NOTES OF CASES

COMMERCIAL TRANSACTION OR SOVEREIGN ACT?

Alcom Ltd. v. *The Republic of Columbia* [1]

Introduction

THE primary purpose of both the State Immunity Act (U.K.)[2] and the State Immunity Act (Singapore)[3] was to reverse the long-standing common law principle of according absolute immunity from jurisdiction in cases where a foreign sovereign was "directly or indirectly" impleaded before their courts,[4] in favour of the so-called restrictive view of immunity long preferred by the United Kingdom's European trading partners, as exemplified in the 1926 Brussels Convention for the Unification of Certain Rules relating to the Immunity of State Owned Vessels[5] and the 1972 European Convention on State Immunity.[6] In 1976, the U.S.A. passed legislation[7] adopting the restrictive view of immunity, although in practice its courts had followed this approach at least since the Tate Letter of 1952.[8] It was felt in the U.K. that the maintenance of London's position as a major international financial and commercial centre necessitated the certainty that legislation on sovereign immunity would bring; although the common law was in fact in any case moving rapidly towards favouring the restrictive approach to sovereign immunity,[9] the State Immunity Act provides greater pre-

1 [1984] 2 W.L.R. 750; [1984] 1 A.C. 580.

2 C. 33, 1978. The Act came into force November 22nd 1978.

3 Cap. 19 of 1979. For further information about both the State Immunity Act (Singapore) and (U.K.) see Chinkin "State Immunity and Diplomatic Immunity", 26 Mal. L.R. 157 (1984).

4 The classic exposition of the absolute view of sovereign immunity is in *Compania Naviera Vascongado* v. *S.S. Cristina* [1938] A.C. 485. Lord Atkin stated, "Two propositions .. . seem to me to be ... beyond dispute. The... courts of a country will not implead a foreign sovereign, that is, they will not by their process make him against his will a party to legal proceedings.... The second is that they will not by their process, whether the sovereign is a party to the proceedings or not, seize or detain property which is his or of which he is in possession or control." *Ibid.* at 490.

5 176 L.N.T.S. 199.

6 E.T.S. No. 74.

7 The Foreign Sovereign Immunities Act of 1976 28 U.S.C. Secs. 1330, 1332(a)(2)-(4), 1391(f), 1441(d), 1602-1611, in force January, 1977. This act is reprinted 17 I.L.M. 1123 (1978).

8 26 Dept. State Bill. 984 (1952). The major significance of the Foreign Immunities Act is that it gives to the courts the competence to decide claims of immunity on legislative grounds, free from executive decision making.

9 See especially *The Philippine Admiral* [1977] A.C. 373 (P.C.); *Trendtex Trading Corporation* v. *Centred Bank of Nigeria* [1977] Q.B. 529 (C.A.) and *I Congreso del Partido* [1983] A.C. 244. In this last decision the House of Lords endorsed the restrictive view of immunity at common law, although by the time of that decision the Act had already become effective for subsequent transactions. See generally Higgins, "Recent Developments in the Law of Sovereign Immunity in the United Kingdom", 71 A.J.I.L. 422 (1977).

dictability in international trade by specifying in advance those situations in which a private party can bring judicial suit against a state trading partner and will not be denied a municipal forum. This obviously allows for more effective planning of international business transactions.

The same motivations underlay the Singapore State Immunity Act, which so closely resembles the British statute that authoritative applications and interpretations of the latter are likely to be strongly influential on Singapore decision makers when they are considering their own responses to similar situations. Further, those involved in negotiating in international business affairs will regard British decisions on the State Immunity Act (U.K.) as predictive of the likely Singapore position and will therefore place reliance upon them. The need for international commercial stability and certainty, as well as the common language of the Statutes justifies their parallel interpretation. This is not in any way to suggest that the Singapore judiciary are obliged to follow any British caselaw on the State Immunity Act (U.K.) but to indicate that they should consider carefully any such cases both from the perspective of statutory interpretation and from that of the underlying policy and outcome of the decision before deciding to pursue their own separate path.

The House of Lords has now had occasion to rule upon certain provisions of the Act that are most pertinent to the maintenance of a proper balance between allowing immunity when it is appropriate to do so, but denying it when that would afford injustice to the plaintiff, without valid supporting justifications for this injustice. The case of *Alcom Ltd.* v. *Republic of Columbia*[10] goes to the very crux of the State Immunity Act and should thus receive careful appraisal from Singapore lawyers.

