The Effects in Municipal Law of Australia's New Recognition Policy

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Introduction

Recognition is the declaratory act by which a government acknowledges the existence of a particular state of facts.[1]

Recognition with respect to governments (as distinct from States) is the process by which one State accepts a new regime as representing another State in international intercourse and renews relations accordingly.[2] Generally, recognition with respect to governments has only been of importance where a government has come to power by unconstitutional means.[3]

In the theory of international law, the recognition of governments has served three functions. In the first place, it has been used by members of the international community to bestow a mark of legitimacy on regimes satisfying the objective criterion of effective control. Secondly, as a consequence of recognition, the new regime had some assurance that its status and rights would be respected. Thirdly, and most importantly, recognition has been an indication to courts (and others) that a particular regime was the proper authority to be considered the government of the State concerned.[4]

The difficulty that lawyers have had with recognition is that recognition is not in itself a legal act *per se*,[5] rather it is a discretionary political decision from which legal consequences flow.[6] It is generally accepted that each nation reserves to itself the right to determine its own reasons for according or refusing recognition to a new government.[7]

There are many discussions by political theorists as to what entitled a government (or a State) to recognition. Generally, what emerges from pronouncements as to State practice, is that certain essential criteria must be satisfied before recognition may be granted. However, it is important to stress that there is no obligation to recognise a new government. What can be said is

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* This is an abridged version of the Research Paper presented for the award of the LLB (Hons) degree of the ANU in July 1988

1 See Greig DW, *International Law*, 2nd ed (1976), p 137.

2 Fischer Williams, "Recognition", (1929) 15 Trans Grot Soc 53.

3 See Hershey, "Notes on the Recognition of De Facto Governments by European States", (1920) 14 AJIL 477 at 478; esp the quotation from Weiss R, *Le Droit International Applique aux Guerres Civiles* (1898), p 227.

4 Peterson, "Recognition of Governments Should Not Be Abolished", (1983) 77 AJIL 31.

5 Not that much theoretical writing has clarified the situation; hence Brownlie's assertion that recognition has produced "various pronouncements of varying degrees of generality, vapidity and illogicality" ("Recognition in Theory and in Practice", (1982) 53 BYIL 197 at 201).

6 Wright, "Some Thoughts About Recognition", (1950) 44 AJIL 548 at 555.

7 See Brown, "The Recognition of Israel", (1948) 42 AJIL 620.

that it is only regarded as proper to recognise a government when it has established effective control over people in a certain territory, that is, when it can be seen to have some form of political existence and perhaps the capacity to perform its international obligations.[8]

While the substance of this proposition is acceptable enough, it is not true to say that a government will be recognised "whenever it fulfils" the conditions prescribed. Although Lauterpacht consistently asserted that there was a legal obligation to recognise a government that was de facto in control,[9] this view is not consistent with a preponderance of State practice confirming that the act of recognition is a sovereign unilateral act.

The reactions of members of the international community to the People's Republic of China (PRC) when that government came to power on the Chinese mainland are instructive. Under the influence of Lauterpacht, the United Kingdom was quick to recognise the new communist regime in 1950.[10] In contrast Australia declined to recognise the PRC until 1972[11] for the reason that the Australian government disapproved of the new regime's policies.[12] Despite the fact that the government of the PRC was clearly in "effective control", Australia's Minister for External Affairs pointed out in 1959:[13]

> a regime's capacity to govern is not the sole test for recognition by other governments. International practice certainly supports the view that whilst capacity to govern is a primary requirement, recognition remains, in fact, within the national discretion to be determined in the national interest.

The United States also considered that recognition might be withheld, even though the communist regime was obviously in "effective control". In 1957 the

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8 Alexandrowicz, "The Quasi-Judicial Function in Recognition of States and Governments", (1952) 46 AJIL 631 at 634-636.

9 Lauterpacht H, *Recognition in International Law* (1947), pp 6, 25.

10 See *Civil Air Transport Inc v Central Air Transport Corp* [1953] AC 70 at 93.

11 On coming to office in 1972, one of the "earliest actions" of the Prime Minister, Mr Whitlam, was to recognise the PRC: see the segment from the address by the Secretary of the Department of Foreign Affairs, Mr Renouf, on "The Rule of Law in International Affairs" (Aust FA Rec, July 1975, 397), reproduced in (1978) 6 Aust YBIL 226 at 227.

12 Hence the following passage from a statement by the Minister for External Affairs, Mr Casey, on 13 August 1959 (HR Deb, Vol 24, 196, quoted (1967) 3 Aust YBIL 239):

> For various reasons deriving from their national and international interests, these countries have not so far recognised Peking. Some Asian countries, having large Chinese minorities or insurgent Communist movements, do not want accredited Communist Chinese representatives and agencies on their territories. In another case - that of Japan - the Chinese Communist pressure for recognition is accompanied by a demand that Japan should abandon the present general aims and direction of that country's foreign policies. As Japan is unwilling to yield to these demands, Peking has cut off all trade with Japan. The separate problems and attitudes of non-recognising countries reflect the complex political character of this question of recognition. It is not to be assumed that Australian policy on this matter can be treated as purely and solely a matter arising between Peking and Australia, and with no wider significance.

13 Ibid.

United States Secretary of State rejected that the Peking Government had any "right" to recognition, explaining his government's position as follows:[14]

> There are some who say that we should accord diplomatic recognition to the Communist regime because it has now been in power so long that it has won a *right* to that.
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> That is not sound international law. Diplomatic recognition is always a privilege, never a right.
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> Of course, the United States knows that the Chinese Communist regime exists. We know that very well, for it has fought us in Korea. Also we admit of dealing with the Chinese Communists in particular cases where that may serve our interests. We have dealt with it in relation to the Korean and Indochina armistices. For nearly 2 years we have been, and still are, dealing with it in an effort to free our citizens and to obtain reciprocal renunciations of force.
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> But diplomatic recognition gives the recognised regime valuable rights and privileges, and, in the world of today, recognition by the United States gives the recipient much added prestige and influence at home and abroad.
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> One thing is established beyond a doubt there is nothing automatic about recognition. It is never compelled by mere lapse of time.

This passage indicates that recognition may be withheld or granted for whatever reason a nation considers appropriate. However, there is a basic limitation upon this "principle" which derives from the notion that it may be inappropriate to grant recognition where the regime in question cannot be said to be in effective control of the particular territory. There is an underlying thread of opinion that premature recognition constitutes an act of intervention in the internal affairs of another state and an international delinquency vis a vis that state and is therefore void.[15]

Pre 1980 British Policy

Despite the apparent adoption of the Lauterpacht thesis of there being a duty to recognise a new regime once it established itself in control of a country, British practice was never entirely consistent. This ambivalence can be seen in the distinction that had developed between *de jure* and *de facto* recognition. This

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14 Whiteman, *Digest of International Law*, Vol 2, p 13.

15 See Chen TC, *The International Law of Recognition* (1951), pp 54, 85-86, and writers there cited; Lauterpacht, op cit, pp 94-95. It is a matter of debate as to the validity or otherwise of an act of premature recognition. As far as the courts of the recognising State are concerned, they would presumably show the normal degree of deference to the view of the executive as to the status of the entity in question. It is at the international level that the suggestion has been made that the act of recognition, being premature, is illegal and therefore void. The difficulty with this view is to decide what it signifies. If recognition is constitutive in effect (which can hardly be true with regard to a single act of recognition), the invalidity of the act would be of significance. If, as is more plausible, individual acts of recognition are merely declaratory, or evidentiary, of a particular state of affairs, the act can hardly be categorised as void. All that can be said is that, in assessing the status of a particular entity under international law, all relevant facts must be taken into account, and the particular act of recognition will be discounted by reference to other facts that suggest that it is premature.

distinction arose because of the wish to avoid offending the authority which had been the previous government of a particular State. *De facto* recognition can be traced back to the early part of the nineteenth century when Great Britain and other States were confronted with the problem of reconciling the "practical necessity of recognition" of the new States of South America with the "legitimate pretensions of Spain and Portugal".[16]

The distinction which developed was that *de facto* recognition was considered as the acceptance by the recognising state of such facts which indicated that the new government actually existed and that it had control of the state in question. *De jure* recognition was essentially the act of recognising that a government had lawful existence.[17] This distinction purported to have the effect of giving "no just cause of offence to the old State, in as much as it decides nothing concerning the asserted rights of the latter".[18]

The traditional British policy with respect to the recognition of governments was explained in the "Morrison Statement" of March 21, 1951, where it was asserted:[19]

> The conditions under international law for the recognition of a new regime as the *de facto* Government of a State are that the new regime has in fact effective control over most of the States territory and that this control seems likely to continue. The conditions for recognition of a new regime as the *de jure* government of a State are that the new regime should not merely have effective control over most of the States territory, but that it should, in fact, be firmly established.

De facto recognition was thus a form of provisional recognition, which could, once the new regime was firmly established, become *de jure*. Thus, the notion that *de jure* recognition was an implicit acknowledgment of the legality of a regime waned in significance. This assertion was supported by frequent statements that recognition of a new regime did not necessarily imply a judgment of the legality, nor an indication of Her Majesty's Government's approval of such regimes.[20]

The distinction between *de jure* and *de facto* was considered by the British courts to be of great significance in some situations. For instance, in *Haile*

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16 Lauterpacht, "De Facto Recognition, Withdrawal of Recognition and Conditional Recognition", (1945) 22 BYIL 164 at 165.

17 Fischer Williams, "Some Thoughts about Recognition in International Law", (1934) 47 Harv L R 776 at 781.

18 Phillimore R, *Commentaries upon International Law*, 3rd ed (1878), Vol 2, p 23.

19 HC Deb, Vol 485, 2410-1.

20 Although British practice was supposed to be based upon preliminary *de facto* recognition with *de jure* recognition to be accorded when the new regime could be considered to hold permanent control, there was evidence to suggest that political considerations occasionally crept into the determination of awarding *de jure* recognition. For instance, even though the British Government had declared that the Soviet Government was recognised *de facto*, it waited a number of years before it awarded *de jure* recognition, although it was clear that the Soviet Government was in effective control, and indeed there was no chance that it would be overthrown. There were clearly underlying motives for withholding *de jure* recognition, not least, an intention to ensure that the Soviets compensate the British for expropriations of property.

