THE NEW AUSTRALIAN RECOGNITION POLICY IN COMPARATIVE PERSPECTIVE

BY HILARY CHARLESWORTH*

1. *INTRODUCTION*

Until recently, the recognition of foreign governments played a role of some consequence in Australian foreign policy. In January 1988 the then Australian Minister for Foreign Affairs and Trade, Bill Hayden, announced a Cabinet decision to alter Australian practice with respect to recognition: Australia would continue to recognize states but would no longer formally recognize governments.[1] The given reason for this change was that, although Australia's former policy of recognizing governments was

> technically a formal acknowledgement that the Government was in effective control of that State and in a position to represent that State internationally . . ., recognition of a new Government inevitably led to public assumptions of approval or disapproval of the Government concerned, and could thereby create domestic or other problems for the recognising Government. On the other hand, 'non-recognition' limited the non-recognising Government's capacity to deal with the new regime.[2]

Doing away with recognition of governments, it was said, allowed quicker and more flexible reactions to international developments and avoided assumptions of approval of recognized regimes.[3] Australia's attitude to a new regime in an existing state, particularly one installed by violent or unconstitutional means, would be ascertained by 'the nature of our policies towards and relations with the new regime.'[4] These policies and relations would be indicated by factors such as public statements, the establishment or conduct of diplomatic relations, ministerial contact and other contacts such as aid, economic, defence arrangements or technical and cultural exchanges.[5]

The official announcement made explicit that the new policy did not imply any change in Australia's attitude towards Afghanistan or Kampuchea (now Cambodia). Australia had refused to recognize the government in Afghanistan since the Soviet invasion in 1980 and had withdrawn recognition of the government of Kampuchea in 1981.

Although the change in recognition policy had been contemplated for some time,[6] it provided an immediate way out of an impasse in Australia's relations

* B.A. (Hons) (Melb.), LL.B. (Hons) (Melb.), S.J.D. (Harv.). Barrister and Solicitor of the Supreme Court of Victoria. Senior Lecturer in Law, University of Melbourne. The author thanks Penelope Mathew for her valuable research assistance.

1 Minister for Foreign Affairs and Trade, Press Release 19 January 1988, reprinted in [1988] *Australian International Law News* 49.

2 'Australia's New Recognition Policy' *Foreign Affairs Backgrounder* January 1988.

3 *Ibid.*

4 *Ibid.*

5 *Ibid.*

6 In a radio interview after the announcement, Mr Hayden said that the policy change had not been announced earlier at the behest of the members of ASEAN who feared that it might be construed as an implicit recognition of the Vietnamese-backed regime in Kampuchea. Radio National *Asia Pacific* January 1988.

with Fiji. The Fijian coup in May 1987 led by Colonel Sitiveni Rabuka had brought down the elected government of Dr Timoci Bavadra and suspended the Constitution. The Governor-General, Ratu Sir Penaia Ganilau, refused to acknowledge the Rabuka military government and appointed an interim Council of Ministers to govern Fiji. A second coup led by Rabuka in September 1987 annulled the Constitution, declared Fiji a republic and Rabuka head of state. Subsequently an 'interim' civilian regime headed by the former Governor-General as President and the former Prime Minister, Ratu Sir Kamisese Mara, who had been defeated at the elections that brought Bavadra to power, as Prime Minister was installed with the support of the military.

Australia had strongly criticised both Fijian coups, recalling its High Commissioner after the first coup and suspending civil and military aid to Fiji. It did not recognize any of the governments established after the fall of the Bavadra government.[7] In January 1988 the French government announced a decision to give $18 million in aid to Fiji[8] and the prospect of the expansion of French influence in the Pacific may have encouraged Australian efforts to normalize relations with Fiji. Given the level of criticism of Colonel Rabuka, restoration of official Australian contact with Fiji was a delicate matter. Certainly formal recognition might be regarded as approval of the ousting of a democratically elected government. The change in policy made restoration of relations much simpler: a few days after the decision to change recognition policy Australia announced the resumption of civil aid to and official contacts with Fiji and the appointment of an Ambassador.[9]

Australia's change of recognition policy brings it into line with that of the United States and most of the members of the European Economic Community. It has been hailed as 'pragmatic and eminently sensible'[10] and 'an excellent way of achieving a degree of political detachment that is sometimes lacking in diplomacy'.[11] What is the legal significance and practical impact of this change in recognition policy? This article aims to place the new Australian policy in its international context and to examine its implications in domestic law through a comparative analysis of the recognition policies of the United States, the United Kingdom and Australia.

