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STATUTORY CONSTRUCTION AND "BASIC PUBLIC POLICY" IN FOREIGN RELATIONS: TAX EXEMPTIONS FOR "OFFICIAL AGENTS" OF AN UNRECOGNISED STATE IN THE UNITED KINGDOM

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The entity calling itself "the Turkish Republic of Northern Cyprus" has posed problems of law and policy for States which have refused to recognise it as a State ever since its creation, such States including the United Kingdom.[1] While the policy issues are, of themselves, quite straightforward — put simply, most States will accord or withhold recognition for new States as a matter of foreign policy rather than a matter of law[2] — some quite thorny legal questions have arisen in the

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1 The events leading up to the unilateral declaration of independence by the Turkish Republic of Northern Cyprus on 15 November 1983 are too involved for space to permit a detailed exposition of them here, but the basic outline of events is easily summarised as follows: after the invasion of the northern part of Cyprus by the Turkish Army on 20 July 1974, an Assembly of the Turkish Cypriot community declared a "Turkish Federated State of Cyprus" on 13 February 1975, while not quite purporting to declare full independence. However, on 15 November 1983, another Assembly of the Turkish Cypriot community unilaterally declared independence under the name of the "Turkish Republic of Northern Cyprus" (hereafter "the TRNC"). The United Nations Security Council subsequently passed Resolution 541 (1983), declaring the assertion of independence to be legally invalid, and imposing (under Article 25 of the UN Charter) a mandatory duty of non-recognition in respect of the TRNC on all Members of the UN. At the time of writing, no State in the world has recognised the TRNC except Turkey.

2 The political nature of recognition, while distasteful to international lawyers, is so manifest that modern commentators acknowledge it automatically when writing on the subject; see, e.g., I.A. Shearer, *Starke's International Law* (London: Butterworths, Eleventh Edition, 1994), 118-119 and 121. The point has also received judicial acknowledgement in

context of deciding whether to give legal effect to the laws or administrative acts of unrecognised entities in the courts of the non-recognising State.[3] Another type of problem that can arise as a result of a State not being recognised is when the private rights of individuals or corporations[4] are affected (usually to the detriment of such individuals or corporations), and it is precisely such a situation, albeit of a singular kind, that arose for consideration recently in *Caglar and Others* v. *HM Inspector of Taxes*.[5]

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some countries, e.g. the United States: see *Oetjen* v. *Central Leather Co.* (1918) 246 U.S. 297 at 302, affirming *Jones* v. *United States* (1890) 137 U.S. 202.

3 Examples of such cases are legion: prominent English ones include *Carl Zeiss Stiftung* v. *Rayner & Keeler Ltd. (No.2)* (1967) 1 A.C. 853 (concerning the German Democratic Republic) and *GUR Corporation* v. *Trust Bank of Africa Ltd.* (1987) Q.B. 599 (concerning the Republic of Ciskei). In both cases, the unrecognised States were vested with legal personality on the artificial basis that they were "subordinate entities" legitimately established by the States with *de jure* plenary power over the territories in question -- respectively, the Soviet Union and South Africa: this doctrine was first aired by Lord Wilberforce in *Carl Zeiss Stiftung* v. *Rayner & Keeler Ltd. (No.2), supra,* at 954, and has attracted near universal derision from commentators: *Starke's International Law, supra* n.2, at 136, refers to the doctrine as a "fiction", and comments that its conclusions are "strained ... and fly in the face of international realities". See also J. Crawford, "Decisions of British Courts in 1985-6 Involving Questions of Public or Private International Law", *British Yearbook of International Law* LVII (1986), 405-428. Some might be tempted to suggest that, *prima facie*, the TRNC is a "subordinate entity" analogous to East Germany or Ciskei. This conclusion would undoubtedly be fallacious because, while South Africa was in law the titular sovereign of Ciskei, and the British government officially regarded the Soviet Union as having *de jure* power in East Germany consequent upon the suspension of German sovereignty and partition of Germany in 1945 (as certified by the Foreign Secretary on 6 November 1964), Turkey did not have any such legal power to dispose of Cypriot territory: the creation of the TRNC was made possible only by an unlawful use of force by Turkey in violation of Article 2(4) of the United Nations Charter. See further: *infra* n.25.

4 This problem was particularly acute in cases involving the status of foreign companies registered in, or incorporated under the laws of, foreign entities not recognised by the United Kingdom; fortunately, Parliament provided, in the Foreign Corporations Act 1991, for the judicial treatment of such companies as if they were from recognised States. See further *infra* n.37.

