognition cannot be pressed to its ultimate logical limit, and that where private rights, or acts of every-day occurrence, or perfunctory acts of administration are concerned (the scope of these exceptions has never been precisely defined) the courts may, in the interest of justice and commonsense, where no consideration of public policy to the contrary has to prevail, give recognition to the actual facts or realities found to exist in the territory in question. … No trace of any such doctrine is yet to be found in English law, but equally, in my opinion, there is nothing in those English decisions, in which recognition has been refused to particular acts of non-recognised governments, which would prevent its acceptance or which prescribes the absolute and total validity of all laws and acts flowing from unrecognised governments. In view of the conclusion which I have reached on the effect to be attributed to non-recognition in this case, it is not necessary here to resort to this doctrine but, for my part, I should wish to regard it as an open question, in English law, in any future case whether and to what extent it can be invoked.

48 The ratio of the case of *City of Berne* ([44] *supra*) is really limited to the point that an unrecognised foreign government could not sue in the name of the State because it was not recognised as representing the State. Thus, it could not claim assets due to the State as a matter of succession to the rights of the previous government. This is obviously correct as, without recognition, a new government cannot sue as successor to the previous government of the State concerned.

49 As we see it, there is nothing seriously inconsistent with the stand of not granting recognition to an entity for purposes of state immunity and yet permitting that entity to be sued for its acts. In an article entitled "The Carl-Zeiss Case and the Position of an Unrecognised Government in English Law" (1967) 83 LQR 96, the author, D W Greig, extensively reviewed the cases on the subject and the following comments of his at 136 are germane:

> Although one difficulty still remains – how can a government which is not recognised by the United Kingdom sue in the English courts? – this is a psychological problem rather than a question of legal principle. As has been stated, non-recognition does not deny the existence of a foreign government: it simply denies its competence to represent the state concerned on the international plane. British companies can trade with it, and the English courts can recognise its acts, and grant it remedies, provided that they do not acknowledge its international status. Thus, if proceedings are brought against a foreign government or its officials in the English courts, the plea of sovereign or diplomatic immunity should not be available unless, as far as diplomatic immunity is concerned, it has been specifically granted by the Foreign Office.

50 Reverting to the present case, once it is appreciated that the non-recognition of Taiwan is only in respect of the Act there is no reason why its effect should or need be extended to other respects. That would be completely unwarranted. The existence of Taiwan is a fact and the

government of Taiwan exercises control over a specified area. The accident happened at an airport within the control of CAA and, as it does not enjoy immunity under Singapore law, it must answer the allegations made against it of having caused or contributed towards the tragedy.

51 In the result, the appeal is dismissed with costs, with the usual consequential orders.