II. *Background of Sovereign Immunity and the Provisions of the State Immunity Act*[11]

Before analysing the judgment in *Alcom* it seems sensible to set out the areas of debate prior to the Act and then the relevant statutory provisions. Throughout this casenote the applicable U.K. sections will be cited first with the Singapore equivalents following in square brackets.

Under Section 1[*3*] of the State Immunity Act the traditional rule of immunity is reiterated:

> 1(1) [*3(1)*] A State is immune from the jurisdiction of the courts of the United Kingdom [*Singapore*] except as provided in the following provisions of this Part....

It has never been intended to deny absolutely immunity to foreign states as it is recognised that situations do exist where a sovereign, independent state should not be subject to the judicial process of another sovereign state. Disputes arising out of the public activities of sovereign states are more suited to settlement through the processes of the international legal system which supports the horizontal public

10 [1984] 2 W.L.R. 750.

11 On the State Immunity Act (U.K.) see: Delaume, "The State Immunity Act of the United Kingdom", 73 A.J.I.L. 185 (1979); Mann, "The State Immunity Act 1978" 51 B.Y.B.I.L. 43, Bowett, "The State Immunity Act 1978", 37 C.L.J. 193 (1978).

order between states.[12] This horizontal order, resting on the concepts of sovereign equality and independence, could be jeopardised by the subjection of one state to the adjudicatory processes of another: it can only be where a state enters into activities more properly deemed private activities in conjunction with private individuals or corporations that it can be at all appropriate for a municipal judicial forum to assert jurisdiction. Denial of jurisdiction in these circumstances deprives the private party of the right to seek judicial determination of a private law dispute and thus benefits the state party unfairly. The private party is then left with the vagaries of diplomatic processes of dispute settlement the effectiveness of which will depend upon the attitude of its own executive, both towards this particular dispute and its impact upon the wider issues of foreign policy, and its willingness to pursue the matters. However, the unresolved problem lies in defining public and private sovereign acts, (acts *jure imperii* from acts *jure gestionis)* with the outcome of affording or denying immunity. It is significant that the restrictive view of immunity resting upon this distinction has been long accepted in states with civil law municipal legal systems in which the public law/private law categorisation may be considered an identifying feature. Since it is a familiar distinction in these municipal legal systems it is that much easier for their courts to accept it as applied to the acts of foreign states. However, the expanded role of state activity in all aspects of domestic affairs throughout the Twentieth Century has made this distinction harder to uphold on logical and precise lines in civil law legal systems, making it somewhat ironic that common law systems are now attempting to apply it in the context of the activities of foreign states.

Even prior to the passing of the Act those who favoured the common law adopting the restrictive theory acknowledged the immense difficulty in delimiting those actions to which immunity should attach from those to which it should be denied. Traditionally two viewpoints were propounded; one should look to the "nature" of the transaction or alternatively to the "purpose" of the transaction. These were classically presented in the scenario of buying boots or uniforms for an army. The "nature" of such a purchase is a contract for the sale of goods, a straight-forward commercial transaction distinguished only by the fact that one party is a state, but the purpose is to equip an army, the paradigm of a sovereign function. An alternative approach to deciding which was preferable between "nature" and "purpose" was adopted by Smith J. in the U.S. Court of Appeals, 2nd Circuit[13] where he defined sovereign acts as those which fall "within one of the categories of strictly political or public acts about which sovereigns have traditionally been quite sensitive," and thereby avoided reliance on either nature or purpose. He amplified this general definition by listing five acts that he thought comprised sovereign acts:

(1) internal administrative acts;

(2) legislative acts;

(3) acts concerning the armed forces;

[12] See Sornarajah, "Problems in Applying the Restrictive Theory of Sovereign Immunity", 31 I.C.L.Q. 661 (1982) for a very effectively presented explanation and argument on this point.

[13] In *Victory Transport Inc.* v. *Comisaria General de Abastecimientos* v. Trans*portes,* 336F. 2nd 354. (2nd Cir. 1964).