5 [1995] S.T.C. 741. See also: C. Warbrick, "Unrecognised States and

The situation which gave rise to the appeal was far from unusual: the appellants were appealing against Inland Revenue assessments for income tax under Schedule E. What made the case as argued before the Special Commissioners unusual was that the appellants had, during the years in respect of which the assessments were made, been employed in the London office of the TRNC. Their salaries were paid by the TRNC Government, which deducted tax at source. They therefore argued that their salaries were exempt from income tax under the Income and Corporation Taxes Act 1988, Section 321 of which provides for exemption from income tax in respect of, *inter alia*, " ... the employment of an official agent in the United Kingdom for any foreign state, not being an employment exercised by a Commonwealth citizen or a citizen of the Republic of Ireland or exercised in connection with any trade, business or other undertaking carried on for the purposes of profit".[6] The Inland Revenue argued that the TRNC was not a "foreign state" and that the appellants were Commonwealth citizens. It not being in dispute that the TRNC had not been recognised as a state by the British Government,[7] there were three issues for determination in the appeal: first, whether the words "any foreign state" in Section 321(2)(b) of the

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Liability for Income Tax", *International and Comparative Law Quarterly* 45 (1996), 954-960.

6 Income and Corporation Taxes Act 1988 (hereafter "the Taxes Act"), s.321(2)(b).

7 The evidence on this point is too conclusive to admit of any argument, even by supporters of the Turkish Cypriot viewpoint. While the British government continues to extend recognition to States, its reaction to the TRNC's unilateral declaration of independence was and is consistently negative. In a debate in the House of Commons on 16 November 1983 (i.e. one day after the unilateral declaration of independence) the Foreign Secretary expressly stated that the British government condemned the establishment of the TRNC and would not recognise it as a state — see *Hansard* H.C. Debs, vol. 48, cols. 723-728 and 984. On 2 October 1989 the Foreign and Commonwealth Office issued a certificate that the TRNC was not a State for the purposes of the State Immunity Act 1978 — a certificate which, it is acknowledged, still represents the British government's view on the subject — see *Caglar, supra* n.5, para.44. The United Kingdom does not have diplomatic relations with the TRNC; the Commissioners viewed the relations between the British Government and the "Turkish Cypriot community in the north of Cyprus" as being "not in the nature of government-to-government dealings but ... functional contacts only": *supra* n.5, at para. 179.

Taxes Act were to be interpreted as including unrecognised foreign states; secondly, if the answer to the above was in the affirmative, whether the TRNC was a foreign state; and thirdly, whether the appellants were Commonwealth citizens. The case was thus treated almost exclusively by the Special Commissioners as being one of statutory construction of domestic legislation — an approach which views the intention of Parliament, in enacting Section 321(2)(b) of the Taxes Act, as all-important.

The first issue — whether the concept of "any foreign state" in the Taxes Act included unrecognised foreign states — was thus necessarily the paramount question which the Special Commissioners had to answer. It is submitted that while the answer which the Special Commissioners gave was in its substance quite unexceptionable, their method of analysis and, above all, their general conclusion, can be interpreted as severely restricting the kind of judicial liberalism exhibited most notably (at least on this issue of recognition) by Lord Denning MR in *Hesperides Hotels Ltd* v. *Aegean Turkish Holidays Ltd.*[8] That case, it will be recalled, concerned the "occupation" of (formerly Greek Cypriot) hotels by Turkish Cypriots following the invasion by the Turkish army; Lord Denning memorably stated, *obiter*, that "If it were necessary ... I would unhesitatingly hold that the courts of this country can recognise the laws or acts of a body which is in effective control of a territory even though it has not been recognised by Her Majesty's Government *de jure* or *de facto*..."[9] Of course, to the extent that Lord Denning's oft-quoted remarks apply to the validity of Turkish Cypriot decrees in Northern Cyprus (as opposed to the rights of Turkish Cypriots situated in the United Kingdom under English law), or "day-to-day affairs" of Private International Law, his *dictum* applies to a set of circumstances quite distinct from that which occurred in *Caglar*. This distinction was emphasised by the Special Commissioners when dealing with Lord Denning's remarks,[10] which had been cited by counsel for the appellants, along with a series of other decisions in which English courts had acknowledged unrecognised states or governments.[11]

The Special Commissioners resolutely distinguished every case cited

8 (1978) 1 Q.B. 205.

9 *Supra* n.8, at 218.

10 *Caglar*, supra n.5, at paras. 111 and 121.

11 It is not necessary, for the purposes of this article, to discuss all of these cases, but some of the most relevant ones are mentioned below.

to them in support of the applicants, taking a relentlessly logical approach which was determined by their basic premise: namely, that the question of the tax exemption rights, in English law, of nationals of an unrecognised territory, could only be decided as a matter of statutory construction of the relevant domestic legislation. On the face of it, this approach renders considerations of international law irrelevant, as all that counts is the intention of Parliament. But the Special Commissioners took note of the appellants' arguments concerning the political nature of the act of recognition[12] and, in building up the legislative structure which they used to demolish the appellants' arguments, they effectively erected a two-tier legal analysis in which their interpretation of the British legislation (the primary law) was very much dependent on foreign policy considerations as laid down by the British government, which in turn are derived from considerations of international law (the secondary law). The Special Commissioners quoted approvingly from Steyn J and Donaldson MR in *GUR Corporation* v. *Trust Bank of Africa Ltd.*[13] (holding Foreign Office certificates as to recognition to be conclusive, by reference to the principle that " ... in the field of foreign relations the Crown in its executive and judicial functions ought to speak with one voice"[14]) and then went on to declare the fundamental principle underpinning their decision on the first question raised by the appeal as follows: " ... the courts will not acknowledge the existence of an unrecognised state if to do so would involve them in acting inconsistently with the foreign policy or diplomatic stance of this country[15] ... In our view it is a matter of basic public policy that we should not take cognisance of the Turkish Republic of Northern Cyprus as that would involve us in acting inconsistently with the foreign policy or diplomatic stance of this

12 Although they pointedly declined to "reach a final view on the question whether recognition is, or is not, a political act": *Caglar, supra* n.5, at para. 104.