[7] By contrast, the Papua New Guinea government gave full recognition to the Rabuka regime in November 1987. For a discussion of this action see Islam, M.R., 'The Recognition of the Revolutionary Regime of Fiji by Papua New Guinea' (1988) 16 *Melanesian Law Journal* 75.

[8] 'Pressure to restore aid to Fiji' *Weekend Australian* (Sydney), 16-17 January 1988.

[9] 'Aid to resume as Ambassador to Fiji is chosen' *Age* (Melbourne), 30 January 1988. Australia did not, however, resume its defence cooperation with Fiji because of its reservations about the lack of Fijian democracy. In May 1990 the Australian Minister for Foreign Affairs and Trade, Senator Evans, said that concern about the new Fijian Constitution, which entrenches the political and economic power of indigenous Fijians and excludes the sizeable Indian population from significant political power, meant that military aid would not yet be restored. Such action, he said, was calculated to send 'exactly the kind of signal that is understood by the Government in Fiji and appreciated by all those in that country who are seeking to restore democracy'. He also noted '[o]ur approach has consistently been to seek to shore up commitment to democracy and human rights while at the same time dealing with the objective realities of those in possession of power and authority in a country where Australian interests are substantial.' Commonwealth of Australia, *Parliamentary Debates*, Senate, 23 May 1990, 881, reprinted in (1990) 61 *Australian Foreign Affairs and Trade Monthly Record* 302, 303, 302.

[10] 'Recognition switch paves way for relations with Fiji' *Age* (Melbourne), 25 January 1988.

[11] Editorial *Age* (Melbourne), 20 January 1988.

2. *RECOGNITION IN INTERNATIONAL LAW*

Professor Brownlie has described theories about recognition in international law as 'a bank of fog on a still day'.[12] For Sir Hersch Lauterpacht this area was 'one of the weakest links in international law'.[13] A feature of the international law of recognition is a series of often overlapping distinctions which give a superficial impression of logic and order. The Australian change of recognition policy involves all these distinctions.

The most basic of these distinctions is that between recognition of states and recognition of governments.[14] Professor Crawford has pointed out the very close relationship between the concepts of 'state' and 'government': the international legal definition of statehood requires an effective government; and a state participates in the international arena through its government.[15] International law, however, maintains a distinction between the two concepts and considers the personality of the state untouched by even radical changes in government.[16] Recognition of a state is, then, the acknowledgement that an entity fulfils the traditional international criteria for statehood: a permanent population, a defined territory, government and capacity to enter into relations with other states (or the need to be independent).[17] It is possible for recognition to be invalid because an entity does not yet possess these attributes; inappropriate recognition may also constitute wrongful intervention in the internal affairs of a state from whose territory a new 'state' is possibly being formed.[18] Recognition of a state by other states is generally a one-off act for it is exceptional that an entity would lose the attributes of statehood.[19]

The distinction between recognition of states and governments means that it is possible to recognize a state but not its government. Recognition of a particular government, however, automatically implies recognition of the state over which it rules. Recognition of governments, the acknowledgement that a particular regime can claim governmental authority in a state and will be so treated by the recognizing state, is in issue in cases of an unconstitutional accession to power.[20]

12 Brownlie, I., 'Recognition in Theory and Practice' in Macdonald, R. St. J. & Johnston, D. M. (eds), *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory* (1983) 627.

13 Lauterpacht, H., *Recognition in International Law* (1947) 3.

14 More generally, the term 'recognition' in international law encompasses, in Brownlie's words, 'the general issues of evaluation of state conduct in face of facts which may relate to legal titles, liabilities or immunities'. Brownlie, *op. cit.* n. 12, 630. Examples would be recognition of a state of war, or claims of sovereignty over territory, or foreign court rulings.