Selassie v Cable and Wireless Ltd (No 2),[21] it was held that the *de facto* recognised Italian Government in Abyssinia was not entitled to the extra-territorial assets of Abyssinia. Since the British government continued to recognise the Abyssinian authorities in exile as the *de jure* government, it was that government which had title to any extra-territorial assets. In British practice *de facto* recognition did not allow full diplomatic intercourse. In *Fenton Textile Association v Krassin*,[22] the Foreign Office asserted, in reference to whether a Soviet Trade official, Krassin, was to be regarded as a representative of the Soviet Government and thus accorded diplomatic immunity:

> It is not the practice of the Sovereign to receive the representatives of States which have not been recognised *de jure*, and...no representative of the Soviet Government would be received by His Majesty's Government because the Soviet Government has not been recognised *de jure*.

With respect to giving effect to the decrees and acts of the foreign regime, the British courts generally considered that there was no distinction between *de jure* and *de facto* recognition, at least as far as the internal effect of the decrees and acts of a recognised authority were concerned.[23] However, the acts of *de facto* authorities were considered as having no extra-territorial effect.[24]

Some writers have asserted that, from a juridical point of view, the distinction between *de jure* and *de facto* recognition is no longer important.[25] Brownlie has been particularly critical:[26]

> The terminology is very out of fashion (though it has not disappeared)... It follows that the standard works, in giving prominence to the *'de jure/de facto'* usage are not only committing atrocities of analysis, but are three decades out of date as a matter of ordinary description of State practice.

The dwindling significance of the purported distinction between *de facto* and *de jure* recognition has also been described as the "inevitable consequence" of the new policies adopted by the British and Australian governments,[27] though whether this is necessarily so will be dealt with later in this paper.[28]

United States Policy pre 1975

The United States has fluctuated in its policy regarding recognition of governments. Under President Wilson there emerged a requirement that the new regime be constitutionally elected or established (a notion which emerged from United States paternalism towards other States in a bid to ensure that they should be democratic!). However, this approach was discarded by President

21 [1939] Ch 182.

22 (1922) 38 TLR 260. Paradoxically a *de facto* authority was regarded as entitled to sovereign immunity: see the *Arantzazu Mendi* [1939] AC 216.

23 *Luther v Sagor* [1921] 3 KB 532.

24 *Re Helbert Wagg* [1956] Ch 323.

25 For example, Kelsen, "Recognition in International Law: Theoretical Observations", (1941) 35 AJIL 605 at 613.

26 "Recognition in Theory and Practice", (1982) 53 BYIL 197 at 208; see also Dugard J, *Recognition and the United Nations* (1987), p 6.

27 Symmons, "United Kingdom Abolition of the Doctrine of Recognition of Governments: A Rose by any Other Name", [1981] Public Law 249 at 254.

28 Below p 64.

Hoover.[29] Generally, the United States policy purported to be that recognition of a new regime would be deferred:[30]

> until it shall appear that it is in possession of the machinery of the State, administering government with the assent of the people thereof and without substantial resistance to its authority, and that it is in a position to fulfil all the international obligations and responsibilities incumbent upon a sovereign State under treaties and international law.

The United States did not follow the British policy of drawing a distinction between *de facto* and *de jure* recognition. Generally, recognition, whether it was called *de facto* or *de jure,* was given on the basis that once a regime was recognised it constituted a government on equal footing with any other. Thus, *de facto* recognition denoted the type of power the government enjoyed, which did not preclude it being considered as full recognition (in the British *de jure* sense).[31]

The United States had however, quite consistently, followed a practice of withholding recognition where it had political interests in the State concerned or wished to illustrate its condemnation of a particular regime, despite a government satisfying the criteria of effective control and obedience of its peoples. For instance, the Soviet Government was clearly established as early as 1919, yet the United States withheld recognition until 1932. Similarly, in the case of the Beijing Government, the United States consistently asserted a policy of non-recognition despite often dealing with the regime as the representative of China.[32] On the other hand, in a number of situations, United States courts were prepared to accept and act upon the *de facto* existence of both regimes, despite the absence of formal recognition.[33]

Australian Policy Pre-1988

Australia's approach to the recognition of governments has also been coloured by the government's political or moral view of a particular regime. In 1967 Australia recognised the revolutionary regime in Greece, since it was considered to be "in effective control" and "recognised as the constitutional government of that country".[34] However, recognition of the Peoples Republic of China was withheld at this time for a range of political reasons.[35]

After 1972 Australia purported to follow the practice of "recognising

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29 Such a policy seems to have been applied with any consistency only to revolutionary regimes in South American States: see Whiteman, *Digest of International Law*, Vol 2, p 69.

30 Letter from Secretary of State Hull dated 16 May 1936, ibid, p 71.

31 See Cochran, "De Facto and De Jure Recognition: Is There a Difference?", (1968) 62 AJIL 457 at 458.

32 See the extract from a talk given on 25 September 1958 by Secretary of State Dulles entitled "Challenge to Peace in the Far East" in Whiteman, *Digest of International Law*, Vol 2, p 555.

33 See below pp 49–50.

34 Minister of External Affairs, Mr Hasluck, in reply to a question without notice on 4 May 1967, HR Deb, Vol 55, 1580, quoted in (1967) 3 Aust YBIL 237-8.

35 See the statement by the Minister of External Affairs, Mr Casey, on 13 August 1959, HR Deb, Vol 24, 195 esp at 196.

realities".[36] In other words, once a government was in effective control, had reasonable prospects of permanence and had expressed a willingness to fulfil international obligations[37] it would be automatically recognised by Australia. At the inception of this policy Australia immediately recognised the People's Republic of China. In doing so Australia reflected the British adoption in the 1950s of the Lauterpacht view that recognition should be accorded immediately a government could be considered in effective control.

Nevertheless, despite the assertion that Australia intended to recognise the "realities of the situation", it is clear that the actual practice which ultimately developed was to decline recognition (despite the realities) for policy reasons. For instance, in March 1982 the Minister for Foreign Affairs announced that:[38]

> Australia recognises all countries of South America and all present governments except that of Bolivia. The Australian Government decided not to recognise the military regime which took power in July 1980 and condemned the reversal of the democratic process in Bolivia.

The Adoption of a New Policy of Recognition

A difficulty which the British, American and Australian governments encountered when implementing their respective policies of recognition was that the municipal electorate began to consider the act of recognition as tantamount to moral approval of a particular regime. It is not difficult to see why this belief developed in an arena where recognition had so often been withheld for political or moral reasons. Despite the continual assertions of governments that recognition did not denote approval of a regime, it became increasingly difficult to persuade the media and the electorate that this was the case: "the extension of recognition to a new regime was often misinterpreted in the public mind as denoting Australia's approval of that regime".[39] Also, determinations of recognition could be compromising in the international arena:[40]

> Sometimes this practice was misunderstood and, despite explanations to the contrary, *our act of recognition was taken to imply approval.* This was particularly unfortunate in cases where there was legitimate public concern about the violation of human rights by the new regime or the manner in which it has taken power, perhaps from an elected Government. Each change of regime by means other than elections, and each *coup* or revolution—and those were many, of course—thus brought us face to face with an awkward and public dilemma. It also created a minor—and rather

36 For examples of recognising realities, see the statements by the Minister for Foreign Affairs, Senator Willesee, on 17 April 1975 (S Deb 1975, Vol 65, 933; 6 Aus YBIL 240) with regard to Cambodia; and on 30 September 1975 (S Deb 1975, Vol 65, 797) with regard to Southern Rhodesia.

37 See the extract from the address by the Secretary of the Department of Foreign Affairs, Mr Renouf, on 9 July 1975 in 6 Aus YBIL 226 at 227.

38 Written answer of Mr Street on 10 March 1982, HR Deb 1982, Vol 126, 850-1; 10 Aus YBIL 282.

39 Statement by the Minister for Foreign Affairs and Trade, Mr Hayden, text in Aus FA Rec, Jan 1988, p 21.

40 Statement by the Minister of State, Foreign and Commonwealth Office, Baroness Young, HL Deb, Vol 448, 344 (15 Feb 1984).

> artificial—crisis in our relations with other countries precisely at the time when the protection of our interests required a relationship both calm and pragmatic.

It is these domestic and international problems which influenced the governments of Great Britain, the United States and Australia to alter their respective policies of recognition. The United States was first to move away from express declarations of recognition. In April 1978, following the overthrow of the Government of Afghanistan, the Ministry of Foreign Affairs of the new Democratic Republic of Afghanistan sought recognition from the United States Government. The reply given by the American Embassy at Kabul was that diplomatic relations would be maintained with the new Government on the assumption that Afghanistan would "continue to honour and support existing treaties and international agreements in force" between itself and the United States.[41] The Department of State spokesman, replying to press inquiries on the question of recognition, said:[42]

> As you know, the question of recognition under the formulation of the last few years doesn't arise per se...The important question is not recognition. The question is whether diplomatic relations continue.

The United States was explicit in its approach, that is, recognition was to be replaced by the decision as to whether diplomatic relations were to be established. It can be suggested that this indicates an adoption of the practice of implied recognition, that is, that whether a particular regime is considered recognised by the United States is to be determined from its dealings with that regime.[43]

However, the statement referred to above does not dismiss the possibility of the United States making formal statements regarding recognition where it is in the national interest to do so. This approach seems to retain a degree of flexibility, since the United States has retained the capacity to deal with each situation as it occurs, without being called upon to make declarations of recognition where such a declaration may be considered politically compromising, and it may still expressly withhold recognition where it appears necessary for political expediency.

The United Kingdom and Australia have not been so unequivocal with respect to whether recognition is to be replaced by the principle of implied recognition or whether recognition is to be abolished as a concept altogether.

In 1980 the British Government announced that it would no longer expressly recognise governments, but that it would:[44]

> decide the nature of our dealings with the new regime in the light of the Government's assessment of whether they are able of themselves to exercise effective control in the territory of the State concerned and seem likely to continue to do so.