(4) acts concerning diplomatic activity;

(5) public loans.[14]

This technique of cataloguing those acts which are regarded as requiring immunity from jurisdiction does not however resolve all the ambiguities; boots purchased for the army's use could easily be included in (3), but is that what is really intended? What is the scope of "concerning" in (4)? Does (4) incorporate all activities carried out through diplomatic personnel or from diplomatic premises, or only those directly envisaged by, e.g., the 1961 Vienna Convention on Diplomatic Relations?[15] Strictly speaking, of course, a government only functions through administrative acts or legislation so the potential scope of (1) and (2) is excessively wide. This formulation also does not help resolve another more recently raised question, that of *which act* should one be looking at. In *I Congreso del Partido*,[16] a decision of the House of Lords made after the passing of the State Immunity Act, but decided under the common law, it was raised whether the crucial transactions to be analysed for the purpose of deciding whether immunity should be afforded were the actual commercial arrangements, or alternatively the decision of the Cuban government that led to the breach of those arrangements.[17] This dichotomy arises because obviously states' actors do not make a series of isolated, unconnected actions, some readily identifiable as commercial, others not. Rather they act through a continuum of events which flow from each other and in response to the actions and reactions of the whole range of actors in both the international and domestic scene. *I Congreso* itself is a good illustration of this; the sale of sugar (Cuba's basic commodity) could not be realistically viewed in isolation from Cuba's overall foreign policy concerns in the American region. It is artificial to characterise some State actions as purely private acts in isolation from the overall State policy, but adoption of the restrictive theory demands that this be done.

The ease with which one can criticise Smith J.'s attempt of getting to the root of separating those acts to which immunity should attach from those to which it should be denied, as well as the lack of precise criteria elsewhere, emphasise that the effectiveness of the legislation on state immunity may depend upon its method of doing this.

However, neither the State Immunity Act (U.K.) nor the State Immunity Act (Singapore) attempts to define public or private acts of states; instead those acts which are not entitled to immunity are listed through sections 2-11 [*4-13*]. This follows the design of the European Convention on State Immunity and covers various specific types of transaction; commercial transactions; contracts of employment; personal

14 *Ibid*., at 360.

15 500 U.N.T.S. 95. In force 1964.

16 [1983] A.C. 244.

17 Briefly, the case arose out of contracts for the sale of sugar by a Cuban State enterprise to a Chilean company. This constituted a clear commercial transaction. However, the agreements were concluded while Allende was President of Chile; after the overthrow of Allende the sugar was not delivered primarily because of a policy decision by the Castro government not to recognise or deal with the new Chilean government. The question was therefore which transaction should be the basis of the claim for immunity; the original contract or the government action leading to non-delivery and the claim. The response to this preliminary question leads to a different outcome as regards immunity. See: Higgins, *supra,* note 9.

injuries and damage to property; ownership, possession and use of property; patents and trade marks; membership of bodies corporate; arbitrations; special situations relating to ships used for commercial purposes and customs duties.

The important provision for the situation in which sovereign states most frequently act within the private law sphere is s. 3[5]:

3(1) [*5(1)*] A State is not immune as respects proceedings relating to:—

(a) a commercial transaction entered into by the State;[18] or

(b) an obligation of the State which by virtue of a contract (whether a commercial transaction or not) falls to be performed wholly or partly in the United Kingdom [Singapore].

Section 3(3)(a) [*5(3)(a)*] defines commercial transaction.

3(3) [*5(3)(a)*] In this section "commercial transaction" means —

(a) any contract for the supply of goods or services;

(b) any loan or other transaction for the provision of finance and any guarantee or indemnity in respect of any such transaction or of any other financial obligation; and

(c) any other transaction or activity (whether of a commercial, industrial, financial, professional or other similar character) into which a State enters or in which it engages otherwise than in the exercise of sovereign authority.

The importance of the concept "commercial transaction" is emphasised by its reiteration in the context of execution. Prior to the passing of the Act the position relating to immunity from execution[19] was even more obscure than that of immunity from jurisdiction, although the British common law view was that all state property was immune from execution without consent.[20] Under s. 13(2) [*15(2)*]:

(b) the property of a State shall not be subject to any process for the enforcement of a judgment or arbitration award or, in an action *in rem,* for its arrest detention or sale.

However under section 13(4) [*15(4)*]:

(4) Paragraph (b) of subsection (2) does not prevent the issue of any process in respect of property which is for the time being in use or intended for use for commercial purposes.

Under the interpretation section 17 [2], "commercial purposes" is defined by reference to the "commercial transactions" in section 3(3), [*5(3)*].