15 Crawford, J., *The Creation of States in International Law* (1979) 27-8.

16 *Ibid.* 28-9.

17 Montevideo Convention (1933), art. 1. See generally Crawford, *op. cit.* n. 15, 36-76. Crawford also argues that it is important to consider the means by which a state was created. For example, a state created contrary to the international prohibition on the threat or use of force cannot be considered as a state. *Ibid.* 118. This conclusion is supported by the *Restatement (Third) of the Foreign Relations Law of the United States* (1987) para. 202, comment e.

18 On the issue of the recognition of Biafra's statehood in 1968 by five states see Ijalaye, D. A., 'Was "Biafra" at any time a State in International Law?' (1971) 65 *American Journal of International Law* 551.

19 Recent examples of such a process are the 1990 reunifications of North and South Yemen and East and West Germany.

20 For a discussion of what constitutes a revolutionary or unconstitutional change of government see Bundu, A. C., 'Recognition of Revolutionary Authorities: Law and Practice of States' (1978) 27 *International and Comparative Law Quarterly* 18, 27-36.

In all other cases it is assumed that successive governments are legitimate. A necessary condition for the recognition of a government is that it is in reasonably permanent 'effective control' of a state.[21] Once this criterion is satisfied,[22] state practice indicates considerable state discretion in deciding whether or not to accord recognition to a regime.[23] For example, before its change of recognition policy, the United Kingdom's position was that it would recognize any regime that met the 'effective control' test.[24] By contrast the United States at various times accorded recognition only when regimes in effective control met further criteria such as committing themselves to hold free elections and to fulfil all international obligations.[25] The pre-1988 Australian foreign government recognition policy oscillated between these two approaches.[26] The practice of recognition of governments generally has thus

21 *Ibid.* 27; Lauterpacht, *op. cit.* n. 13, 98.

22 As Islam illustrates in the Fijian context, this is not always a simple matter to establish. Islam *op. cit.* n. 7, 79-80.

23 The record for non-recognition of an effective government is Portugal's refusal to recognize the government of the Soviet Union from 1917 until 1974.

24 The classic statement of British recognition policy is found in the statement of Foreign Secretary Morrison in 1951: '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 State's territory and that this control seems likely to continue.' A *de jure* government, on the Morrison definition, was one in 'firmly established' effective control. United Kingdom, *Parliamentary Debates*, House of Commons, 21 March 1951, col. 2410. Inconsistency in British recognition practice (for example, the long period of non-recognition of the effective East German and North Korean governments, and the continued recognition of the Pol Pot regime in Kampuchea even when in 1979 it was no longer in effective control of Kampuchea) gave rise to what it termed a 'mistaken' impression that recognition implied approval and disapproval. On the British recognition of governments in Kampuchea see Warbrick, C., 'Kampuchea: Representation and Recognition' (1981) 30 *International and Comparative Law Quarterly* 234.

25 In *Recognizing Foreign Governments, The Practice of the United States* (1978), L. T. Galloway provides a detailed history of various United States Presidents' recognition policies. Factors influencing United States recognition policy at different times included support for anti-monarchical governments, advancing American economic interests, promoting constitutional government, reducing support for Axis powers in World War Two and curbing the spread of communism. Recognition policy also varied with region: recognition of Central and Latin American revolutionary governments was typically based on more stringent conditions than recognition of European, African or Asian revolutionary regimes. See also Fenwick, C. G., 'Recognition of De Facto Governments: Old Guide Lines and New Obligations' (1969) 63 *American Journal of International Law* 98. Latin American States too have on occasion considered factors such as whether or not a foreign government was involved in the revolutionary change of government, or whether or not elections will be held, as relevant to decisions on recognition. See the Organization of American States resolution on 'Informal Procedure on the Recognition of De Facto Governments' reprinted in (1966) 5 *International Legal Materials* 155.