Similarly, the Australian Government announced that it too would no longer be making decisions as to "formal recognition, whether de facto or de jure, to new

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41 Press Briefing of 1 May 1978: text in (1978) 72 AJIL 879.

42 Ibid.

43 See further below pp 49–50.

44 Statement by the Secretary of State for Foreign and Commonwealth Affairs, Lord Carrington, HL Deb, Vol 408, 1121-2 (28 April 1980); 51 BYIL 367.

governments taking power in other countries. Instead, Australian authorities will conduct relations with new regimes to the extent and in the manner which may be required by the circumstances of each case".[45]

Although it was asserted that this new Australian policy was "consistent with the practice of other major western countries",[46] it is submitted that the Australian position far exceeds that taken by the British Government in 1980. For although the British Government announced that it would no longer recognise foreign governments, it left open the possibility of denying recognition where it considered recognition should not be given.[47]

It appears from the Minister's statement of January 18 1988 that the Commonwealth Government does not even intend to make statements regarding non-recognition; this is supported firstly by the declaration that "withholding recognition of foreign governments should be abandoned" and secondly by the comment that "...existing practice has forced successive Australian governments to make a simple black and white choice between recognition and non-recognition. This has created practical difficulties".[48]

It is implicit in these statements that the Australian government no longer intends to withhold recognition on a declaratory basis. This may cause problems as far as flexibility in dealing with new regimes. Since, if Australia does not intend to make declarations of non-recognition, its dealings with a particular regime could be considered as suggesting the practice of implied recognition, even though there was no intention for such an implication. However, there is some indication that the same effect may be achieved by a statement to the effect that "the government will not take any steps...to establish formal relations with either Afghanistan or Kampuchea"[49] and this may be considered as tantamount to "non-recognition".

The Effect of the New Policy in International Law: Adoption of a Doctrine of Implied Recognition or the Estrada Doctrine?

It is unclear how far the new Australian policy dispenses with the practice of recognition. There is certainly an implication that the new policy purports to "abandon" the practice of recognition of foreign regimes. Although the traditional approach of Western nations has been to regard recognition as a sovereign prerogative of the State, it was Lauterpacht's view that there was a legal obligation to recognise a government that was *de facto* in control,[50] or indeed that *de facto* governments of already recognised States should be tacitly accepted without recognition. This latter principle was asserted in 1930 by the Mexican Foreign Minister Estrada, who stated:[51]

the Mexican Government is issuing no declarations in the sense of grants of

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45 Aus FA Rec, Vol 59, p 21.

46 Ibid.

47 Warbrick, "The New British Policy on the Recognition of Governments", (1981) 30 ICLQ 568 at 575.

48 Aus FA Rec, Vol 59, p 21.

49 Ibid.

50 *Recognition in International Law*, pp 6, 25; also in (1946) Columb LR 37 a 51–52.

51 Text in (1931) 25 AJIL Supp 203; Whiteman, *Digest of International Law*, Vol 2, pp 85-86.

> recognition, since that nation considers such a course is an insulting practice and one which, in addition to the fact that it offends the sovereignty of other nations, implies that judgment of some sort may be passed upon the internal affairs of those nations by other governments, inasmuch as the latter assume, in effect, an attitude of criticism, when they decide, favourably or unfavourably, as to the legal qualifications of foreign regimes.
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> Therefore, the Government of Mexico confines itself to the maintenance or withdrawal, as it may deem advisable, of its diplomatic agents, and to the continued acceptance, also when it may deem advisable, of such similar accredited diplomatic agents as the respective nations may have in Mexico; and in so doing, it does not pronounce judgment, either precipitately or *a posteriori*, regarding the right of foreign nations to accept, maintain or replace their governments or authorities. Naturally, in so far as concerns the usual formulas for accrediting and receiving agents and for the exchange of signed letters of Heads of Governments and Chancellors, the Mexican Government will continue to use the same formulas accepted up to the present time by international law and diplomatic law.

The Estrada Doctrine envisaged recognition to be unnecessary and, in essence, abandoned it as a practice altogether. In 1934 the Foreign Minister for Mexico explained:[52]

> I will only add that the practice derived from the criterion set forth in the note...continues in force among us; that is to say, in changes of government, recognition not being considered necessary, we only send letters of continuation, without interruption of diplomatic relations with the new governments, as a reply to the official notice sent us of the change that has occurred. Naturally in cases of exception, which until now have not occurred, the Mexican Government, within that Doctrine, could recall its diplomatic representatives from a country in which an unsatisfactory change of government might take place, which would bring about an estrangement in fact, without formulas of any kind, permitting a return of its representatives when deemed opportune, and when, of course, the other country also deemed it opportune. This would be what we might call the negative application of the Estrada Doctrine, by which it will be seen there does exist fundamentally in it a judgment of the new governments, but which, with our procedure, does not give place to diplomatic haggling for recognition, nor does it involve a wound of any kind to the dignity and independence of a State.

So, akin to the new United States policy, the important question was whether diplomatic relations continued not whether a government was recognised or not. It is not clear whether the British or Australian policy is an espousal of the Estrada Doctrine. Although it is reported that the Australian Department of Foreign Affairs and Trade views the new policy as entailing a complete abandonment of the concept of recognition with respect to governments, there is another interpretation which can be posited. In the British policy statement, all that was said was that there would be no further "formal declarations" regarding recognition, but that dealings might be established if the government were considered to be in effective control. The Australian approach seems to be

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52 Ambassador Daniels to the Department of State, 1 March 1934, ibid p 86.

not dissimilar. The difficulty with asserting that, under the new policy, there is no longer such a thing as recognition (and that the new approach adopts the Estrada doctrine) is that the commencement of diplomatic relations is the classic ground for implying recognition and such an implication is not necessarily ruled out by the new policy.[53]

It is also important to consider that the Estrada doctrine (or the doctrine of implied recognition) "will not always save foreign governments from the necessity of choosing between rival claimants".[54] As was pointed out in parliamentary debate on the recognition of revolutionary governments in Greece and China in 1967, a change of government "would involve a change of policy to enter into relations with a government with which we were not previously in relations".[55] Such difficulties are compounded where there are two rival regimes existing in one State. For instance, in the mid-seventies the Australian government was faced with determining whether it would accord recognition to the governments of North or South Vietnam (where both governments functioned quite distinctly). The Australian government determined that it would only recognise the government of South Vietnam:[56]

> the two governments continue to function separately. The existence of two governments is recognised by at least seventy-five countries...It is the Australian government's intention to accredit its Ambassador to South Vietnam to the PRG as the sole government of the country.

The Consequences of Recognition in Municipal Law

i. The Role of Recognition in Municipal Courts

The traditional practice of giving or withholding recognition of governments which have come to power by unconstitutional means had the effect that until recognition was granted, the unconstitutional authority had no "juridical existence" and "no legal consequences of its purported factual existence [could] be admitted" in the forum of the State which had not recognised the usurping authority.[57]

Recognition by the executive government had important repercussions in English and Australian courts. For a foreign government to have status as a plaintiff,[58] or if such a government was to claim successfully sovereign immunity[59] (or in fact be party to proceedings), or if the effect of its decrees or acts were to be accepted,[60] such a government had to be recognised (*de facto* or *de jure*) by the authorities of the forum concerned.

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53 See Lauterpacht, "Implied Recognition", (1944) 21 BYIL 123 at 131; and below p 56.

54 Jessup, "Editorial Comment on the Estrada Doctrine", (1931) 23 AJIL 722.

55 Wright, "Some Thoughts About Recognition", (1950) 44 AJIL 548 at 553.

56 Written answer of the Minister of Foreign Affairs, Senator Willesee, on 2 October 1975, S Deb 1975, Vol 65, 933; 6 Aust YBIL 239 at 240.

57 Lauterpacht, *Recognition in International Law*, pp 145-6.

58 *City of Berne v Bank of England* (1804) 9 Ves Jun 347.

59 *The Annette and the Dora* [1919] P 105.

60 *Luther v Sagor* [1921] 3 KB 532.

The municipal effect of non-recognition was that an unrecognised foreign government was regarded as non-existent, and could not be acknowledged at all by the British courts.

The British courts approach of giving no cognizance to an unrecognised regime created what could only be called a "legal vacuum".[61] However, as Alexandrowicz pointed out:[62]

> There is always somebody aiming for recognition which must be considered at least temporarily as endowed with quasi-governmental capacity.

The legal fiction of regarding an unrecognised regime as a nullity has worked unjustly in the past.[63] The difficulty is that there are inherent injustices in treating any State as without law, since, for example, any decrees of its courts will be regarded as nullities in Anglo-Australian courts. In *Adams v Adams*,[64] a divorce decree made by a Rhodesian judge appointed by the unrecognised Smith Government was denied effect by the English court because the decree was held to be invalid in the legal system considered to be applicable in Rhodesia by United Kingdom law. In this case the court refused to take cognisance of the Rhodesian regime because it would have been deplorable if Great Britain had appeared to be speaking with two voices. What really was deplorable was the fact that, as Sir Jocelyn Simon P pointed out, prior to the case of *Adams* being considered there had been eight marriages which were not allowed to proceed where there had been a purported divorce decree in the same circumstances.[65] The inequities are not simply limited to matrimonial matters: consider the effect on birth certificates, adoption papers and even contractual undertakings. These issues with which municipal courts have to deal are left unresolved by the Commonwealth's adoption of the new policy of "non-recognition", and indeed may become more complicated in the light of the new policy.

ii. The Executive Certificate and the Effect of the New Policy

In court proceedings, where recognition was a requirement of the action, the practice had been for courts to take judicial notice of the recognition of foreign governments in the form of executive certificates issued by the Department of Foreign Affairs.[66]

This approach has been adopted in Australia in accordance with the well established principles of English law.[67] As Latham CJ said in *Chow Hung Ching v The King*:[68]

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61 *Carl Zeiss Stiftung v Rayner & Keeler Ltd* [1967] 1 AC 853 at 953 per Lord Wilberforce.

62 "The Quasi-Judicial Function in Recognition of States and Governments" (1952) 46 AJIL 631 at 634-5.