[18] This does not appear to incorporate any requirement of "links" with the territory for the purposes of establishing jurisdiction. The Foreign Immunities Act of 1976 provides for jurisdiction where the activity of the foreign state takes place or has direct effect in the United States. In the absence of express words in the statute, requirements for jurisdiction as laid down by Lord Denning M.R. in *Thai-Europe Tapioca Ltd.* v. *Government of Pakistan* [1975] 1 W.L.R. 1485 presumably still stand. It is noticeable that most of the specific types of action laid down in sections 2-11 [4-13] of the State Immunity Act stipulate some link with the territory.

[19] See: Crawford, "Execution of Judgments and Foreign Sovereign Immunity", 75 A.J.I.L. 820 (1981).

[20] See the second of Lord Atkin's propositions, cited *supra,* note 4.

Use or intended use of the property for any commercial purpose suffices. It does not have to be for the identical commercial purpose as led to the litigation, which is the position under section 1610 of the United States' Foreign Sovereign Immunities Act. In this respect then the British/Singapore legislation is wider than the corresponding United States position.

Section 3(3) [*5(3)*] appears implicitly to follow the "nature" test, for the activities are defined by their character with no reference made to the underlying purpose or motive of the transaction. Thus by statutory definition "any contract, for the supply of goods or services"; and "any loan or other transaction for the provision of finance" are deemed to be commercial undertakings; the reason or authority for these undertakings is irrelevant. Only in subsection (c), which is the "catch-all" arm of the definition is there any reference to "purpose"; here "any other transaction" is deemed to be commercial unless entered into by a state in the exercise of its sovereign authority. Again this begs the issue as to what constitutes "sovereign authority". However 3(3)(a) and (b) [*5(3)(a) and (b)*] do not contain the exception of sovereign authority so in those sections it presumably does not apply.[21] This definition may be compared with the equivalent section in the Foreign Sovereign Immunity Act. Section 1603 para. d. states:

> A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purposes.

This is an explicit adoption of the nature test. Despite the formulation, in *Carey* v. *National Oil Corp*.[22] the nature of the transaction was still not accepted by the Court as the sole determining feature. In that case Duffy J. held that the acts complained of (breaches of oil concessions) were the consequence of oil nationalisation by Libya and that nationalisation "is the quintessentially sovereign act never viewed as having a commercial character".[23]

In fact within the State Immunity Act "commercial transaction" is used as a convenient label to embrace those activities that the judiciary feel philosophically should be justiciable in their domestic courts, bearing in mind private trading and market interests. The same is true of "commercial activity" in the Foreign Sovereign Immunities Act.

21 In *Alcom Ltd.* v. *Republic of Colombia* counsel for the Colombian government argued that this inclusion of purpose to limit nature should be read into section 3(3)(a) and (b) [*5(3)(a) and (b)*] as well as section 3(3)(c) [5(3)(c)] so as to make it always necessary to consider whether the transaction was entered into in the exercise of sovereign authority. In the Court of Appeal, Sir John Donaldson M.R. explicitly refused to do this as it would be to alter the words of the statute beyond the scope of legitimate statutory interpretation. In the House of Lords, Lord Diplock implicitly rejected it by pointing out that 3(3)(c) excludes the specific types of contract referred to in 3(3)(a) and (b) [5(3)(a) and (6)]. [1984] 2 W.L.R. 757; [1984] 1 A.C. 603.

22 453F. Supp. 1097 (S.D.N.Y. 1978) *aff'd* 592 F. 2d 673 (2nd. Cir. 1979).

23 Duffy J.'s opinion has been much criticised and subsequent cases have held nationalisation to constitute a commercial transaction. See Brower, Bistline and Loomis, "The Foreign Sovereign Immunities Act of 1976 in Practice", 73 A.J.I.L. 200 (1979). The relevant point here is that even in the face of the adoption of the nature test in s. 1603(d), judges have been influenced by the sovereign purpose of the activity.

Neither expression is or can be a formal or precise term of art, although the legal definitions attempt to make them appear such.

In *Alcom* v. *Republic of Columbia*[24] Sir John Donaldson M.R. applied a strict literal interpretation to this section that, if followed, would have given excessive precision but have also severely limited its scope. The House of Lords rejected this approach and gave little further definitional assistance. "Commercial transaction" can thus serve as a smoke screen behind which the judiciary can shelter while making value judgments as to whether a claim to immunity is justified and should on policy grounds be supported.