26 In 1959 the Minister for External Affairs, Mr Casey, explaining Australia's non-recognition of the People's Republic of China, told Parliament that 'a regime's capacity to govern is not the sole test for recognition by other governments'. Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 13 August 1959, 196 reprinted in (1970) 3 *Australian Year Book of International Law* 239. By 1974, however, the Australian position was that 'recognition and establishment of diplomatic relations are neutral acts, implying necessarily neither approval nor disapproval of the government of the country concerned . . .'. (Foreign Minister Willisee, [1974] *Australian Foreign Affairs Record* 367-8 reprinted in (1978) 6 *Australian Year Book of International Law* 226.) The minimum criteria for the policy of 'universal' recognition of governments were said to be: the exercise of effective control; a reasonable prospect of permanence; the support of the population; and an expressed willingness to fulfil international obligations. See the speech by the Secretary of the Foreign Affairs Department, Alan Renouf, in 1975, [1975] *Australian Foreign Affairs Record* 397 reprinted in (1978) 6 *Australian Year Book of International Law* 226-7. The policy explained, for example, the recognition of the Pinochet regime in Chile (Commonwealth of Australia, *Parliamentary Debates*, Senate, 27 February 1975, 514, reprinted in (1978) 6 *Australian Year Book of International Law* 228-9) and the Whitlam government's recognition of the incorporation of the Baltic States into the Soviet Union (Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 15 October 1974, 2294, 27 November 1974, 4216, reprinted in *ibid.* 229-31). The latter recognition was reversed in 1975 by the Fraser government. But this policy was not always strictly adhered to.

tended to blur three separate issues: the status of a new regime, the type of communications other states wish to have with it and the level of approval other states accord it.[27]

Is there a duty of non-recognition when either a state or government has acquired its status in violation of international law? There is considerable support for the existence of such a duty with respect to statehood.[28] A parallel duty of non-recognition of governments rests of course only on a particular government's dependence on violations of international law, rather than on any domestic unconstitutionality.[29]

For example, in May 1975 Australia recognized a Viet Cong government in South Vietnam before the final collapse of the Thieu government. (See *ibid.* 239; Galloway, *op. cit.* n. 25, 124.) The policy of 'recognizing reality' appeared to inform the 1978 statement by Foreign Minister Peacock recognizing the *de facto* absorption of East Timor into Indonesia, while deploring the Indonesian use of force to achieve 'integration', and the 1979 *de jure* recognition of Indonesian sovereignty. (See (1978) 52 *Australian Law Journal* 104-6; *Canberra Times* (Canberra), 16 December 1978 quoted in (1983) 8 *Australian Year Book of International Law* 281.) Mr Peacock's earlier statements on East Timor demonstrate the difficulty of 'recognizing a reality' which is politically unpalatable: 'The bases of this Government's policies are our rejection of the use of force as a proper means of solving international problems; our belief in the democratic process and the right of peoples to determine their own institutions; and our deep concern for the welfare of the underprivileged anywhere in the world.' (Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 20 October 1976, 2016, reprinted in (1981) 7 *Australian Year Book of International Law* 431.) By contrast, a later Foreign Affairs Minister in the same government explained Australia's refusal to recognize a military regime in Bolivia on the grounds that it had reversed the democratic process. (Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 10 March 1982, 850-1, reprinted in (1987) 10 *Australian Year Book of International Law* 282.) The Australian non-recognition of the Soviet-backed regime in Afghanistan and the Vietnamese-backed regime in Kampuchea/Cambodia in the 1980s appeared to be based on their dependence on outside support. Compare the justification given for the prompt recognition of the Lule administration in Uganda in 1979 which was supported by Tanzanian troops. (Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 22 November 1979, 3507, reprinted in (1983) 8 *Australian Year Book of International Law* 276-7.)

27 Peterson, M., 'Recognition of Governments Should Not be Abolished' (1983) 77 *American Journal of International Law* 31, 47.