63 See the *Carl Zeiss* case [1967] 1 AC 853 at 954 per Lord Wilberforce.

64 [1970] P 188.

65 At 197.

66 Lyons, "Judicial Application of International Law and the 'Temporising' Certificate of the Executive", (1952) 29 BYIL 227; Edeson, "Conclusive Executive Certificates in Australian Law", (1981) 7 Aus YBIL 1.

67 See *Anglo-Czechoslovak & Prague Credit Bank v Janssen* [1943] VLR 185; *Van Heyningen v Netherlands Indies Govt.* [1948] QWN 19.

68 (1948) 77 CLR 449 at 467.

> There are certain matters in respect of which a statement by a Minister is accepted by a court as conclusive, for example, the question as to whether a person is a foreign sovereign, or whether a foreign state exists, or whether a territory belongs to a foreign state, or whether a person has been recognised as a foreign ambassador or as a member of diplomatic staff, or whether a ship is a warship or a public vessel of the state. There is authority that the answer of the appropriate minister will be accepted as conclusive on these matters.

The new Commonwealth Government policy will have a fundamental impact upon the executive certificates to be issued to the courts as such documents will no longer provide any express statement on recognition or non-recognition of the regime in question.

There are a number of possibilities regarding what an executive certificate might contain in the light of the new policy. It is possible that the certificate might contain a statement of the relations which the Australian government has had with the authority concerned. This was the practice the British Government proposed to take. In reply to a question as to how courts were to determine whether a new regime should be regarded as the government of a State, the Secretary of State for Foreign and Commonwealth Affairs said:[69]

> In future cases where a new regime comes to power unconstitutionally our attitude on the question whether it qualifies to be treated as a Government, will be left to be inferred from the nature of the dealings, if any, which we may have with it, and in particular on whether we are dealing with it on a normal Government to Government basis.

Alternatively, the executive certificate may contain not only a statement of dealings, but may also include certain facts about the new regime pointing to the issue of whether it is in effective control of the territory in question.

Much may depend upon what the court feels is the proper question to address to the executive. The court may regard the appropriate information to be limited to a statement of Australia's dealings with the government concerned. This would be consonant with the view that the executive has, in its new policy, adopted a doctrine of implied recognition. On the other hand, if the court accepts that the Australian Government has dispensed with the practice of recognition altogether, it may seek information as to whether the regime is in effective control of the State concerned.

In either case, the executive has now placed upon Australian courts the burden of determining whether a particular regime is to be given cognisance for the purposes of local proceedings. The court is left to surmise whether a government may be accorded any juridical status on the basis of the evidence before it, including the information on the face of the executive certificate.[70]

Some guidance as to how the Australian courts might deal with the new situation may be discerned in earlier English cases. In *Duff Development Co v*

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69 HL Deb, Vol 409, 1097–8 (23 May 1980); 51 BYIL 368.

70 It is not proposed to deal with here (though the issue was canvassed in the original thesis) the question of whether s 61 of the Australian Constitution and the doctrine of the separation of powers create difficulties for the Australian courts if they wish to adopt a doctrine of implied recognition with regard to the new policy.

Government of Kelantan,[71] for example, Lord Sumner suggested that where there is no clear pronouncement with respect to recognition then the question could become a matter of proof:[72]

> 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...but, if there is no recognition yet given, the independence becomes a matter of proof.

In a number of cases the executive certificate was "couched in opaque and vague terms" so that the Court was placed in a position of having to make some determination upon the recognition question.[73] This approach was clearly the intention of the executive in *White, Child and Beney Ltd v Eagle Star and British Dominion Insurance*,[74] where the Foreign Office would not make a determination as to the date at which the Soviet Government became the Government of Soviet Russia. When the court sought further information from the Foreign Office, the reply was equally unhelpful. The Foreign Office stated that they were not "in any better position than the Court for drawing [from the facts in previous replies] the correct deduction as to the moment at which the transfer of sovereign authority in Russia to the Soviet authorities can be said to have become complete". This suggests that the executive considered that the court was equipped to deal with the determination of such an issue.

Since executive certificates are no longer to contain pronouncements as to recognition, the courts must take it upon themselves to determine whether they will give cognisance to a new regime despite the absence of formal recognition. However, a crucial issue is whether the executive certificate is still to be considered as conclusive, that is, should the courts consider that the executive certificate contains the only information which they can take into account, or are they entitled to consider facts outside those contained in the certificate?

Instances where a court has actually looked behind an executive certificate have been rare. In *Luigi Monta of Genoa v Cechofract Co Ltd*,[75] the Foreign Office had indicated that the Formosan Government was not recognised by the British Government, yet the court held that the phrase "any government" contained in a charter party could be construed to include a "government" whose existence could be established by other evidence. In the parallel case of *Re Al-Fin Corp's Patent*,[76] the issue was whether the expression "any foreign state" in s 24 of the Patents Act 1949 (UK) encompassed the Democratic People's Republic of Korea. The Foreign Office certificate stated that Her Majesty's government were aware of the existence of the authorities in control of the territory in question, but that these authorities were not recognised de jure or de facto by the British Government. Nonetheless, evidence was received which satisfied the Court that at the time North Korea had a defined area over

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71 [1924] AC 797.
72 At 824-5.
73 Symmons, op cit, p 249 at 255, pointing to a number of examples, including *The Gagara* [1919] P 95; *The Annette and the Dora* [1919] P 105.
74 (1922) 127 LT 571.
75 [1956] 2 QB 552.
76 [1969] 3 All ER 396.

which the government had effective control. Graham J said of the words in s 24:[77]

> They must at any rate include a sufficiently defined area of territory over which a foreign government has effective control. Whether or not the State in question satisfies these conditions is a matter primarily of fact in each case and no doubt there will be difficult cases for decision from time to time, but difficult cases of fact do not prevent the court from coming to a conclusion when the relevant facts are proved before it.

Similarly a United States court has commented:[78]

> In some situations the State Department may find it expedient to make no response to a request for immunity. Where, as here, the court has received no communication from the State Department concerning the immunity of the Comisaria General, the court must decide for itself whether it is the established policy of the State Department to recognise claims of immunity of this type.

While the justification for the English decisions was that the court was dealing with a matter of interpretation (a commercial document in one case and a statute in the other), the clear implication of all three cases is that where, under the new policy, the executive refuses to make a determination of recognition, the courts may decide the matter on the evidence proved before it, and consider evidence beyond that contained in the executive certificate.

There is little Australian authority on the matter. However, in one instance the Victorian Supreme Court gave some support for the principle that, where executive pronouncements are not clear, the court may decide such issues. In *Anglo-Czechoslovak & Prague Credit Bank v Janssen*,[79] there was a suggestion that issues with respect to recognition might be "best resolved" by information from the executive. Indeed, in certain circumstances it was "necessary or desirable" to do so. For instance:[80]

> where a country has been or is being invaded by an enemy and war has been waged or is still being waged in some degree in...the invaded territory. In such cases it will often be extremely difficult to determine which portion of the territory in question is under the effective administrative control of either of the contestants.

Notably Mann CJ only asserted that it was "necessary or desirable" to seek a statement from the executive where it was "extremely difficult to determine" who was in effective control. He continued.[81]

> But where *no difficulties of this kind occur de facto* occupation in the required sense may be proved by other evidence, or the fact may be notorious as matter of common knowledge not calling for sworn testimony at all.

There is some ambiguity in this proposition—does "where no difficulties of this kind" refer to situations of civil war or invasion, precluding judicial notice of recognition where there is an insurgent government? Alternatively, does it only

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77 At 405.
78 *Victory Transport Inc v Comisaria General* 336 F 2d 354 (1964) at 358-9.
79 [1943] VLR 185.
80 At 197.
81 Ibid (emphasis added).

refer to situations where the court finds it difficult to determine who is in effective administrative control?

The solution to this dilemma is not crucial to this discussion since the suggestion was not that executive determinations were mandatory but that they might be desirable. What is important was the approach taken regarding the problem he was faced with. The executive certificate presented in this case had stated that "no action has in fact been taken by His Majesty's Government in the Commonwealth of Australia which could be construed as a recognition of the German Government". However, the court decided that the executive certificate was irrelevant to the issues involved, and concluded that the German control of Czechoslovakia was so notorious that they could in effect go behind the executive certificate and take judicial notice of the situation. This determination was one which was ultimately quite distinct from the executive policy presented by the certificate, since the court took cognisance of the fact that the German Government was effectively administering *de facto* control in Czechoslovakia. The court in *Janssen* seemed to be swayed, however, by the consideration that the issue before them was not a political one, rather it concerned private rights:[82]

> The question of de facto control...is only of importance for the determination of private rights, and has nothing to do with the interest, merits or demerits of the occupying power.

This case supports the principle that in the absence of a conclusive statement of recognition (and even where there has been one) the courts may determine the question of whether a government will be given judicial cognisance by considering other evidence than that recited in the executive certificate. Although the ultimate determination of the issue as to whether under the new policy the courts will consider the executive certificate as containing the only admissible evidence or alternatively as only the best evidence, which may be supplemented by further evidence proved before the court, awaits judicial decision. It is possible that where private rights are concerned the courts may be more inclined to look to evidence outside the executive certificate, if the approach in *Janssen* is considered. It is certainly arguable that the courts approach in *Janssen* is desirable in the light of the new executive policy in order to give the courts a sensible approach to recognition in the future. The notion that there may be a distinction made between political and private rights is one that may have to be canvassed further.

The Consequences of the New Policy for Future Decision Making.

In the preceding discussion it was considered that the new recognition policy may be viewed in a number of ways. It could be considered as a complete abandonment of the practice of recognition, giving way to the practice enunciated by the Estrada Doctrine, or it could be viewed as the adoption of a doctrine of implied recognition. The problem which arises is that it is difficult to determine which approach the new policy purports to support. However, such a determination may become crucial, since Australian courts are now faced with having to decide whether they will give cognisance to a new regime without explicit guidance from the executive.