III. *Alcom Ltd.* v. *Republic of Colombia, Santos, First National Bank of Boston and Barclays Bank plc.*

A. *The Facts*

Alcom presents the issue of sovereign immunity in the context of the most public of all sovereign activities, that of maintaining an embassy for the facilitation of international intercourse between states and as a basic means of conducting foreign policy. The defendant, the Republic of Columbia, a friendly sovereign state, had a default judgment issued against it for £41,690 in relation to a contract for the sale of goods. The plaintiffs wished to garnishee the defendant's embassy bank account for this amount, plus costs. The defendant claimed that its embassy bank account was immune from garnishee proceedings, as it was used solely for the "day to day running of the embassy and not for commercial purposes", a description that was certified by the Ambassador. The case involved their immunity from execution which, as has been explained, rests upon the concept of "commercial transaction". It necessitated choosing between two possible extremes; should maintaining a bank account be looked at as an essential concomittent to running an embassy or should it be viewed as enabling a series of commercial transactions, that is paying for goods and services?

B. *Decision*

Hobhouse J. considered sections 3(1) and 13(4) [*5(3) and 15(4)*] to be the governing sections of the State Immunity Act and concluded that since an embassy bank account is primarily not for financing commercial transactions but rather to enable an embassy to perform effectively its vital diplomatic and public functions, its contents should be immune from attachment. The Court of Appeal in an unreserved decision disagreed and allowed the appeal. It reached this result by formulating an extremely literal interpretation of the Act which was admitted probably to run counter to Parliament's intentions.[25] The House of Lords, explicitly mindful of the international implications of its decision and recognising that a statute such as the State Immunity Act cannot be looked at solely from the domestic perspective, agreed that monies in a bank account were capable of being property under section 13(4) [*15(4)*] of the Act, but concluded that these monies were not used for "commercial purposes" within that section and were thus immune from attachment. The appeal of the Republic of Colombia was thus allowed.

[24] [1983] 3 W.L.R. 906 (C.A.); [1984] 2 W.L.R. 750 (H.L.); [1984] 1 A.C. 580 (H.L.).

[25] "This is a very remarkable result and one which may well not have been intended by Parliament. Unfortunately we are bound to give effect to Parliamentary intentions as expressed in the statute..." [1983] 3 W.L.R. 906, 913, *per* Sir John Donaldson M.R.

IV. *Discussion*

The different conclusions reached by the Court of Appeal on the one hand and Hobhouse J. at first instance and the House of Lords on the other are explained primarily by their totally diverse approaches to the State Immunity Act. Hobhouse J. construed the Act in the context of "general principles of international law" and Lord Diplock realised the "outstanding legal importance" of the case, "not only nationally but internationally".[26] Both the High Court and the House of Lords were thus explicitly mindful of the desired outcome of their judgments. Sir John Donaldson M.R. by way of complete contrast felt that reference to international law could only be allowable where the wording of the statute was ambiguous; since he could "detect no ambiguity in the Act" the only relevant source of law for the decision was the strict wording of the Act, regardless of its potentially adverse effects. As the decisions of the Court of Appeal and House of Lords are at such odds with each other this casenote will refer to both, so as to demonstrate the potential impact on the maintenance of the international public order of this municipal law decision, and so that Singapore decision makers can assess the opposite conclusions in deciding which is preferable.

Sir John Donaldson M.R. looked to the function of maintaining monies in an embassy bank account and concluded that they are typically used exactly for paying for goods and services received by the embassy and thus are ordinary contractual arrangements within the exact wording of section 3(3)(a) [*5(3)(a)*] of the State Immunity Act and could not therefore be entitled to immunity. Although he did not feel any reference to international law to be justified, he did in any case think that international law demanded scrutiny of the *nature* of the transaction (payment of monies from bank accounts) rather than of its purpose (maintaining an embassy). He however cited no international law authority for this conclusion. At first instance Hobhouse J. had distinguished between routine consumer activities that are necessarily incidental to the running of any institution and cannot be avoided, and "genuine" commercial transactions deliberately entered into as such. Obviously numerous routine payments have to be made from any bank account, but, given the purpose of the State Immunity Act to limit immunity with respect to state trading activities, he concluded that these payments did not fall within that type of activity and should not therefore be subject to attachment in the same way as monies reserved for genuine commercial transactions on that basis. To Hobhouse J. the primary purpose of the account was to be available to run the day to day affairs of the embassy; this is a sovereign activity and its necessary inclusion of consumer processes should not be allowed to prejudice its basic identification. Sir John Donaldson M.R. was unable to accept any of this reasoning. He found no basis in the Act for subdividing "commercial" into "trading activities" and "consumer activities" and would not let policy considerations alter the literal wording of the Act. He concluded that the use to which the account was put fell squarely within section 3(3)(a) [*5(3)(a)*] and was therefore subject to attachment. The consequence that this would leave no bank account immune from attachment (except under section 14(4) [*16(4)*][27]