13 *Supra* n.3.

14 *Supra* n.3 *per* Steyn J. He went on to remark that " ... recognition ... is a matter of foreign policy on which the executive is in a markedly superior position to form a judgement". The conclusiveness of a Foreign Office certificate as to British recognition or otherwise of any entity is stipulated in s.21 of the State Immunity Act 1978.

15 *Caglar, supra* n.5, at para. 121. The wording is borrowed practically *verbatim* from Donaldson M.R.'s proposition in *GUR Corporation, supra* n.3.

country".[16]

In order to make sense of the "foreign policy or diplomatic stance" which the Special Commissioners used as the foundation for their analysis of the legislative scheme relating to tax exemptions of foreign representatives, it is necessary briefly to discuss the position of the TRNC in international law — a position to which reference was also made in *Caglar*. The basic chronology has already been outlined above;[17] the key pronouncement in international law on the unilateral declaration of independence of the TRNC was contained in Security Council Resolution 541 (1983). This, in its preamble, declared the creation of the TRNC to be invalid on grounds of incompatibility with the 1960 Treaty Concerning the Establishment of the Republic of Cyprus,[18] and, in its operative paragraph 7, "[c]alls upon all States not to recognise any Cypriot State other than the Republic of Cyprus". This demand for non-recognition of the TRNC was reiterated, more insistently and forcefully, by the Security Council in Resolution 550 (1984), and has been respected by every State in the world except Turkey[19]. The United Kingdom's compliance with this mandatory duty[20] of non-recognition has already been mentioned;[21] the United States, likewise, has refused to extend recognition to the TRNC.[22]

16 *Caglar, supra* n.5, at para.122.

17 *Supra,* n.1.

18 (1961) U.K.T.S. 4; Cmnd. 1252.

19 The "exchange of ambassadors" between Turkey and the TRNC is vigorously condemned in the preamble to Resolution 550; operative paragraph 2 of the Resolution then declares this "secessionist action" to be "illegal and invalid".

20 The source of this duty in this instance is the provision for binding Security Council Resolutions in Article 25 of the United Nations Charter, rather than any Chapter VII resolution. *Supra* n.1.

21 The Government's statements in the House of Commons are referred to at n.7, *supra*. A convenient collection of parliamentary and Security Council exchanges on the subject is further to be found in "United Kingdom Materials on International Law", *British Yearbook of International Law* LIV (1983), at 384-385.

22 See the "sense of the House" resolution passed by the United States House of Representatives on 16 November 1983 (H. Con. Res. 223); the refusal of successive Administrations to recognise the TRNC has also been judicially noted at appellate level in *Autocephalous Church of Cyprus* v. *Goldberg & Feldman Arts* (1990) 917 F. 2d 278, at 291-292 (United States Court of Appeals, 7th Circuit). The case concerned title to mosaics stolen

Turkey, on the other hand, has consistently maintained full diplomatic relations with the TRNC and regards it as an independent sovereign State,[23] citing Turkish Cypriot claims to self-determination and the need for them to be protected against Greek expansionism.[24] Partisan claims by supporters of the Greek and Turkish sides of the argument, however, must be subordinate to international law, which is meant to be the arbiter in such disputes; and in this matter, it is submitted that the relevant international law rules are far too well settled to admit of serious argument. The Turkish military intervention in Cyprus in 1974 was a violation, not only of the general prohibition of the use of force as an act of aggression in international relations[25] and of the general principle of non-intervention,[26] but also of the specific

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from a Cypriot church by invading Turkish troops: the court held that the Church of Cyprus was the legitimate owner of the mosaics because United States law regarded the TRNC as a non-recognised entity.

23 This attitude is exemplified most recently by the Ankara Declaration of 28 December 1995, the preamble of which expressly reiterates Turkish recognition of the TRNC, and paragraph 6 of which guarantees the military security of the TRNC against "the ongoing Greek/Greek Cypriot attempts of military escalation". This guarantee is maintained only by the continued presence in the TRNC of an estimated 30,000 troops of the Turkish army, in a permanent state of high alert.

24 The Turkish invasion of Cyprus in 1974, which resulted in the present situation, was directly prompted by Turkish fears of an imminent Greek-instigated coup d'état in Cyprus with the intention of forcing *enosis* (unification of Cyprus with Greece, the latter being at the time under the control of a belligerently nationalistic military government).

25 As contained in Article 2(4) of the United Nations Charter. This rule has been undisputed as a fundamental principle of international law since the end of World War II, having been reiterated by the United Nations itself (e.g. in General Assembly Resolution 2625 (XXV) (1970) — the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance With the Charter of the United Nations) and by the International Court of Justice, which noted the International Law Commission's view that the Charter prohibition of the use of force had attained the status of *jus cogens* — see the *Case Concerning Military and Paramilitary Activities In and Against Nicaragua* (1986) 76 I.L.R. 1, at para. 190.