28 For example, in 1965 the Security Council imposed a mandatory obligation on United Nations members not to treat Rhodesia as a state. S.C. Res. 216, 217, 20 UN SCOR Resolutions and Decisions (S/INF/20/Rev. 1) (1965). More recently, the Security Council called for non-recognition of the Iraqi annexation of Kuwait. S.C. Res. 662 (9 August 1990). Even in the absence of an explicit binding determination as to recognition, states have a duty not to recognize territorial acquisition resulting from the use of force: International Law Commission, Draft Declaration on the Rights and Duties of States (1949), art. 11; Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (1970); Definition of Aggression G.A. Res. 3314 (xxix) (1974) art. 5(3); *Legal Consequences for States of the Continued Presence of South Africa in South West Africa (Namibia)* (Advisory Opinion), [1971] I.C.J. Rep. 16, 54, 56; Crawford, *op. cit.* n. 15, 106-18; Starke, J., *Introduction to International Law* (10th ed. 1989) 153-6. See also s. 202(2) of the *Restatement*, *op. cit.* n. 17, which provides that '[a] state has an obligation not to recognize or treat as a state an entity that has attained the qualifications for statehood as a result of the threat or use of armed force in violation of the United Nations Charter.' Professor Crawford suggests other grounds of illegality in the creation of states: for example, violation of a (narrowly defined) right of self-determination (Crawford, *op. cit.* n. 15, 105); and, possibly, violation of other norms of *jus cogens*, such as the right to racial equality and non-discrimination (*ibid.* 226-7). The issue of obligations of non-recognition is raised in the *Case Concerning Certain Activities of Australia With Respect to East Timor* (Portugal v. Australia) filed in the Registry of the International Court of Justice, 22 February 1991.

29 See s. 203 (2) of the *Restatement*, *op. cit.* n. 17, set out *infra* n. 60 which codifies this principle as an obligation of non-recognition if a government's control 'has been effected by the threat or use of armed force in violation of the United Nations Charter'. Such a principle appears to have been the basis of Australia's non-recognition of the Vietnamese-backed regime in Kampuchea and the Soviet-backed regime in Afghanistan. See n. 26 *supra*. In his discussion of the Papua New Guinea recognition of Fiji's military government in 1987, Islam argues that the fact that the revolutionary regime proposed to create a racially discriminatory new Constitution made recognition problematic: 'the policies associated with the regime is [sic] also a criterion that needs to be reckoned with.' Islam, *op. cit.* n. 7, 80. This is not, however, widely accepted as the basis for a duty of non-recognition of governments.

A second distinction drawn in the international law of recognition is between theories as to the legal effect of an act of recognition, whether of a state or government. The debate is whether recognition is constitutive or declaratory: is recognition by other states an essential element of the claim to authority or is it simply a political act which does not affect the true legal status of the state or government in question? One asserted concomitant of the former, the constitutive theory of recognition, is that recognition becomes a legal duty. Thus Lauterpacht wrote:

> To recognize a political community as a State is to declare that it fulfils the conditions of statehood as required by international law. If these conditions are present, the existing states are under the duty to grant recognition. In the absence of an international organ competent to ascertain and authoritatively to declare the presence of requirements of full international personality, States already established fulfil that function in their capacity as organs of international law.[30]

The declaratory theory of recognition contemplates considerable political discretion in state action with respect to recognition. A much quoted explanation of this theory is found in the *Tinoco Arbitration*, in the context of recognition of governments. At issue was the status of certain acts of the revolutionary Tinoco regime in Costa Rica which had not been recognized by a number of states. The Arbitrator, Chief Justice Taft, said:

> The non-recognition by other nations of a government claiming to be a national personality, is usually appropriate evidence that it has not attained the independence and control entitling it by international law to be classed as such. But when such recognition *vel non* of a government is by such nations determined by inquiry, not into its de facto sovereignty and complete governmental control, but into its illegitimacy or irregularity of origin, their non-recognition loses something of evidential weight on the issue with which those applying the rules of international law are alone concerned. . . . Such non-recognition for any reason . . . cannot outweigh the evidence disclosed by this record before me as to the de facto character of Tinoco's government, according to the standard set by international law.[31]

The former British and American approaches to recognition of governments sum up the differences between views of recognition as legal or political in character. In 1951 United Kingdom Foreign Secretary Morrison stated: 'recognition should be accorded when the conditions specified by international law, are, in fact, fulfilled. . . . The recognition of a Government de jure or de facto should not depend on whether the character of the regime is such as to command His Majesty's Government's approval.'[32] In contrast, United States Secretary of State John Foster Dulles said in 1957: 'basically a nation conducts its foreign policy in such a way as to protect itself, and recognition is something that is a privilege, not a right.'[33]