26 [1984] 2 W.L.R. 752; [1984] 1 A.C. 597.

27 This section creates a specific exclusion from attachment for property held in a "State's central bank or other monetary authority." This exception was to appease fears that relaxation of absolute immunity attached to the property of a state's central bank would cause financial uncertainty and fears by attach-

did not daunt him; Parliament had so framed the definition so it must therefore be presumed to be Parliament's intent that it should be so applied. Further, that this might inhibit the proper functioning of diplomatic missions and the holding of sufficient funds to perform satisfactorily their functions for fear of attachment was not considered to be a relevant factor. To avoid such potential attachment a diplomatic mission could always utilise the state's central bank instead of holding its own bank account and thus bring itself within the exception of section 14(4) [*16(4)*]. However, not all states have central banks in all places where they maintain diplomatic missions so this is not a realistic comment. For example, Singapore has no state central bank in London and thus could not prevail itself of this proposal. The implications of Sir John Donaldson M.R.'s ruling would have been to make embassies impossible to operate and thus to impede the vital network of international communications of which they constitute an integral part. His Lordship even accepted the evidence that the garnishee order would completely disrupt the embassy, even to the extent that it could no longer operate its telex and thus could be put out of contact with its sending state. This is contrary to the very *raison d'etre* of diplomatic missions and would be likely to cause international tension. If even government authorities cannot enter diplomatic premises[28] it seems unquestionable that private parties should not be able to prevent an embassy from operating by gaining a default judgment and subjecting the bank account to garnishee orders. An embassy is not a business concern that should take normal business risks; it is an institution upheld as part of the international order to maintain friendly relations between states. Such consequences of private litigation could cause severe embarrassment to the government and have unforeseen foreign policy repercussions.

Fortunately for the continued effectiveness of the maintenance of diplomatic establishments within the United Kingdom, the House of Lords rejected Sir John Donaldson M.R.'s judgment, surprisingly without even once referring to it. The House of Lords, in the leading judgment delivered by Lord Diplock, first briefly summarised the history of the adoption of the restrictive view of sovereign immunity by both the common law and statute. His Lordship then turned to the purpose of diplomatic missions in the international order as defined in the Vienna Convention on Diplomatic Relations. He concluded that the running of diplomatic missions represented the "prototype of things done in the exercise of [its] sovereign authority." Further, under Article 25 of the Vienna Convention the "receiving state shall afford full facilities for the performance of the functions of a mission". This constitutes an international undertaking that the legislative or executive branches of a government shall not impede or obstruct the proper purpose of any mission. The necessary implication of this is that the consequences of issuing a garnishee order, as envisaged by Sir John Donaldson M.R. would constitute a breach of this international obligation.

ment that would threaten Britain's banking interests by a withdrawal of holdings from state's central banks. These fears were especially acute after the decision of the Court to Appeal in *Trendtex Trading Corporation* v. *Central Bank of Nigeria* [1977] Q.B. 529.

[28] See *Intpro Properties (U.K.)* v. *Sauvel and others* [19831 2 W.L.R. 908 (C.A.).

The United Kingdom is a party to the Vienna Convention[29] and is thus bound by these Articles. Singapore however, has never acceded to the Vienna Convention and therefore has not explicitly undertaken this obligation. However, it seems that the duty not to obstruct a mission in performing its business is fundamental to the international network of diplomatic relations; Article 25 of the Vienna Convention almost certainly now represents customary international law and is thus applicable to Singapore.[30] Since Singapore has accepted the necessity for the maintenance and reception of diplomatic missions it must be held to have acquieced in this most basic of duties, not least as a practical matter on the basis of reciprocity. This reasoning of Lord Diplock is equally relevant to Singapore, despite its being a non-party to the Vienna Convention.