26 As contained in the United Nations Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty — General Assembly Resolution 2131 (XX) (1965).

prohibition of the use of military force against the integrity and sovereignty of the Republic of Cyprus.[27] In response to the latter point, the Turks have always invoked Article IV of the Treaty of Cyprus, which permits unilateral military intervention, if necessary, by one of the three guarantors of Cypriot independence (namely, Greece, Turkey and the United Kingdom, all of which are party to the 1960 Treaty). What this argument fails to address is the point that Article IV only allows such intervention for the purpose of preserving the *status quo* in Cyprus, while the effects of the 1974 Turkish intervention were precisely the opposite in that they resulted in mass forced transfers of population between the predominantly Greek south and the predominantly Turkish north, and, ultimately, in the creation of the TRNC.[28] The Turkish Cypriot claim to self-determination has not been accepted other than by Turkey, as the Turkish Cypriot community has not been regarded as "a self-determination unit". The effect of all this has been to bring the TRNC within the scope of the doctrine of non-recognition originally known as the Stimson Doctrine but now regarded as an inevitable corollary of Article 2(4) of the United Nations Charter: that States should not recognise any entity or situation brought about by means contrary to the Charter and the general principles of international law concerning friendly relations between States.[29]

27 As contained in the Treaty of Cyprus 1960, *supra* n. 18.

28 The United Nations Security Council condemned the original Turkish military intervention in Cyprus in operative paragraph 3 of Resolution 353 (1974) and in operative paragraph 1 of Resolution 360 (1974); in operative paragraph 1 of Resolution 367 (1975), it called upon all States, " ... as well as the parties concerned, to refrain from ... any attempt at partition of the island [a clear reference to the Turkish intervention] or its unification with any other country [an equally clear reference to the possibility of a Greek-inspired coup d'etat leading to union between Cyprus and Greece]". The Security Council's hostile reaction to the TRNC in Resolutions 541 (1983) and 550 (1984) has already been described, *supra* nn.1 and 19 respectively.

29 This doctrine of non-recognition, in its post-1945 incarnation, is essentially contained by implication in the 1970 Declaration on Principles of International Law, *supra* n.25. For the historical background of the Stimson Doctrine, see *Starke's International Law, supra* n.2, at 140-143. See also J. Crawford, *The Creation of States in International Law* (Oxford: Clarendon Press, 1979), 118. The doctrine is expressly incorporated into the domestic law of some States; see, e.g., the *Restatement (Third) of the Foreign Relations Law of the United States*, §202(2), and Comment (e) and Reporter's Note (5) thereto.

The Special Commissioners in *Caglar* could have used, or at least made reference to, the international law position of the TRNC outlined above. Instead, they concentrated for the crux of their analysis exclusively on the construction of the British statute law invoked in the case, although they did hear submissions by counsel for the appellants (largely undisputed by the Inland Revenue) on the nature of and criteria for recognition in international law. As has been indicated above, the analysis used rests on a two-tier legal structure, the "lower" tier of which (the international law) has just been discussed. The "upper" tier — interpretation of British statute and caselaw — follows the argument on the first point in the appeal to its logical conclusion. Given the weight of international law hostile to the TRNC and the British Government's consequent refusal to recognise the TRNC, the Special Commissioners fell back on domestic statute law in force, namely the Cyprus Act 1960 (implementing the Treaty of Cyprus), and decided they could not depart either from the Treaty or the Act, both of which provide that the Republic of Cyprus is the only State on the island of Cyprus.[30]

In reaching this conclusion, it was necessary for the Special Commissioners to consider both statute and caselaw concerning international relations between the United Kingdom and unrecognised States. Their interpretation of the statutory scheme for dealing with such entities is the more important, as it formed part of the direct justification for the interpretation adopted for the Taxes Act. Having considered "the whole scheme of immunities and exemptions for representatives of foreign states", the Special commissioners concluded that "within the context of the Taxes Act ... it was not the intention of Parliament to introduce, in a sub-sub-section, a new exemption for representatives of unrecognised foreign states when all the other immunities and exemptions were specifically dependent on recognition or certification; if it had been the intention of Parliament to introduce a new concept in a sub-sub-section it would have stated so specifically".[31] The "other immunities and exemptions" referred to were primarily the "general law of sovereign immunity", involving consideration of the Diplomatic Privileges Act 1964,[32] the Consular Privileges Act 1968,[33]

30 *Caglar, supra* n.5, at paras. 148 and 150.

31 *Caglar, supra* n.5, at para. 148.