82 At 199.

i. Effective control as a criterion

The principal source of guidance as to what the Australian courts might do if they wish to treat effective control as the primary basis upon which to act would be the attitude of the United States courts which have, in certain circumstances, avoided the inequities of non-cognisance by giving some juridical consideration to the existence of an unrecognised government.

In the numerous cases which arose in America after the civil war, the courts gave some effect to the laws of the "rebel states". This approach was based upon the view that, although the rebel regimes could not be considered as the "legitimate legislature of the State", nonetheless, their acts were in force when they were made. Such a regime could be regarded as a "legislature *de facto*", since it was the only law making body to exist at the time.[83] Laws of the rebel regimes were thus considered effective in order to prevent a failure of justice. The courts were not willing to give effect to all acts and decrees, those of a political, rather than a private, nature being excepted, that is to say, those which were considered hostile to the United States constitution or were "perverted to the manifest and intentional aid of treason against the government of the Union".[84] However, acts "necessary to peace and good order among citizens, such for example, as acts sanctioning and protecting marriage and the domestic relations, governing the course of descents, regulating the conveyance and transfers of property, real and personal, and providing remedies for injuries to persons and estate, and other similar acts, which would be valid if emanating from a lawful government",[85] would be given effect.

This approach was adopted in some later cases concerning the Communist regime in Russia, though at a time when due deference was still being given to State Department policy. In *Latvian State Cargo Line v McGrath*,[86] Prettyman J considered that there might be certain instances where there is no "strong executive policy against condoning" the unrecognised government and in such circumstances regard could be had to it under normal considerations of the conflict of laws.[87] Thus effect could be given in the United States to the laws of the new regime which were not contrary to public policy. However, this pronouncement was made in the light of a general policy of reliance by the American courts on the executive certificate. Hence effect could be given to the acts and decrees of the unrecognised regime if the executive's pronouncement could be construed in a way that allowed the court to consider it permissible to do so. For example, in *Salimoff & Co v Standard Oil Co of New York*,[88] it was essentially the content of the certificate which allowed the court to conclude that there had been a valid expropriation of oil by the Soviet Government. The executive certificate pointed out that, even though the Soviet Government was not recognised formally by the United States, the United

83 See *United States v Insurance Companies* 89 US 99 (1875) at 101.
84 *Sprott v United States* 87 US 459 (1874) at 464.
85 *Texas v White* 74 US 700 (1868) at 733.
86 188 F 2d 1000 (1951).
87 At 1002.
88 186 NE 679 (1933).

States Government was "cognizant of the fact that the Soviet regime is exercising control and power in the territory of the former Russian Empire...and has no disposition to ignore that fact".[89] Thus the court concluded that the Soviet Government had been recognised "de facto" or at least as a quasi-government.

This case may be contrasted to *The Maret* [90] and *Latvian State Cargo Line v McGrath*,[91] where the State Department certified that the incorporation by Russia of the Baltic States had not been recognised by the United States, neither had any of its acts or decrees in this area. In the light of such a statement the courts upheld the executive policy. For example, the judge in *The Maret* asserted that "when the fact of non-recognition of a foreign sovereign and non-recognition of its decrees by our executive is demonstrated...the courts of this country may not examine the effect of the decrees of the unrecognised foreign sovereign".[92]

Although *Salimoff* illustrates the United States courts' compliance with executive certificates, it also indicates that cognisance may be given to the existence of the regime in question, using the usual principles of private international law if there is no public policy to the contrary. It is indicative of the approach that the courts must consider in the dilemma they are faced with at present.

It has already been postulated that Australian courts are entitled to go beyond the evidence contained in the executive certificate to determine the existence of a regime (particularly where the executive certificate is not determinative) and indeed there would appear to be no apparent reason why the courts cannot do so, whatever the executive certificate contains. It can be argued that where the executive certificate is silent on such matter, the issues in question become a matter of proof. The courts may, if they wish, consider other facts in order to decide as a matter of fact whether a particular regime is in effective control of a particular area. The approach of determining cognisance on the basis of whether a particular regime can be said to be in effective control may also be supported if the executive certificate presented to the court contains particular facts about the new regime which would allow the court to draw its own conclusions with respect to whether such control exists.

ii. Application of the principle of effective control

(a) *Decrees and Acts*

If the notion of effective control is to become paramount in shaping the response of the Australian courts to the new recognition policy, it will provide an impetus to the rule already emerging in relation to private law matters. In other words, where the acts and decrees of a regime, which has come to power unconstitutionally, affect the everyday lives of persons under its territorial control, or are of a purely administrative nature, they can be given judicial cognisance. As Lord Wilberforce said in *Carl Zeiss Stiftung v Rayner & Keeler*

89 At 681.
90 145 F2d 431 (1944).
91 188 F 2d 1000 (1951).
92 145 F 2d at 442.

Ltd,[93] relying upon the American Civil War cases:

> where private rights, or acts of every day occurrence, or perfunctory acts of administration are concerned...the courts may, 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 invalidity 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 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 cases whether and to what extent it can be invoked.

This approach was also considered by Lord Denning in *Hesperides Hotels Ltd v Aegean Turkish Holidays Ltd.*[94] The issue in this case was whether there had been a valid expropriation of real property by the Turkish Federated State of Cyprus which, at the time, was not recognised by the British Government. Two members of the English Court of Appeal (Roskill and Scarman LJJ) concluded that the court could not entertain the action because of the *Mocambique* rule.[95] However, Lord Denning considered that the rule was confined to cases where the actual title of property was in dispute. His Lordship went on to examine the history of Cyprus since 1960 and concluded that since 1974 the evidence produced clearly indicated that there were two distinct administrations in Cyprus. His Lordship also considered that the English courts might differ from the executive with respect to whether a particular regime in a particular State at a particular time was considered the government. His conclusion was that in this case the acts complained of were lawful under the *lex loci actus* and therefore the action could not be maintained, since notice could be had of the laws of the Turkish Federated State of Cyprus (which authorised the acts), even if that regime was not expressly recognised by the British executive:[96]

> There is an effective administration in northern Cyprus which has made laws governing the day to day lives of people. According to these laws, the people who have occupied these hotels in Kyrenia are not trespassers. They are not occupying them unlawfully. They are occupying them by virtue of requisitions made by the existing administration. If an action were brought in the courts of this northern part, alleging trespass to land or to goods, it would be bound to fail. It follows inexorably that their conduct cannot be made the subject of a suit in England.

Lord Denning was explicit that the courts could recognise the laws of a body which could be considered in effective control of a territory, even though it was

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93 [1967] 1 AC 853 at 954.
94 [1978] QB 205.
95 *British South Africa Co v Companhia de Mocambique* [1893] AC 602.
96 [1978] QB at 221.

not recognised by Her Majesty's Government:[97]

> at any rate, in regard to laws regulating the day to day affairs of the people, such as their marriages, their divorces, their leases, their occupations and so forth; and furthermore that the courts can receive evidence of the state of affairs so as to see whether the body is in effective control or not.

The approach endorsed by Lord Wilberforce and Lord Denning is consistent with the principles of private international law. In cases where there is a conflict of laws issue, the courts can determine what law is actually in force in the particular state at the particular time.[98] Such an approach seems sensible in view of the new policy. It allows a simple determination upon the facts as to what is the *lex loci actus*, without any question of recognition being decided, and also avoids the difficult political and constitutional questions that a determination of recognition might involve.

(b) *The New Regime as Plaintiff: Locus Standi*

The difficulty which arises is that, although some courts have been willing to consider the possibility of giving effect to particular acts and decrees which alter the everyday lives of the people, there is no indication that such an approach would be adopted with respect to the issue of whether a foreign regime may be a plaintiff to a suit.

It is clear that Lords Wilberforce and Denning only considered that certain domestic acts and decrees could be given cognisance. Lord Wilberforce in fact implied that such a consideration may not be applicable to the question of *locus standi*:[99]

> The principle is well established that the courts of Her Majesty do not speak with a different voice from that of Her Majesty's executive government...but we are not here under the risk of committing the courts to action of this kind...*The primary effect and intention of non-recognition by the executive is that the non-recognised 'government ' has no standing to represent the state concerned whether in public or private matters.* Whether this entails non-recognition of its so called laws, or acts, is a matter for the courts to pronounce on, having due regard to the situation as regards sovereignty in the territory where the 'laws' are enacted and, no doubt, to any relevant consideration of public policy.

His Lordship's assertion that non-recognition by the executive was directed at *locus standi*, and to accord an unrecognised regime *locus standi* might cause the courts to depart from the "one voice" doctrine, must be considered in the light of the new policy on recognition. It should be kept in mind that the "one voice" policy can only survive where the judiciary can understand what the executive has said.[100] Furthermore, where the executive is silent on the question of recognition it is open for the court to decide such issues by receiving other

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97 At 218.

98 See Greig, "The Carl Zeiss Case and the Position of an Unrecognised Government in English Law", (1967) 83 LQR 96.

99 *Carl Zeiss Stiftung v Rayner & Keeler Ltd* [1967] 1 AC 853 at 961 (emphasis added).

100 See *Gur Corp v Trust Bank of Africa Ltd* [1987] QB 599 at 625 per Nourse LJ.

evidence as to the status of the foreign regime.

However, the use of the "effective control" test has been regarded as excluded where the issue of *locus standi* has been raised. In *Gur Corp v Trust Bank of Africa Ltd*,[101] Steyn J considered Lord Wilberforce's "individual rights exception" but rejected its application for the reason that the unrecognized Republic of Ciskei itself was a litigant. In such a situation, "the court is not confronted with the necessity of doing justice to individuals who were caught up in a political situation which was not of their making";[102] to allow Ciskei standing would "bend established rules in a way which would implicitly amount to judicial recognition of the Ciskei".[103] The difficulty with this approach is that it gives no guide as to how the courts are to deal with such issues under the new executive policy on recognition. Indeed, it seems almost nonsensical to treat the Ciskei government as non-existent because Ciskei is not recognised as a State, when the British government has expressed a policy of no longer according recognition to governments.