The declaratory theory best describes the effect of recognition of governments for the basis and scope of their authority is primarily domestic and does not depend on international endorsement. Non-recognition of a government can be, in Brownlie's words, 'simply a code for a policy of hostility short of armed conflict'.[34] Certainly the new Australian policy on recognition implicitly supports the declaratory theory by presenting all relations with foreign governments

30 Lauterpacht, *op. cit.* n. 13, 6. See also *ibid.* 61-6, 88.
31 [1923] Reports of International Arbitral Awards Vol. 1, 369, 381.
32 United Kingdom, *Parliamentary Debates*, House of Commons, 21 March 1951, col. 2411.
33 News Conference, Canberra, Australia, 14 March 1957, reprinted in Whiteman, M., *International Law* (1963) vol. II, 7.
34 Brownlie, *op. cit.* n. 12, 628.

as purely optional. In the context of recognition of states, some version of the declaratory theory of recognition is favoured by most modern commentators and is supported by state practice: for example states refusing to recognize another often insist that the unrecognized state must nevertheless abide by international law.[35] The possibility that acts of recognition can be considered invalid because they do not rest on international legal criteria[36] indicates that 'the test for recognition must be extrinsic to the act of recognition'.[37] But the declaratory, political nature of the act of recognition does not preclude it having important legal implications. Thus Brownlie writes, in the context of state conduct, that 'there is a duty to accept and apply certain fundamental rules of international law: there is a legal duty to "recognize" for certain purposes at least [*e.g.* acknowledging a state's basic right to exist], but no duty to make an express, public, and political determination of the question.'[38]

A third distinction employed in the law of recognition is that between *de jure* and *de facto* governments, or the distinction between *de jure* and *de facto* recognition.[39] Usually of course a government of a state has both *de jure* and *de facto* status. After a revolution or other unconstitutional change of government, however, there may be quite separate *de jure* and *de facto* governments. The use of the term '*de jure*' means that the user recognises its claim to governmental authority (whether or not it is actually in power); the epithet '*de facto*' implies at the least that the regime is in effective control and performing the functions of government and, in some circumstances a variety of further glosses, ranging from reticence about recognizing a particular government to suggesting doubts about its stability or legality.[40] The transition from *de facto* to *de jure* status does not depend on internal domestic ratification of the unconstitutional change of government (although this may be significant) but on the political assessment of the new government by other states.[41] The distinctions between *de jure* and *de facto* governments and recognition have international legal impact only in contexts where legality of acquisition of power is in issue. Generally *de facto* recognition is regarded as equally strong evidence of effective government as *de jure* recognition.[42] The domestic legal consequences of classification of a foreign government as *de facto* or *de jure* may be significant in some cases.[43]

35 Brownlie, I., *Principles of Public International Law* (4th ed. 1990) 89-90. For example, in 1968, the United States accused North Korea, which it did not recognize, of violating international law by attacking *The Pueblo*, a United States vessel. See *Restatement*, *op. cit.* n. 17, s. 202, Reporters' Note 3.

36 Crawford gives the example of the German and Soviet recognition of the extinction of the Polish State in 1939. Crawford, *op. cit.* n. 15, 19, 311-12.

37 *Ibid.* 19.

38 Brownlie, *op. cit.* n. 35, 92. See also *ibid.* 97, and Crawford, *op. cit.* n. 15, 23-5.

39 Professor Brownlie regards the difference between these two notions as 'insubstantial'. *op. cit.* n. 35, 94.

40 *Ibid.* 93-4. The Morrison statement, *supra* n. 32, illustrates the use of the term *de facto* to imply lack of stability.

41 For example the Australian move from *de facto* recognition of East Timor's integration into Indonesia in 1978 to *de jure* recognition in 1979 appeared to be a condition for the commencement of talks with Indonesia on the delimitation of the seabed boundary between the south of East Timor and Australia. See Commonwealth of Australia, *Parliamentary Debates*, Senate, 11 May 1978, 1648; *Canberra Times* (Canberra), 16 December 1978, both quoted in (1983) 8 *Australian Year Book of International Law* 281.

