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International Law - Retroactive Recognition of De Facto Government Not Invalidation of Acts of Prior De Jure Government

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INTERNATIONAL LAW — RETROACTIVE RECOGNITION OF DE FACTO GOVERNMENT NOT INVALIDATION OF ACTS OF PRIOR DE JURE GOVERNMENT—On December 12, 1949, the Chiang regime on Formosa accepted the offer of an American group headed by General Chennault to purchase the physical assets of the Nationalist-operated Central Air Transport Corporation, including forty aircraft located at Hong Kong. The British government ceased to recognize the Nationalists as the de jure government of China on January 5, 1950. Thereafter the British announced that they recognized the Communist regime as the de facto government of those parts of China they actually controlled, effective October 1, 1949, the date the Communists had proclaimed themselves the government of China. The Chennault corporation brought an action in Hong Kong against the CATC, seeking an order declaring it the owner of the forty planes. The action was dismissed on the ground, inter alia, that the recognition of the Communist regime operated retroactively to "validate"[1] its actions and to invalidate the actions of the Chiang government subsequent to October 1, 1949, thereby annulling the sale of December 12, 1949. On appeal to the Privy Council, *held,* reversed. Retroactivity of recognition operates primarily "to validate acts of a de facto government which has subsequently become the new de jure government, and not to invalidate acts of the previous de jure government." *Civil Air Transport, Inc. v. Central Air Transport Corp.*,[1953] A.C. (P.C. 1952) 70 at 93.

The principal case is one of two which have passed on the validity of acts of a former government after the state of the forum has ceased to recognize it as a de jure government. In *Gdynia Ameryka Linie v. Boguslawski*[2] the Polish government-in-exile offered a terminal pay settlement to those men who left the Polish merchant fleet rather than return to Soviet-dominated Poland. When the offer was accepted subsequent to the recognition of the Polish provisional government, a British court held that there resulted a contract binding on the state-owned line. The new Polish government claimed existence prior to the date of the offer in controversy, and argued as an extension of the retroactivity doctrine that the acts of the old government during the interim were invalid. This argument was rejected by the court on a territorial jurisdiction distinction: retroactivity operates only in that area under de facto control prior to the de jure recognition.[3] In the principal case the court accepted the territorial juris-

[1] Although now conventional phraseology, the use of "validate" is perhaps misleading. See Moore, "The New Isolation," 27 AM. J. INT. L. 607 at 618 (1933): "Recognition 'validates' nothing. On the contrary, it opens the way to the diplomatic controversion of the validity of any and all 'actions and conduct' that may be regarded as illegal." This was in criticism of Justice Clark's use of the term in Oetjen v. Central Leather Co., 246 U.S. 297 at 303, 38 S.Ct. 309 (1918). Even if it is conceded that Moore's stand is correct at least as to public international law, the fact remains that "validate" has become a term of art, embodying the implications of a large number of decisions. See Stevenson, "Effect of Recognition on the Application of Private International Law Norms," 51 COL. L. REV. 710 (1951); Mann, "Sacrosanctity of the Foreign Act of State," 59 L.Q. REV. 42, 155 (1943). Mann points out that "the invalidity of the act of State was not in issue in any of the American decisions." Id. at 163.

[2] [1953] A.C. (H.L. 1952) 11.

[3] The court of appeal had treated the retroactivity problem as not strictly in point,

diction limitation with only minor reservations.[4] The doctrine of retroactive validation of prior acts of newly recognized governments is at least as well established in England as in the United States.[5] In spite of the distinction drawn between retroactive validation and retroactive invalidation in the present case,[6] it and the *Boguslawski* case seem to represent simply an application of the territorial jurisdiction limitation on retroactivity. In the United States the existence of such a limitation is not at all clear.[7] The Supreme Court in *United States v. Pink*[8] came close to a result contrary to that reached in England. That case upheld the assignment by the Soviet government to the United States under the Litvinov Agreement[9] of the American assets of Russian companies which the Soviets had nationalized prior to their recognition by this country. This result may be viewed as an extraterritorial extension of the retroactivity doctrine.[10] It may also be viewed as a manifestation of the Court's willingness to give effect to "national foreign policy as evidenced by the terms of an

viewing the case merely as one involving a normal succession of governments. Gdynia Ameryka Linie v. Boguslawski, [1951] 1 K.B. (1950) 162 at 173. The subsequent acceptance of the offer was considered permissible on a vested rights analysis.