32 Section 4 of the Diplomatic Privileges Act provides for certification by the Foreign Secretary as to "whether or not any person is entitled to any privilege or immunity under this Act", such certification to be conclusive

and certain provisions of the 1988 Taxes Act;[34] in addition to these statutory restrictions on exemption, it was also noted that there was a general immunity for foreign sovereigns and States, but under the common law " ... that would only be granted if their states were recognised".[35] The Special Commissioners, viewing all these (sometimes overlapping) statutory provisions within an overall framework as a coherent scheme of legislation, decided that the aim of the scheme was "to confine exemption to certain certificated persons or to certain persons from recognised foreign states".[36] The Special Commissioners identified only two statutes which were of any assistance to the appellants' argument that the legislative scheme could be construed as inclusive of unrecognised States: the Foreign Corporations Act 1991 and the Patents Act 1949. The former extends legal personality, for the purposes of British litigation, to foreign corporations incorporated under the laws of "territories" not recognised by the United Kingdom[37] — the Special Commissioners seized upon the word "territories" as confirmation that "Parliament reserves the word 'state' to mean a recognised state and uses another word, in [the Foreign Corporations Act] 'territory', to refer to an entity which is not a recognised state".[38] As to the Patents Act, the one and only case in which the words "any foreign state" in Section 24 of that Act had been interpreted as meaning recognised and unrecognised States[39] was distinguished on the grounds

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evidence of the facts stated therein.

33 Section 11 of the Consular Privileges Act is in exactly the same terms as Section 4 of the Diplomatic Privileges Act, *supra* n.32.

34 Sections 320-322 of the Taxes Act provide exemptions for official agents of Commonwealth countries and self-governing colonies, subject to certification by a High Commissioner.

35 *Caglar*, *supra* n.5, at para. 88.

36 *Calgar*, *supra* n.5, at para. 89.

37 Foreign Corporations Act 1991, s.1. It should be noted that this provision uses the word "territory" with the specific meaning of an entity "which is not at that time a recognised State", thereby defeating the logic of the appellants' argument in *Caglar* to the effect that Parliament's use of the general term "State" can refer to both recognised and unrecognised States: here, where Parliament specifically meant to refer to unrecognised States, a different word was used and its intended terms of reference expressly stated in the statute.

38 *Caglar*, *supra* n.5, at para. 93.

39 *Re Al-Fin Corporation's Patent* (1970) 1 Ch.160. The unrecognised State in

that the words in the statute had to be construed in their context and given the meaning intended by Parliament,[40] and "In that case the issue concerned the private rights of the patentee and the decision had no effect on the foreign entity".[41] The distinction is certainly correct in that the situation covered by Section 321 of the Taxes Act is not the same as that covered by Section 24 of the Patents Act: while the latter deals with the statutory *rights* of a private person, the former is concerned with *exemptions* (dependent on express certification) from liabilities imposed by statute. The two are fundamentally different in terms of the legal position of individuals as envisaged by Parliament. Furthermore, the context in which the phrase "any foreign state" occurs in Section 24(1) expressly refers to "*hostilities* between His Majesty and any foreign state" (emphasis added); it is submitted that it is far from unreasonable to suppose that the context of hostilities might well logically include situations of armed conflict where the enemy of the United Kingdom is not officially recognised as a sovereign State;[42] on the other hand, it can equally be maintained in logic that formal diplomatic or consular relations are only consistent with recognition — indeed, it is submitted that precedents in the law and practice of international diplomacy generally confirm this to be the case.[43]

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question was the People's Democratic Republic of Korea.

40 *Supra* n.39, at 180, *per* Graham J.

41 *Caglar, supra* n. 5, at para. 106.

42 Examples of conflicts between States that have not at all material times recognised each other as such are legion: particularly celebrated ones include the various Arab-Israeli wars since 1948, in none of which has the State of Israel been recognised by its Arab enemies; the Korean War (which was the subject of the litigation in *Re Al-Fin Corporation's Patent, supra* n. 39); and World War II, in which various puppet states established as satellites by Germany and Japan (notably the Vichy French State, Slovakia, Croatia and Manchukuo) were never recognised by the Allies.

43 There are, however, some ambiguities as to the exact legal relationship between recognition and diplomatic relations; for a discussion of this point, see *Starke's International Law, supra* n.2, at 128-130, especially *supra* n.15, where reference is made to the decision of the United States District Court for the Southern District of Texas in *Compania de Transportes Mar Caraibe SA v. M/T Mar Caraibe* (1961) 55 A.J.I.L. 749 (concerning the breaking off of American diplomatic relations with Cuba); and cf. Misra, "India's Policy of Recognition of States and Governments", *American Journal of International Law* 55 (1961), 398-424, especially at 404-409 (concerning India's ambivalent relationship with Israel after according recognition but

Various other precedents which might, *prima facie*, appear to support the appellants' position in *Caglar* were considered and distinguished by the Special Commissioners. The most significant of these were *Fenton Textiles Association* v. *Krassin*[44] (in which the "Chief Official Agent" of the Soviet Union — not at that time recognised *de jure* by the United Kingdom — claimed that his exemption from tax entitled him to full diplomatic immunity: the Special Commissioners noted that the Court of Appeal's decision had made it clear that Krassin's exemption from tax was based on the express terms of a specific agreement — the Anglo-Russian Trade Agreement of 1921 — rather than on any wider policy or practice on the part of the Inland Revenue);[45] and a series of cases involving the acknowledgement, by British courts, of unrecognised States for the purposes of enforcing rules of Private International Law in commercial and contractual disputes between individuals or private corporations.[46] As has already been pointed out,[47] such situations are fundamentally different to that in *Caglar*.