42 Brownlie, *op. cit.* n. 35, 94-5.

43 *E.g.*, *Haile Selassie v. Cable and Wireless Ltd (No. 2)* [1939] Ch. 182.

A final dichotomy in the law of recognition concerns modes of recognition: the act of recognition can be express or implied.[44] A formal statement recognizing a state or government is sometimes employed to indicate recognition. But recognition may be also implied from actions such as concluding a bilateral treaty or establishing diplomatic relations.[45] Less formal dealings with an entity such as negotiations or allowing unofficial representation or participating in organizations, treaties or meetings in which the unrecognized entity is also a member or party do not imply recognition.[46]

The new Australian policy on recognition purports to abandon recognition of governments and to engage only in the apparently less controversial and more durable operation of recognizing states. In doing so, it jettisons some of the complexities of the international law of recognition: the distinction between *de jure* and *de facto* governments, for example, will no longer have any significance in Australian policy. The political function of recognition of governments is, however, a useful one: the realities of international relations demand that there be some method of differentiating Australia's attitudes towards various nations. The new policy retains in effect most of the political advantages of the device of recognition of governments but replaces express recognition of governments with a spectrum of flexible attitudes.

3. *ABANDONING THE RECOGNITION OF GOVERNMENTS*

The official announcement of the Australian change in recognition policy pointed out that the change mirrored that already made by a number of Western governments. The United States had explicitly rejected recognition of governments as a foreign policy option in 1977 and the United Kingdom had done so in 1980. Abandoning the recognition of governments has a much longer history than these relatively recent changes, however. The policy announced by the Mexican Secretary of Foreign Relations, Señor Estrada, in 1930 foreshadowed the modern moves.

(i) *The Estrada Doctrine*

The 'Estrada Doctrine' was a reaction to the United States constant and damaging use of the tool of non-recognition of Central and South American governments to express disapproval of revolutionary regimes or to bargain for financial or commodity concessions.[47] For example, President Wilson's conditions for United States recognition of the Carranza government in Mexico in 1915 were: honouring of all superseded contracts and obligations of the government; protection of foreign life and property; indemnification for injuries caused

[44] See generally Brownlie, *op. cit.* n. 35, 95-6.

[45] Breaking off diplomatic relations by contrast does not amount to withdrawal of recognition of either a state or a government, although it is a necessary consequence of non-recognition. The United States, for example, has no diplomatic relations with Cuba, although it recognizes the government of Fidel Castro.

[46] Lauterpacht, *op. cit.* n. 13, 330. Compare Starke, *op. cit.* n. 28, 135-6. On the issue of collective recognition by international organizations see Brownlie, *op. cit.* n. 35, 96-8; Dugard, J., *Recognition and the United Nations* (1987).

[47] See Galloway, *op. cit.* n. 25.

by the revolution bringing the government to power; guarantee of religious freedom; and arrangement of popular elections.[48] In 1921 President Harding withheld recognition of Mexico's Obregon government on the grounds that the Mexican Constitution did not adequately protect United States oil and mining interests there.[49] 'It is a well-known fact,' wrote Señor Estrada, 'that some years ago Mexico suffered, as few nations have, from the consequences of that doctrine, which allows foreign governments to pass upon the legitimacy or illegitimacy of the regime existing in another country, with the result that situations arise in which the legal qualifications or national status of governments . . . are apparently made subject to the opinion of foreigners.'[50] Estrada referred to the discriminatory nature of recognition practice ('in well-known cases of change of regime occurring in European countries the governments of the nations have not made express declarations of recognition; consequently, the system has been changing into a special practice applicable to the Latin American Republics') and then stated:

> [henceforth] the Mexican Government is issuing no declarations in the sense of grants of recognition, since that nation considers that 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, favorably or unfavorably, as to the legal qualifications of foreign regimes.

Mexican practice with respect to other governments would be confined to maintaining or withdrawing diplomatic representatives, without 'pronounc[ing] judgment . . . regarding the right of foreign nations to accept, maintain or replace their governments or authorities.'[51]

The Estrada doctrine has generally been adhered to by Mexico[52] and a few other Latin American nations.[53] In a 1969 survey by the United States State Department, thirty-one out of some hundred states had recognition policies based on, or effectively the same as, the Estrada doctrine.[54]

(ii) *The United States*

The United States abandonment of the device of recognition and non-recognition of governments, formally acknowledged in 1977, was based not on Señor Estrada's concern for non-intervention in the affairs of foreign nations but

48 *Ibid.* 29, n. 53.