[4] The opinion is not clear regarding the reservations. The court refers to the case of a ship on the high seas seized by insurgents and brought into port under de facto control. Apparently it had in mind The Arantzazu Mendi, [1939] A.C. (H.L.) 256. There the Spanish Republican regime was denied the right to arrest a vessel of Spanish registry, because the Franco forces, recognized as a de facto government, were in possession. Although the Republican regime was recognized as the de jure government of all Spain, it was thus unable to implead another sovereign state. However, the court in the present case also cites Banco de Bilbao v. Sancha, [1938] 2 K.B. 176, which held that Franco's de facto government in Bilbao was the proper government to pass enactments concerning a bank having its corporate home in Bilbao, even though the Republican regime remained the recognized de jure government. Neither of these cases involved retroactivity, but they have obvious implications as to the effect of retroactivity in the event of subsequent de jure recognition of the de facto regime. The court wisely distinguished the instant case as presenting a simple issue of title to chattels located outside the area of de facto control. Principal case at 94.

[5] Mann, "Sacrosanctity of the Foreign Act of State," 59 L.Q. REV. 155 at 162 et seq. (1943); Luther v. Sagor & Co., [1921] 3 K.B. 532; Princess Paley Olga v. Weisz, [1929] 1 K.B. 718.

[6] See principal case at 93, and quotation therefrom in text supra.

[7] The court in the Boguslawski case, note 2 supra, at 30, quotes Justice Stone's opinion in Guaranty Trust Co. v. United States, 304 U.S. 126 at 140, 58 S.Ct. 785 (1938), calling for a distinction on a territorial basis and also on the validate-invalidate dichotomy. However, the passage quoted does not seem to have been necessary to the decision. See 26 CALIF. L. REV. 713 (1938). Certainly the case was given no such import by either the majority or dissenting opinions in United States v. Pink, 315 U.S. 203, 62 S.Ct. 552 (1942). See text supra at note 7 et seq.

[8] Note 7 supra.

[9] See Establishment of Diplomatic Relations with the Union of Soviet Socialist Republics, Dept. of State, Eastern European Series, No. 1 (1933). See also the account in 28 AM. J. INT. L. SUPP. 1 (1934).

[10] Borchard, "Extraterritorial Confiscations," 36 AM. J. INT. L. 275 at 279 (1942); 51 YALE L.J. 848 at 851 (1942).

executive agreement."[11] The basic reasoning of subsequent lower court cases is similarly ill-defined.[12]

The recent litigation between the Chiang regime and the Wells Fargo Bank suggests the possibility that the United States may now abandon the ambiguity of the *Pink* case and adopt a limitation essentially the same as that in the principal case. A federal district court at first refused to award Chinese funds on deposit with the Wells Fargo Bank either to the Bank of China, a substantially government-owned corporation, or to representatives of the new Communist regime.[13] In effect this decision denied the continuing force of the United States' recognition of the Nationalist government.[14] On rehearing, the court awarded the funds to the Nationalist management.[15] However, this decision was based primarily on the ground that the Nationalist government had become sufficiently stable to promote the Bank's corporate interests, and that as between the Nationalist and Communist regimes the court should accept the executive's decision as to which was "best able to further the mutual interests of China and the United States."[16] The court expressly rejected a straight territorial limitation on the validity of acts of non-recognized governments,[17] which would seem to impeach any such limitation in the event of subsequent recognition. The court also chose to view the *Pink* case as requiring "that full faith and credit be accorded those acts which our executive has expressly sanctioned"[18]—thus rejecting the extraterritorial validation theory of that case. If the Wells Fargo Bank has assets in England the way is now open for an interesting claim to be pressed by the "Communist Bank of China." It seems clear that much more litigation will be required to fix the bounds of the retroactivity doctrine.

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[11] Stevenson, "United States v. Pink—A Reappraisal," 48 COL. L. REV. 890 at 894 (1948). The difficulty with this view is that the entire Litvinov Agreement gives no evidence whatever on the executive's wishes concerning extraterritorial retroactivity.

[12] Stevenson, "Effect of Recognition on the Application of Private International Law Norms," 51 COL. L. REV. 710 at 722 et seq. (1951).

[13] Bank of China v. Wells Fargo Bank & Union Trust Co., (D.C. Cal. 1950) 92 F. Supp. 920.

[14] This of course was not the expressed rationale of the decision. However, the fear of early recognition of the Communist regime seems the only plausible explanation of the court's virtual abdication of the judicial function.

[15] Bank of China v. Wells Fargo Bank & Union Trust Co., (D.C. Cal. 1952) 104 F. Supp. 59.

[16] Id. at 66.

[17] Id. at 63.

[18] Id. at 64.