Having considered the meaning of the phrase "foreign state" in the context of British statute and caselaw, the Special Commissioners briefly considered its meaning in international law. The appellants' argument on this point was somewhat ill-conceived: counsel suggested that "the phrase 'foreign state' was a generic term of international law which was incorporated directly into English law and the meaning of which evolved with the evolution of the law".[48] This submission rested on the views

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refusing to establish diplomatic relations).

44 (1922) 38 T.L.R. 259.

45 *Caglar*, *supra* n.5, at paras. 96-98. In any event it should be noted that *Krassin* was concerned with recognition of governments, not recognition of States.

46 *Hesperides Hotels Ltd.* v. *Aegean Turkish Holidays Ltd.*, *supra* n.7; *Reel* v. *Holder and Another* (1981) 3 All E.R. 321; and *Polly Peck International plc* v. *Nadir and Others* (1992) 2 Lloyd's L.R. 238. It is noteworthy that while the latter case actually involved the TRNC, the most that Scott L.J. was prepared to say on the issue was that "Northern Cyprus is not recognised by Her Majesty's Government but nonetheless has had *de facto* control over its territory since about 1974": *Polly Peck International plc* v. *Nadir and Others*, *supra*, at 240. See *Caglar*, *supra* n.5, at paras. 109-111 and 114-118.

47 *Supra* n.3.

48 *Caglar*, supra n.5, at para. 126.

expressed by Lord Denning MR and Shaw LJ in *Trendtex Trading Corporation* v. *Central Bank of Nigeria*[49] — views which contradict established caselaw on the position of rules of customary law in the British legal order.[50] The argument also mysteriously failed to take into account either the fact that the evolution of customary international law has, if anything, made States *less* willing to extend recognition to entities like the TRNC, or the fact that the primary sources of legal obligation for the United Kingdom in respect of any situation arising in Cyprus are the 1960 treaties (in international law) and the Cyprus Act of the same year (in domestic law). This position effectively rendered pointless any attempt by the appellants to pursue an argument on these lines, as the international law position in both customary and treaty law is very unfavourable to the TRNC. Just as they stressed the paramount importance of Acts of Parliament on the domestic law points raised in the case, so the Special Commissioners also gave primacy to the treaties when considering the international law aspects of the matter.[51]

With regard to whether recognition was a requirement for being a State in international law generally, the Special Commissioners commented: "We accept that recognition acknowledges as a fact the independence of a body claiming to be a state but from that it appears to follow that a state which has not recognised an emerging entity has not acknowledged it to be a state";[52] and as to the argument that the effect of recognition in international law is declaratory rather than constitutive, the Special Commissioners took note of the possible "force of these arguments in the international sphere", but inevitably concluded that " ... we are faced with the fact that the United Kingdom has not recognised the Turkish Republic of Northern Cyprus ... Accordingly, in interpreting legislation made by the United Kingdom Parliament, we should have regard to the fact that the United Kingdom has not yet

49 (1977) Q.B. 529.

50 Cf. *Mortensen* v. *Peters* (1906) 8 F. (J.) 93 (regarding the consistency of such rules with British statute law, based on the constitutional doctrine of parliamentary supremacy), and *Chung Chi Cheung* v. *R.* (1939) A.C. 160 (regarding the interpretation of the scope of customary international law rules by British courts of final authority). For a discussion of the general relationship between international law and British law, see *Starke's International Law, supra* n.2, at 68-74.

51 *Caglar, supra* n.5, at paras. 129-131.

52 *Caglar, supra* n.5, at para. 141.

acknowledged that the Turkish Republic of Cyprus has satisfied the criteria of statehood".[53]

The conclusion of the Special Commissioners on this first issue in the appeal — that "the words 'any foreign state' in Section 321(2)(b) mean any foreign state recognised by Her Majesty's Government"[54] — was inevitable, given the logic of their analysis. In addition, they referred to the Cyprus Act (although it was ignored by counsel for both sides in their submissions) and found that " ... there is a current statutory provision in the United Kingdom that the only state on the island of Cyprus is the Republic of Cyprus. In the light of that provision it would be contrary to domestic statute law to hold that the Turkish Republic of Northern Cyprus is a foreign state and from that it would follow that the Appellants, who are its representatives, cannot be entitled to the exemption in Section 321".[55] Compared to their thorough analysis of the statutory scheme of exemptions for representatives of foreign States, this amounted to a throwaway remark, tacked on to the argument for good measure.

The discussion of the second issue in the appeal — whether or not the TRNC satisfied the requirements of statehood in international law — was, as the Special Commissioners pointed out, technically superfluous in view of the conclusion they had reached on the first issue of statutory construction. Nevertheless, they went on to consider the point, "in case we are wrong in our conclusion on the first issue".[56] Such modesty was quite unnecessary, as the conclusion on the first issue was undoubtedly correct, but the discussion of the second issue involved consideration of the position of the TRNC in general international law, and specifically in terms of statehood.[57] Both parties accepted that there were traditionally four criteria of statehood in international law,[58] and that the TRNC satisfied three of them — namely a permanent population, a defined territory and a government in effective control.