On appeal, there was no discussion of Wilberforce's "individual rights" exception, Sir John Donaldson simply asserting that this exception was not applicable to the facts. Ultimately, the Court of Appeal held that Ciskei did have *locus standi* on the basis that it could be considered a delegate of the South African Government, and subject, therefore, to the principle laid down in the *Carl Zeiss* case. This conclusion was possible because, since the executive certificate was silent on the matter, the court was able to determine the extent of South African control over Ciskei.[104] Although the Court of Appeal supported the view that, where the executive certificate was silent on recognition, the court could consider other evidence apart from the executive certificate, it gave little guidance on the question of *standi*.

The decision in the *Gur* case may be justified if regard is had to the worldwide condemnation of the South African government's creation of the African Homelands. As Steyn J pointed out, it was "common knowledge that the...homelands do not enjoy the courtesies and privileges of the community of nations".[105] Cognisance of Ciskei could be considered as excluded by the evidence of general non-recognition in the international sphere. The approach of the court may simply reflect the need to deny standing in a situation where a determination affirming cognisance of Ciskei as an independent authority would have been compromising, in view of the general condemnation of the homelands by other nations.[106]

Despite the view of the court in *Gur* that the "effective control" test was not

101 [1987] QB 599.

102 At 605.

103 At 609.

104 As Sir John Donaldson MR said (at 623):

> The question for our consideration is whether the Ciskei certificates, either alone or taken in conjunction with other evidence, point to any superior authority, of which the courts can take cognisance, as supplying the requisite authority to enable the Government of the Republic of Ciskei to undertake executive, administrative or legislative acts.

105 At 609.

106 For the significance which might be attributed to a general pattern of recognition by other States, see below pp 62–64.

applicable to the issue of *locus standi*, it is possible to argue that, if the only reservation to such an approach is that the courts are reluctant to contradict executive policy, such a reservation may be accommodated in the way the court considers that test. There is no reason why an Australian court should not consider the approach of some United States courts, which have distinguished political and private acts in determining issues of recognition with respect to regimes which have not expressly been recognised.

In *RSFSR v Cibrario*,[107] it is true, it was held that, since a Foreign Government could only sue in United States courts as a matter of comity and that comity did not arise until it was recognised, the Soviet Regime could not be a proper plaintiff to an action. However, this case arose at a time when the State Department had asserted that any consideration of trade relations with the Soviet Government was postponed "until such time as our government has convincing evidence of a fundamental change" pointing to the adoption of "private rights of property, sanctity of contract and rights of free labour", and also at time when recognition was still made by express declaration. Today when recognition will no longer be expressly given and also seems no longer to exert the same influence in the United States courts, there is no need for the *Cibrario* principle to be followed. It is open for the court to determine the existence of the regime by use of the "effective control" test, subject to whatever limitations public policy might impose when there is reason why the regime should be denied access to the courts. Once express recognition is abandoned, the actual existence of an authority cannot be denied simply because it is not recognised by the executive. As was said in *Re Alexandravicus*:[108]

> While judicially a government that is unrecognised may be viewed as no government at all, it was pointed out...by Justice...Cardozo that in practice 'juridical conceptions are seldom, if ever, carried to the limit of their logic...but are subject to self-imposed limitations of common sense and fairness...' It is only where the acts are political in nature that the courts are precluded from considering their validity and effectiveness... Thus, where the controversy is concerned exclusively with private rights and obligations of the subjects of an unrecognised State, the law of that State may prevail.

There is no reason why the issue of standing should be regarded as automatically falling within the public sphere. At a time when the doctrine of absolute state immunity is being eroded, it would be illogical to deny standing to a government in respect of its commercial activities in the courts of a state which was not prepared to acknowledge its existence.

The abolition of the practice of according recognition to governments might promote the views of those jurists and judges who refused to accept that standing and recognition were inextricably linked. Borchard, in particular, argued that it was erroneous to base the power to sue upon recognition.[109] In his opinion, recognition should only be regarded as the best evidence of the existence of a government; and, as in the *Tinoco Arbitration*,[110] it did not

107 139 NE 259 (1923).
108 199 A 2d 662 (1964) at 666-7.
109 "Can an Unrecognised Government Sue?", (1922) 31 Yale LJ 534.
110 Text in (1924) 18 AJIL 147.

"create the government nor is it the only means of evidence".[111] As for the judiciary, the notion that public notoriety could prove the existence of a government, akin to the views expressed by Lord Sumner in *Duff Development Corp v Kelantan*[112] and by the Victorian court in *Anglo-Czechoslavak & Prague Credit Bank v Janssen*,[113] had been expressed as early as 1826 by Best CJ in *Yrissarri v Clement* when he said:[114]

> The existence of unacknowledged states must be proved by evidence. The proof necessary to establish the fact of the existence of such states is, that they are associations formed for mutual defence, who acknowledge no other authority but that of their own government, observe the rules of justice to the subjects of other states, live generally under their own laws, and maintain their independence by their own force.

If the new policy is viewed as abandoning recognition altogether, recognition can no longer be regarded as the test for *locus standi*. If there is no such thing as recognition, it is essential that the courts can and should consider other evidence, if necessary, outside that contained in the executive certificate, to determine whether the government is in fact in "effective control", and is the proper representative of the State concerned, to appear before the courts.

(c) *The New Regime and the Grant of Sovereign Immunity*

The use of the "effective control" test may also be utilised with respect to sovereign immunity. In *Victory Transport Inc v Comisaria General*,[115] it was held that, although a United States court should deny immunity where the State Department indicated, directly or indirectly, that immunity should not be accorded,[116] where the State Department is silent or equivocal on the question of immunity, then it is for the court to determine for itself whether the foreign sovereign is entitled to immunity. As the court explained:[117]

> the Supreme Court has made it plain that when the State Department has been silent on the question of immunity in a particular case, it is the court's duty to determine for itself whether the foreign sovereign is entitled to immunity 'in conformity to the principles accepted by the department of the government charged with the conduct of foreign relations'.

If this is the case, some American courts at least have considered the issue of sovereign immunity without any executive determination on recognition. It may be argued that there is no reason why Australian courts should not also determine whether sovereign immunity should be granted to a government on the basis of whether it is in effective control of the State concerned.

In *Victory Transport*, the court held that immunity could be granted in such circumstances only where it is plain that the activity in question falls within one of the categories of strictly political or public acts about which sovereigns have

111 31 Yale LJ at 534.
112 [1924] AC 797 at 820.
113 [1943] VLR 185.
114 (1826) 3 Bing 432 at 438.
115 336 F 2d 354 (1964).
116 At 358.
117 At 360.

been sensitive. This particular approach would accord with the principles of restrictive sovereign immunity. The categories where the court considered a grant of immunity appropriate were:[118]

1. Internal administrative acts, such as expulsion of an alien;
2. Legislative acts, such as nationalisation;
3. Acts concerning the armed forces;
4. Acts concerning diplomatic activity;
5. Public loans.

Thus if a regime was considered to be the proper representative of the State, and its acts fell within one of those activities of a political or governmental character, the United States courts could have granted immunity from suit. With the advent of the new approach to recognition, the mere fact that the government in question was apparently carrying out such functions would be strong evidence of its status. While the United States Foreign Sovereign Immunities Act 1976 has affected the scope of the immunities to which a foreign State is entitled in American law, it should not affect the issue of the factors by which the status of the new government to represent the State is tested. There would be no reason to accept the application of either of the following propositions advanced by the court in *RSFSR v Cibrario*:[119]

> if the defendant was not an existing government it might not be sued. There was no party before the court. If it were...the same result followed, not because of comity, but because an independent government is not answerable for its acts to our courts.

There is no reason why the Australian courts should not adopt a similar approach to that suggested above in rejection of the *Cibrario* proposition. Today an independent government may indeed be answerable for some of its non-political acts. It appears ridiculous to suggest that, even if Australians are carrying on commercial dealings with a new regime, the regime may not be answerable in our courts for breaches of its obligations to aggrieved Australian citizens. Unless there is a satisfactory alternative, it appears only sensible to consider the test of "effective control" as the basis for the standing of the regime as defendant, leaving it to the principles of restrictive immunity, as laid down in the Foreign State Immunity Act 1985, to provide the regime with adequate protection in the ensuing litigation.

iii. Imputing Recognition: A Doctrine of "Implied Recognition"?

Where state immunity and *locus standi* are concerned, the courts may feel that they are obliged to consider executive policy towards the regime in question, and are not entitled to rely exclusively (or even primarily) upon the test of effective control. If the courts believe that they should consider what the executive's position is regarding a new regime, they may choose to determine the issue by reference to the principles of implied recognition. There is in any case the possibility that the Australian courts will construe their government's statement that it will make no formal declarations of recognition with regard to new governments not as an adoption of the Estrada Doctrine, but rather as an adoption of a doctrine of implied recognition. That is, what the courts will

118 Ibid.

119 139 NE 259 (1923) at 262.

consider in determining questions of recognition is the nature of the Australian government's dealings with the regime concerned.

Such an approach would be supported by the provision of an executive certificate which simply recites the Australian government's dealings with the new regime and excludes any recital of other facts. The inference which would arise from such a certificate is that the courts are intended to consider whether the government has, by those dealings, in effect accorded recognition to the entity in question. This was certainly the implication of the statement made in the British Parliament to the effect that courts were to determine recognition by the "nature of dealings", if any, that the executive had with the authority concerned. The inference may be drawn from the following parts of the statement:[120]

> Where an unconstitutional change of regime takes place in a recognised state, Governments of other States must necessarily consider what dealings, if any, they should have with the new regime, and whether and to what extent it qualifies to be treated as the Government of the State concerned...[W]e shall...decide the nature of our dealings with regimes which come to power unconstitutionally in the light of our assessment of whether they are able of themselves to exercise effective control of the territory of the State concerned, and seem likely to continue to do so.

If assessment of degree of effective control is the test of the extent of the dealings, it is highly likely that the courts will take the latter to signify whether the regime in question "qualifies to be treated as the Government of the State concerned" in the eyes of the State of the forum.