However, although a general duty not to obstruct the functioning of a diplomatic mission was easily asserted, Lord Diplock went further so as to establish a specific duty under public international law not to allow the seizure of monies from a bank account designated for financing the routine functions of a mission. His Lordship approved totally the decision of the West German Federal Constitutional Court in a case with very similar facts with respect to a bank account held by the Republic of the Philippines' embassy in that country.[31] The Federal Constitutional Court, basing its decision explicitly on public international law, which under the West German constitution[32] forms a component part of Federal law and even takes precedence over internal laws, found that such a prohibition does exist. Although the acceptance by the House of Lords of a foreign municipal decision as evidence of public international law is to be welcomed, it is regrettable that Lord Diplock did not elaborate on that Court's reasoning and on its wider discussion of execution against a state's assets. However, his Lordship was more immediately concerned with the problem of applying these principles of public international law in British domestic law. Public international law does not automatically form a source of municipal law unless there is a constitutional provision to this effect, as in West Germany, or unless one accepts the transformation or incorporation theory as utilised by Lord Denning M.R. in *Trendtex Corporation* v. *Central Bank of Nigeria*.[33] *Trendtex* was decided prior to the passing of the State Immunity Act so in that case it was the incorporation of principles of customary international law into the common law that was at issue. In *Alcom,* Lord Diplock, by way of contrast, had to consider whether the State Immunity Act had made the principles of public international law he had just enunciated part of United Kingdom Law. His starting point was that it must be con-

29 The United Kingdom ratified the Convention in 1964. It is incorporated into domestic law by section 2 and schedule I of the Diplomatic Privileges Act 1964.

30 However Denza concludes that the provision was not based on any previous rule of customary law, although clearly a state would refrain from impeding the legitimate activities of a mission. Denza, *Diplomatic Law* (1976) 113. Interestingly Denza feels the Article is too vague and generalised to be useful so it is perhaps unusual to find it relied upon by the House of Lords.

31 *In re Republic of the Philippines,* 46 B VerfGE 342 (1977), summarised 73 A.J.I.L. 295, 305, 703 (1979). For a discussion of this case and its importance in the jurisprudence on the execution of the assets of a sovereign state, see Crawford, "Execution of Judgments and Sovereign Immunity", 75 A.J.I.L. 820, 838 (1981).

32 Basic Law of the Federal Republic of Germany, May 29th 1949. Article 25.

33 [1977] Q.B. 529.

sidered unlikely that Parliament intended non-conformity with international law, (especially as the United Kingdom was now a party to the European Convention on State Immunity) although this presumption could not be upheld in the face of plain contrary statutory language. Here the difference in attitude between Sir John Donaldson M.R. and Lord Diplock is at its most striking; the former looked exclusively at the words of the statute without considering the international law framework, while the latter presented first the international legal position before focusing in on the actual statutory provisions.

Lord Diplock also refused to look at the relevant statutory sections in isolation from the remainder of the statute. His Lordship asserted that the legislation must be construed as a whole, so that the wording in one section was not divorced from that in others. Thus, although "commercial purposes" in section 13(4) [*15(4)*] is given by the interpretation section 17(1) [*2(1)*] a wider meaning than its ordinary everyday one, by connecting it to the concept of commercial transaction, this extended meaning is still limited by specific exceptions in other sections, notably the exclusion of the contract of employment.[34] Since certain transactions are explicitly outside the wide-sweeping concept of "commercial purpose" there is no reason to suppose that the phrase was intended to be all-embracing. Again the contrast with Sir John Donaldson M.R. is dramatic. The broad meaning attributed to section 3 [5] by the Master of the Rolls would have left almost no state activity still attracting immunity, for very few transactions are performed without some form of payment from a bank account. This view is denied by the other sections of the Act itself, for they rather tortuously create exceptions to the exceptions to absolute immunity (i.e. restrictive immunity) imposed by the Act,[35] and so restore absolute immunity in these cases. The purpose of the Act was, after all, to provide for the application of the restrictive view of immunity in situations, not to destroy immunity completely.