53 *Caglar, supra* n.5, at para. 144.

54 *Caglar, supra* n.5, at para. 149.

55 *Caglar, supra* n.5, at para. 150.

56 *Caglar, supra* n.5, at para. 151.

57 The international law position of the TRNC as a matter of recognition, as distinct from statehood, has been outlined *supra*, n.1.

58 As set out in Article 1 of the Montevideo Convention on Rights and Duties of States 1933 (165 L.N.T.S. 19; *American Journal of International Law Supp.* 28 (1934), 75-78).

The problem centred on the fourth requirement, defined in Article 1 of the Montevideo Convention as the capacity to enter into relations with other States. The position of the TRNC in respect of this is very similar to that of the former "Bantustans" of South Africa and, in a more historical context, the Japanese puppet "Empire of Manchukuo": the general duty not to recognise the TRNC has been based by the United Nations Security Council on the illegality of the circumstances in which it was created, and by individual States (as a supplementary justification) largely on the fact that the TRNC is not properly independent of Turkey.

In their consideration of this issue, the Commissioners unsurprisingly concurred in the view expressed by the majority of writers on this subject, namely "that the fourth requirement of a state may be expressed as a capacity to enter into relations with other states *and that there should be both formal and functional independence*"[59] (emphasis added). Pursuing this line of enquiry, there can surely be little doubt as to the formal independence of the TRNC: such is evidenced by the factual existence of a separate administration in Northern Cyprus which has claimed statehood since 1983 and which possesses most of the formal attributes of statehood, not least *de facto* control of the territory which it claims to govern; various documents such as the Ankara Declaration;[60] and *obiter dicta* in various cases referring to Northern Cyprus.[61] The Commissioners rightly did not consider this a problem, and chose instead to concentrate on the TRNC's functional independence. The appellants' submission on this point was that the TRNC's contacts with the British and other Governments were in the nature of inter-

59 *Caglar, supra* n.5, at para. 168. In paras. 166-167, the Commissioners make an interesting reference to a passage in J. Dugard, *Recognition and the United Nations* (Cambridge: Grotius, 1981), where the latter discusses the position of the so-called Bantustans at pp. 60-64, and disagrees with a South African judicial decision to the effect that " ... where a state had the infrastructure to implement relations with other states it was a state even if it was precluded from entering into such relations due to political considerations. Professor Dugaard [*sic*] disagreed with this view which, he said, was out of touch with reality; there had to be both formal independence and functional independence." (*Caglar, supra* n.5, at para. 167.)

60 *Supra* n.23.

61 E.g. *Hesperides Hotels Ltd.* v. *Aegean Turkish Holidays Ltd., supra* n.7; and *Polly Peck International plc* v. *Nadir and Others, supra* n.46.

governmental dealings. The Commissioners, on the other hand, agreed with the Inland Revenue that the contacts maintained with Northern Cyprus by the British Government were "functional contacts only" and were really with "the Turkish Cypriot community in the north of Cyprus".[62]

Again, the evidence clearly supports the conclusion reached by the Commissioners on this point, namely that the TRNC cannot enter into normal relations with any State other than Turkey because of general non-recognition by the rest of the international community as a whole, and therefore the TRNC does not have functional independence and thus cannot satisfy the fourth requirement of statehood. What is interesting is that in spite of reaching this conclusion, the Commissioners noted the circular nature of the constitutive theory of recognition in that it holds that only recognised States are actually States in the eyes of those that recognise them, because it is self-evident that recognising States will enter into relations with an entity but non-recognising States will not, and therefore lack of recognition of the TRNC by States other than Turkey was not necessarily evidence that the TRNC was not a State. The bottom line here appears to have been that if the TRNC were recognised by more States apart from Turkey, it might be possible to say that the TRNC was a State, even though certain parts of the international community did not recognise it. But in the case of the TRNC international practice was overwhelmingly hostile to recognising its statehood. In other words, it is submitted, the respective numbers of States recognising and not recognising a given entity is likely to be crucial in determining the status of that entity in international law.[63]

The third and last issue for determination in the appeal was whether the appellants were Commonwealth citizens in accordance with the definition in the British Nationality Act 1981.[64] It is submitted that the

62 *Caglar*, *supra* n.5, at para. 179.

63 It may be useful to compare the situation of the TRNC with that of Bangladesh, created in 1971 as a result of a military intervention by India arguably as illegal as the Turkish intervention in Cyprus. Bangladesh has since received general recognition in the international community. This was probably due, at least in part, to the acknowledgement that the East Pakistanis (as they were until 1971) constituted a "self-determination unit". It is difficult to see why Turkish Cypriots do not benefit from similar status.