The difficulty which the courts would face in applying a doctrine of implied recognition is that, in the past, recognition could only be implied if there had been an unequivocal intention to recognise evident. Such an intention can only be inferred in very limited circumstances. As one writer warned, "we are entitled to treat a particular act as amounting to recognition only when there is no doubt as to the intention to recognise".[121]

The legal advice to the United States Department of State had also indicated the requirement that recognition could only be imputed where the intention to recognise was unequivocal:[122]

> By the term 'recognition', used in the sense of recognition of new governments, is meant the establishment of normal official relations by the recognizing government with the government recognized, or an indication of readiness to do so. Such recognition is largely a matter of intention on the part of the recognizing government and can not be lightly imputed, contrary to its intentions, if the act to which recognition is ascribed is susceptible of a different interpretation.

And furthermore:[123]

> Political recognition of a foreign state or government is primarily a matter of intention. Such recognition may be express or implied, but to bring about

120 Above note 44.

121 "Implied Recognition", (1944) 21 BYIL 123 at 124.

122 Memorandum by Hackworth dated 17 May 1933, Whiteman, *Digest of International Law*, Vol 2, p 48.

123 Memorandum by Hackworth dated 13 Dec 1940, ibid.

recognition by implication the act must be an unequivocal one and of such character as clearly to indicate that recognition was intended or is inescapable, as for example, by the exchange of diplomatic and consular officers, the negotiation of a treaty, etc.

In order for the courts to imply recognition under traditional doctrine, the conduct of the recognising State had to demonstrate a clear intention to accord recognition. Such an approach would not necessarily be appropriate in the present circumstances for a number of reasons. For example, formerly the courts were imposing their interpretation upon a situation where an express formal act was the usual way for recognition to be granted: now the informal indications are the only basis upon which something akin to recognition might be accorded. Another problem is that, notwithstanding the increasing range of contacts that are possible or even necessary in the world of today, the community of States is now so large that formal diplomatic contacts are maintained amongst a relatively few of their number. Subject to these reservations, however, the earlier practice might provide some guidance on what dealings might give rise to implied recognition under the new policy.

(a) *Multilateral negotiations*

It is generally accepted that recognition cannot be imputed from participation in multilateral conventions or treaties, nor from the attendance by representatives of a State at a conference which is also attended by representatives of a government unrecognised by that State.[124] Similarly, general communication with foreign authorities does not, or need not, amount to recognition of those authorities.[125] Amongst other types of international relations which cannot be said to give rise to an implication of recognition would be the appointment and reception of consuls,[126] or the appointment of agents. The latter appointment probably expressly negates recognition, since the appointment of an agent suggest unwillingness to grant recognition and maintain ordinary diplomatic relations.[127]

(b) *Diplomatic relations*

It would appear that, under traditional doctrine, the only "irrebuttable presumption" of recognition was the formal appointment or reception of diplomatic representatives, since persons endowed with diplomatic character

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124 Although express disclaimers are often made to preclude the possibility of any such implication being made, see the examples of the Berlin Conference of Foreign Ministers in February 1954 at which it was resolved:

> It is understood that neither the invitation to, nor the holding of, the ...conference shall be deemed to imply diplomatic recognition in any case where it has not already been accorded.

Whiteman, *Digest of International Law*, Vol 2, p 50; and the others given, ibid, pp 50-51.

125 See the materials on dealings between the United States and the People's Republic of China prior to the formal recognition of the latter by the former, ibid, pp 553-5.

126 "Implied Recognition", (1944) 21 BYIL 123 at 132.

127 Ibid, at 136.

are considered to represent the State in all its aspects.[128]

Despite the confidence with which such statements are made,[129] a distinction might need to be drawn between continuing relations with a country under a new regime, and entering into relations with that country for the first time under the new regime. The latter step would undoubtedly constitute recognition, but, in the former situation, some statement of intention was more likely to accompany the act in question. Indeed, State practice has numerous examples of an announcement of recognition coinciding with a continuation of diplomatic relations. For instance, the British recognition of Poland in 1919 was coupled with a willingness to enter into formal diplomatic relations. In a letter from London to the British representative in Warsaw, the British Government acknowledged that the Polish Government were to be "recognised by His Majesty's Government as the official Polish Government with whom they will be happy to enter into formal diplomatic relations".[130] Similarly, under the new policy, the United States indicated that what was important was that diplomatic relations continue in their pronouncement regarding Afghanistan in 1978.[131]

However, a source of difficulty which the courts may have to face is that there may be a need to draw a distinction between full diplomatic relations and certain relations which are conducted on a lower scale. For instance, during the period that the United States refused to recognise the Huerta government in Mexico, it still maintained and conducted business with the government who were de facto in control. Although the correspondence was consistently marked, "Personal—Unofficial", as Houghton pointed out, the relations were hardly distinguishable from ordinary diplomatic intercourse.[132]

In the past, the dividing line between various levels of dealings with a regime and full diplomatic relations may not have been easy to draw:[133]

> En attendant la décision définitive de leurs gouvernements, ils continuent à traiter avec les nouvelles autorités les affaires courantes et à user des formules de courtoisie usitées. Le fait de traiter avec ces autorites n'engage nullement les gouvernements étrangers, parce que leurs agents sont couverts par la fiction des *rapports officieux*, soit de *l'action extra-officielle*.
>
> Dés que les circonstances démontrent que le gouvernement de fait est accepté par le pays, les puissnces étrangères le reconnaissent par le moyen d'un acte diplomatique—lettre autographe, dépêche de chancellerie, etc—qu'elles font parvenir au gouvernement nouveau, soit directment, soit par l'intermédiaire de leurs agents diplomatiques, auxquels elles font parvenir, à cet affet, des instructions spéciales.

Then, formal recognition was the norm rather than the exception so that it was seldom necessary to have recourse to the notion of implied recognition.

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128 Ibid, at 131.

129 See also Lauterpacht, *Recognition in International Law*, p 406.

130 "Implied Recognition", (1944) 21 BYIL 123 at 132.

131 See above p 40.

132 "Methods of Communicating and Negotiating Agreements with Unrecognised Governments", (1931) 5 Temple LQ 349 at 352.

133 Wiesse C, *Le Droit International Appliqué aux Guerres Civiles*, pp 237 et seq, quoted by Hershey, "Notes on the Recognition of De Facto Governments by European States", (1920) 14 AJIL 499 at 501.

Under the new policy, the adoption of a form of implied recognition is an available option, but the courts also have to decide whether to apply it as strictly as in the past, or to regard more tenuous dealings than full diplomatic relations as the equivalent to the recognition of the status of a new regime.

(c) *Bilateral arrangements*

The other circumstance where an implication of recognition is open is where there has been a bilateral agreement concluded between a State and the new regime in question. It has been asserted that "in the case of bilateral treaties the presumption of recognition appears to be cogent to the point of being conclusive".[134]

This view is supported in State practice. In 1928, the United States Minister to China entered a treaty of commerce with the National Government of China, which until then had not been recognised by the United States. The position was considered in *Republic of China v Merchants' Fire Assurance Corp*,[135] in which it was held:[136]

> On July 25, 1928, the Envoy...to China, appointed by the President of the United States, and the Minister of Finance, appointed by the National Government of the Republic of China, entered into a treaty of commerce; and while their treaty has not as yet been ratified by the Senate, it contains a clear recognition by the Executive Department of this government of both the National Government of the Republic of China and of its accredited representative.

However, the issue may not be as clear cut as this statement assumed. There are some instances which suggest that it is necessary to consider the type of agreement that is negotiated and entered into, since not all agreements of a bilateral nature have led to the presumption of recognition. On February 20, 1920, the British Government entered into an arrangement with the unrecognised Soviet Government for the release of prisoners of war.[137] Yet, in November of the same year, an executive certificate presented to the courts expressed the view that "His Majesty's Government have never officially recognised the Soviet Government in any way".[138] Clearly, the British Government considered that the negotiation of this particular treaty did not evidence recognition of the Soviet Government. However, in March 1921, the Government of Great Britain entered a trade agreement with Soviet Russia, and subsequently, the Foreign Office stated to the court, "His Majesty's Government recognise the Soviet Government as the *de facto* Government of Russia".[139]

The fact that bilateral treaties have not always implied recognition was

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134 "Implied Recognition", (1944) 21 BYIL 123 at 127.

135 30 F 2d 278 (1929).

136 At 279. See also *Restatement of the Law, The Foreign Relations Law of the United States* (May 1962), Pt 2 "Recognition", pp 375-6.

137 1 LNTS 264.

138 *Luther v Sagor* [1921] 1 KB 456.

139 *Luther v Sagor* [1921] 3 KB 536.

expressly stated in a memorandum of the United States Department of State:[140]

> It is possible for bilateral treaties or agreements entered into not to constitute recognition. Thus, during the years of 1919 and 1920 a number of bilateral treaties or agreements provided for the repatriation of prisoners of war and nationals were entered into by the Soviet Government, without being regarded as resulting in recognition.

Despite the significance attached to bilateral agreements by some commentators, whether in fact recognition could be implied from the entering into of such an arrangement depended upon its nature and the circumstances in which it was made.[141] The use of the normal avenues for negotiating a bilateral treaty would raise a presumption of recognition. Other circumstances, for example, that the agreement was an armistice in time of hostilities, or where the negotiations took an unusual form, with the parties meeting at a venue provided by a third State, might point to the opposite conclusion.

If such factors were important in the context of the more formal attitudes towards recognition, the matrix of events would be of equal significance (though the need to make reference to them would be greater) within the framework of the new policy. The existence of treaty arrangements, and the circumstances of their making, with a foreign regime would be taken into account by an Australian court in deciding whether the Australian government had thus implicitly recognised the status and authority of that regime for the purposes of Australian law.

iv. Consequences of adopting an implied recognition approach

Under the new policy, it might be all too easy for the courts to infer recognition where there was no intention on the part of the executive that such a conclusion be drawn. A fundamental criticism of the new Australian policy is that it apparently does not allow the executive to make formal declarations with respect to non-recognition. Hence the courts may indeed compromise the executive by implying recognition in the absence of declarations by the executive refuting such an implication. In theory this should not be a cause for concern as the very purpose of the policy is to avoid the executive having to make public and invidious choices. It remains to be seen whether the embarrassment is any the less when the decisions are made by the courts.