In looking at the specific exclusions from restrictive immunity Lord Diplock referred especially to s. 16(l)(b) [*19(1)*] upholding the special status of a state's diplomatic mission. The Act does not destroy the immunities adopted by the Diplomatic Privileges Act,[36] which incorporates the Vienna Convention on Diplomatic Relations into United Kingdom law. It is therefore reasonable to assume that there was also no intention to deny immunity to activities that are necessarily incidental to the maintenance of those missions. Undoubtedly some monies in an embassy bank account will be used to finance clear-cut commercial transactions, while others will be used for payment of routine, functionary expenses. Lord Diplock put the burden squarely onto the plaintiff; unless the plaintiff can show the court that the money that is wished to become subject to a garnishee order has been separately earmarked for use solely for commercial purposes, then the attemped attachment must fail. In this way, Lord Diplock is looking at the overall purpose of the bank account and is refusing to look at the

34 In 3(3) [*5(3)*] itself:

> … but this subsection does not apply to a contract of employment between a State and an individual.

35 Lord Diplock illustrates this with reference to section 6(1) [*8(1)*] in conjunction with section 16(l)(b) [*19(1)*] which cover immovable property and, notably, premises used for diplomatic purposes. These sections were interpreted and applied in *Intpro Properties (U.K.) v. Sauvel* [1983] 2 W.L.R. 908 (C.A.).

36 Cap. 81 1964.

details of different payments from it. This will only be permissable if the judgment creditor can discharge the very difficult burden of proof. In future, such a burden of proof is likely to be harder still since an obvious consequence of this decision is that diplomatic missions will just maintain general bank accounts with no separate accounts for purposes that could possibly be labelled "commercial". This will admittedly enable missions to protect themselves from potential attachment but is justified by the need to protect the efficient running of diplomatic missions as an essential aspect of the international network of communications.

The final question is how the function of the bank account is to be determined and who should do this. The Act seems to stipulate the answer: 13(5) [*15(5)*] provides that the certification by the head of the diplomatic mission that "any property is not in use or intended for use for commercial purposes shall be... sufficient evidence of that fact unless the contrary is proved."

Extraordinarily after construing other sections of the Act so strictly, Sir John Donaldson M.R. refused to accept the plain and ordinary meaning of this section. The Ambassador's characterisation as being for the "day to day running" of its embassy was dismissed as "impossible". The purpose of the *account* was to pay the bills necessary to the running of the embassy. The purpose of money in a bank account can never be 'to run an embassy'.[37]

The Master of the Rolls added that this was not to impute the good faith of the Ambassador who had taken a common sense approach to the question, but nevertheless his certificate too had to be interpreted in the light of the sections of the Act. The certificate was accepted as evidence of usage, but could not be conclusive as to the legal consequences under the statute. Yet there was no evidence refuting the Ambassador's certification so it could not be said that the contrary had been proved, as demanded by the Act. Lord Diplock recognised that to go behind the Ambassador's certificate would constitute interference in the internal affairs of the mission. Again in a situation where the agents of the receiving state are not allowed to interfere with a diplomatic mission without the consent of the sending state or to obstruct the mission in the carrying out of its functions it would be strange if a private litigant could impugn the Ambassador's certificate to investigate the true purpose of an embassy bank account. Admittedly the section makes provision for contrary evidence but this must presumably be very clear, public evidence.

Lord Diplock's judgment, which was agreed with by the remainder of the House of Lords, is striking in its lack of textual analysis of the kind that characterised the judgment of Sir John Donaldson M.R. Lord Diplock stressed that immunity from adjudicative process is distinct from immunity from execution, and that this distinction is preserved by the framework of the Act, with sections 1-11 [5-75] dealing with the former and 12-13 [*14-15*] with the latter. *Alcom* of course deals with attachment of assets in execution of a default judgment, but the repetition of "commercial purposes" in s. 13(4) [*15(4)*] as interpreted in the general definition section 17 [2] gives a cohesion to the

37 [1983] 3 W.L.R. 906, 912 (C.A.).

statute. The lack of a judicial definition of "commercial purpose" gives little guidance for future cases, apart from the important emphasis that the act must be construed as a whole and that the background of public international law must be considered relevant. When a statute is passed to give municipal effect to an international obligation it is essential that this is remembered by the Courts and the House of Lords' readiness to give a judgment that conforms with the realities of international intercourse is to be welcomed.

C. M. CHINKIN