64 Section 37(1) of the British Nationality Act 1981 provides that any person

appellants' argument on this point was based entirely on semantics: they argued that Section 37 used the word "country" rather than "state", and that the two concepts were different as the former was "the territory over which a government had authority".[65] They also argued that nationality laws were a matter for the *lex loci* rather than the *lex fori* and that, in this case, the *lex loci* was that of the TRNC which was not a member of the Commonwealth and which had duly conferred, in accordance with its own law, its nationality on the appellants.[66] Furthermore, counsel for the appellants argued that the Republic of Cyprus could not confer its nationality on persons living in territory outside its effective control who were not able to enjoy the benefits of such nationality.[67]

Each of the appellants' submissions on the third issue in the appeal was rejected by the Commissioners, again by reference primarily to British legislation. In discussing the meaning of the word "country" in the context of the British Nationality Act 1981, the Commissioners distinguished *Reel v. Holder*,[68] wherein the view was expressed that the word "country" was not confined to sovereign states.[69] The Commissioners took the view that in passing the British Nationality Act 1981, Schedule 3 of which lists the Republic of Cyprus as a Commonwealth "country", Parliament must have been aware of the 1975 declaration of the Turkish Federated State of Cyprus and also of the Cyprus Act 1960, Section 2(1) of which provides that the Republic

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who is a citizen of a country listed in Schedule 3 to the Act, in accordance with any law for the time being in force in that country, shall have the status of a Commonwealth citizen. The Republic of Cyprus is listed in Schedule 3 to the Act, and the appellants in the instant case were citizens of the Republic of Cyprus under Article 198 of the 1960 Constitution of Cyprus and under the Republic of Cyprus Citizenship Law (No. 3 of 1967); the Commissioners, taking these matters into account, declined to enquire into the validity of acts of the recognised Cypriot Government — *Caglar, supra* n.5, at para. 217.

65 *Caglar, supra* n.5, at para. 186.

66 *Caglar, supra* n.5, at paras. 187-188.

67 *Caglar, supra* n.5, at para. 191.

68 *Supra*, n.46.

69 *Per* Lord Denning M.R., remarking that Scotland would be a country although it was not a sovereign State in international law. The Commissioners rightly commented that Scotland does not have or purport to have a government separate from that of the United Kingdom: *Caglar, supra* n.5, at para. 207.

of Cyprus comprises the entirety of the island of Cyprus. Thus statutory interpretation was used again, as it had been on the first issue in the appeal, to rebut the appellants' arguments.

On the validity of the 1967 Cypriot citizenship law, the Commissioners held that they would not enquire into the validity of acts of the Government of the Republic of Cyprus, which was recognised by her Majesty's Government.[70] They further dismissed the argument that the Turkish Cypriots' right to self-determination under international law invalidated the citizenship law of the Republic of Cyprus, finding themselves "unable to state with certainty that there is a principle of self-determination in customary international law".[71] With respect, it must be submitted that this last comment by the Commissioners is quite plainly wrong — international practice since 1958, in particular that of the United Nations, quite clearly recognises a right to self-determination in international law.[72] In view of the Commissioners' finding that the laws of citizenship are inextricably linked to the status of sovereign States in international law,[73] and their foregoing remarks on recognition of the TRNC, it was a foregone conclusion that their final determination should be that the appellants were indeed Commonwealth citizens.

On the whole, the Commissioners' interpretation of the relevant British legislation in *Caglar* appears to have been eminently sensible and their reasoning sound. The decision undoubtedly restates clearly — albeit in special terms required by the unique position of the TRNC in British law, because of the existence of international treaty obligations and specific domestic legislation — the general position with regard to agents of unrecognised States in the United Kingdom. There are a few oddities here and there in the decision, such as the doubts expressed by the Commissioners as to the existence of the principle of self-determination in customary international law,[74] and the Commissioners' misinterpretation of *Reg. v. Minister of Agriculture, Fisheries and Food, ex*

70 *Supra* n.64. The principal authorities cited by the Commissioners were *Luther* v. *Sagor* (1921) 3 K.B. 532 and *The Vapper* (1947) 80 Lloyd's L.R. 99.

71 *Infra* n.74.

72 See *Starke's International Law, supra* n.2, at 111-113, and R. Higgins, *Problems and Process: International Law and How We Use It* (Oxford: Clarendon Press, 1994), ch. 7.

73 *Caglar, supra* n.5, at para. 244.

74 *Caglar, supra* n.5, at para. 231.

parte S.P. Anastasiou (Pissouri) Ltd. and Others[75] to the effect that the TRNC had in that case been treated as a "competent authority" of the Republic of Cyprus for the purpose of certificating the origin of imported fruits and vegetables pursuant to European law, thereby assimilating it to the position of Ciskei in *GUR Corporation*[76] or East Germany in *Carl Zeiss Stiftung*,[77] whereas the TRNC could not in any circumstances be regarded as a subordinate or delegated authority of the Republic of Cyprus.[78] The overall principles, however, are not limited to matters concerning the TRNC but may henceforth apply to cases involving any entity not recognised by the United Kingdom as a State. They are comprehensively analysed; and therein lies the true significance of this decision. For it is to be hoped that the decision in *Caglar* will be used consistently in future cases of this kind, helping to cast a light of legal certainty on an area much obscured — and quite unnecessarily so — by considerations of foreign policy and State practice.

75 (1994) E.C.R. I-3087.

76 *Supra* n.3.

77 *Supra* n.3.

78 *Caglar*, *supra* n.5, at para. 177.