As to the criteria regarded as significant in determining whether recognition should be implied, the presence or absence of diplomatic relations may not always be a helpful guide. Few if any States have the extensive network of diplomatic posts enjoyed by the United States. Australia has significantly fewer

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140 Assistant Legal Adviser Whiteman to Legal Adviser Becker, 25 March 1959, Whiteman, *Digest of International Law*, Vol 2, p 52. The memorandum did go on to suggest that the "conclusion of a bilateral treaty normally, however, does constitute recognition."

141 As was pointed out by one commentator ("Implied Recognition", (1944) 21 BYIL 123 at 137):

> If recognition is refused for reasons other than the non-existence of the unrecognised State or government, then it is difficult to see how contact with it for limited purposes, including the conclusion of agreements, necessarily implies recognition.

missions to foreign countries. Accordingly, the existence or continuation of diplomatic relations with a new regime might not be a relevant factor in assessing Australia's contacts with that regime.

The fact remains that, if Australia has purportedly abandoned the concept of recognition altogether, it would be anomalous for the courts to adopt an approach based on implied recognition. Indeed, for courts subsequently to impute recognition appears to undermine the very basis of the new recognition policy. From this point of view, it would seem to be more consistent to consider the "effective control" test if recognition is no longer the issue.

However, the Australian courts may feel that the doctrine of implied recognition is more in accord with the old policy that the courts must speak in "one voice" with the executive. Such an approach is not strictly necessary, if regard is had to the proposition that the new policy, by denying that the executive has spoken at all, makes it impossible for the courts to speak in "one voice" with the executive. While it is open for the courts to make their own determinations with regard to new regimes in the absence of any express declaration on recognition from the executive, the likelihood remains that the courts will treat actions (in the form of contacts with a new regime) as speaking, if not louder than words, at least as loud.

v. Patterns of Recognition

Given the absence of any decisive reason for selecting effective control in preference to implied recognition (or vice versa), there is a further possibility which the courts might consider it appropriate to rely upon, and that is the international pattern of recognition vis-a-vis the new regime.

It was stated in the *Gur* case[142] that it was "common knowledge" that the South African homelands "do not enjoy the...privileges of the community of nations". This suggests that the court was influenced by the general view of the majority of States in the international arena that the homelands were not considered to have the status of States in international law or indeed States with representative governments. Thus, it is possible that courts may be influenced by the general pattern of recognition by other States. This would accord with the view espoused in the *Tinoco Arbitration*[143] that recognition by other nations is often the best evidence of the existence of a regime.

The collective practice of States regarding recognition may be constitutive in effect and thus it is possible that courts may consider this in determining whether they will acknowledge the existence of a regime for the purposes of municipal law. Such an approach could only be determinative if this principle is considered a customary norm of international law[144] which is doubtful, since collective non-recognition has thus far only been considered constitutive with respect to the question of statehood.

If the courts considered that there was enough evidence, they may take the view that collective recognition may be persuasive, even if not determinative,

142 *Gur Corp v Trust Bank of Africa Ltd* [1987] QB 599 at 609 per Steyn J.

143 Text in (1924) 18 AJIL 147.

144 On the basis of *Trendtex Trading Corp Ltd v Central Bank of Nigeria* [1977] QB 529; but see Dunbar, "The Myth of Customary International Law", (1983) 8 Aust YBIL 1.

of the issue. Such an approach could be beneficial for the courts since such an exercise may be an alternative to investigating the "realities" of a situation in a particular State, which may sometimes be difficult. Courts may have easier access to information regarding diplomatic relations of other nations with the regime in question. Or, at least, it may supplement poor evidence on the realities of the situation, perhaps suggesting further satisfaction of the test of effective control.

However, if courts consider that the proper issue for determination is that of implied recognition (on the basis that there is still an underlying requirement to speak with "one voice" with the executive of the forum), the courts are unlikely to consider the practice of other governments. What should be important is not other governments' cognisance of the particular regime, but the Australian government's view alone.

A criticism which may be levelled at taking into account the collective practice of recognition is one that has already been expressed in the context of implied recognition: if recognition is purportedly no longer the matter in issue, it seems anachronistic to consider other nations' determinations upon recognition. However, it may be permissible to consider collective recognition if it is kept in mind that recognition by other nations is only evidence of the existence of a regime. If a court is determining whether a government satisfies the criterion of effective control, a general acceptance of the existence of a regime may be a supplementary factor in that determination.

Not that the patterns of recognition will frequently be of assistance. The shift to a policy of not issuing formal declarations on recognition is part of a general trend amongst Western countries. Accordingly, in relation to a new regime, it may well be that the only pattern that emerges is one based on contacts. A pattern of recognition (or non-recognition) is likely to arise only in the context of claimants to statehood. The *Gur* case suggests that there may be a "spillover" effect: where there is a denial of recognition to the State, there will be no acknowledgment of its government by reference to the alternative criteria to recognition.

The Problem of Two Competing Regimes in a Particular State

There is one issue which may be left unresolved by either of the approaches which the courts may adopt. Where there are two competing regimes in a particular State, it may be difficult for the courts to determine which is the proper authority to be considered the government of the State concerned. The world community has often been faced with situations where there are two authorities which claim to be the government of a particular State. Notable examples have been provided by the rival regimes in Beijing and Taiwan, in East and West Germany and North and South Korea which operated independently of each other and forced other nations to consider which regime was the proper authority to be dealt with as the government of the State in question.

The new policy does not prevent the executive providing details of its dealings with a new regime, nor with both regimes in a situation where vestiges of the former government's authority are preserved. It is in this latter situation that the temptation will be strongest for a court to adopt a policy based upon

implied recognition. Indeed, in a case where Australia has dealings with both claimants to represent the foreign State in question, there is even the possibility that a court might revive the distinction based upon *de facto* and *de jure* recognition.

As far as the courts in England (and presumably Australia) were concerned, it made no difference whether the claimant authority were recognised *de facto* or *de jure* with regard to things or matters within its territorial control. However, a *de facto* recognised authority was not entitled to the extra-territorial assets of a State, those being reserved for the original *de jure* authority.[145] This was the courts' solution to a difficult political problem. Arguably such an approach was open to criticism on the ground that it was an act of intervention in the affairs of another State, having the effect of assisting the previous regime to maintain its position through financial support.

In the absence of any clear indication from the Australian government as to which regime it regards as the true government of the State concerned, the courts may find themselves compromised. One solution may be to freeze the extra-territorial assets until the conflict is resolved. However, if the situation is one which has remained unresolved for a long period of time, and appears unlikely to change in the immediate future, what then are the courts to do? It was precisely this sort of situation which Mann CJ must have had in mind when he suggested that, where it was "extremely difficult to determine" who was in effective control, it is "necessary or desirable" to seek a statement from the executive.[146]

Such a response is equally appropriate in the new climate, whether the courts are seeking to apply the "effective control" test or a doctrine of implied recognition. In the context of the latter, the information provided would be taken to signify which of the contestants Australia was by implication recognising, or whether it was in effect recognising them both. Where contacts exist with the rival governments, the issue of diplomatic relations might be crucial. If no such relations exist or have been established, the courts could treat both regimes as having been recognised *de facto.* If, on the other hand, full diplomatic relations exist with one of the rivals, that regime could be regarded as having been recognised *de jure.*

Conclusion

The adoption of a policy of no longer according recognition to foreign regimes coming to power by unconstitutional means may relieve the Australian government of a major public relations problem. In a sense it involves "passing the buck" to the courts who may find it necessary themselves to determine whether Australia has in effect, from its conduct towards the regime in question, accorded that regime the status of a recognised government.

It is true that an "effective control" test might relieve them and the Australian government of some of the embarrassment that any type of recognition is said to cause. However, as soon as the issue of what dealings have occurred between the Australian government and the new regime is introduced, the question of a form of implied recognition will inevitably arise.

145 *Haile Selassie v Cable and Wireless Ltd* [1939] Ch 182.

146 In *Anglo-Czechoslovak & Prague Credit Bank v Janssen* [1943] VLR 185 at 197.

In addition, the courts are on more familiar ground when dealing with the consequences of some form of recognition; there are earlier decisions to guide them.

It is an interesting postscript to this conclusion that, in *Attorney-General for Fiji v Robt Jones House Ltd*,[147] the High Court of New Zealand interpreted the executive certificate provided by the New Zealand Ministry of Foreign Affairs as amounting to implied recognition of the new government in Fiji. As Jeffries J said:[148]

> The New Zealand Government continues to disapprove strongly of the unconstitutional method by which the present interim Government of Fiji was installed but, notwithstanding, seems prepared to adopt a policy 'consistent with the policies and practices of most of the Western democratic countries'..., which brings it close, if not actually to the point of, the familiar doctrine of 'implied recognition'.

In reaching a conclusion in the plaintiff's favour, the judge did say:[149]

> It is not for the Court to declare recognition or non-recognition of the Government of Fiji in the light of the recently adopted policy of the New Zealand Government, which specifically itself does not take that formal course. However, as judged by the nature of dealings Government to Government locus standi should be accorded to the plaintiff in the New Zealand Courts.

Although the decision is open to criticism with regard to the excessive deference paid to the executive certificate,[150] it is correct with regard to the balance between the test of effective control and the notion of implied recognition based upon the dealings between the State of the forum and the new regime. In the words of the judge:[151]

> the Executive has supplied the Court with actual and specific information about the "nature of dealings" so as to assist the Court to determine the regime's status. It is noted the certificate omits any Government opinion on the exercise of effective control by the new regime of the territory of the State of Fiji and whether the control seems likely to continue, which test in the past was a central determinative issue in Governmental recognition. Effective control would influence the nature of dealings but it seems the latter is now more prominent as an issue, and particularly in this case.

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147 [1989] 2 NZLR 69.

148 At 75.

149 Ibid.

150 According to Jeffries J (ibid):

> In my view, this Court having judicially requested a formal certificate from the Executive, and it having been supplied, cannot examine any other material, or reach any other conclusion on the subject of recognition of the Government of Fiji than that contained in ...the certificate.

151 At 74-75.