49 *Ibid.* 29-30.

50 Declaration of Señor Don Genaro Estrada, Secretary of Foreign Relations of Mexico, Published in the Press on September 27, 1930, Relating to the Express Recognition of Governments reprinted in (1931) 25 *American Journal of International Law* (Supp.) 203.

51 *Ibid.*

52 An exception was the Mexican government's non-recognition of the Franco government, and recognition of the Republican government, in Spain from 1939 until 1977. See Peterson, *op. cit.* n. 27, 42 n. 37.

53 Guatemala, Peru, Honduras and Trinidad and Tobago, according to a survey by the United States State Department in 1969 set out in Galloway, *op. cit.* n. 25, Appendix A. Another, very different, Latin American doctrine on recognition of governments is the Tobar doctrine, named for a Foreign Minister of Ecuador. This doctrine involves the refusal to recognize any government that comes to power through unconstitutional means until free elections are held. It was espoused in the 1960s by Venezuela and Costa Rica. See *ibid.* 10.

54 *Ibid.* 128. Many of these states were developing nations although among them were France, Belgium and West Germany. A total of 75 states deemphasized the importance of recognition and focused on continuing relations.

was rather due to the realization that it was no longer a potent tool in foreign relations. In 1969 Senator Cranston told the Senate Committee on Foreign Relations '[t]he evidence is overwhelming that withholding recognition from governments of which we disapprove, and with whom our relations are particularly hostile, has failed totally to advance our values or to achieve any other significant and enduring purposes.'[55] Threats of non-recognition by the United States, moreover, had increasingly prompted hostile reactions and charges of intervention, closing avenues of communication with revolutionary regimes and occasionally exacerbating the cause of United States reservations about recognition.[56] The Department of State statement on recognition policy in 1977 acknowledged that United States recognition practice had 'create[d] the impression among other nations that the United States approved of those governments it recognized and disapproved of those from which it withheld recognition'.[57] The modern United States policy on dealing with unconstitutional regimes involved simply whether or not the United States wanted to have diplomatic relations with the revolutionary government; and 'establishment of relations does not involve approval or disapproval but merely demonstrates a willingness on our part to conduct our affairs with other governments directly'.[58] Although the distinction between approval and a willingness to have direct relations may be a very fine one, the Deputy Secretary of State implied in a speech in 1977 that effective control would be an important basis for this decision.[59] This is also the approach of the American Law Institute's most recent *Restatement of the Foreign Relations Law of the United States*, although the Restatement explicitly excepts effective control gained through the threat or use of force in violation of the United Nations Charter.[60]

Under modern United States policy, then, formal diplomatic relations are the only official acknowledgement of a regime's status and existence. This policy has less complexity than earlier United States approaches to unconstitutional governments. Because there are no constraints on withdrawal of diplomatic

[55] Quoted *ibid.* 141. The Senate subsequently adopted Resolution 205 (which had the support of the State Department) setting out the 'sense of the Senate that the recognition of a foreign government did not imply that the United States necessarily approved of the form, ideology, or policy of that foreign government'. Quoted *ibid.* 103.

[56] *Ibid.* 141.

[57] (1977) 77 *U.S. Department of State Bulletin* 463.

[58] *Ibid.*

[59] 'Withholding diplomatic relations from [revolutionary] regimes, after they have obtained effective control, penalizes us. It means that we forsake much of the chance to influence the attitudes and conduct of a new regime. Without relations, we forfeit opportunities to transmit our values and communicate our policies. Isolation may well bring out the worst in the new government.' Speech by Warren Christopher at Occidental College 11 June 1977, quoted by R. R. Baxter in the Foreword to Galloway, *op. cit.* n. 25, x.

[60] *Restatement*, *op. cit.* n. 17, s. 203:

> (1) A state is not required to accord formal recognition to the government of another state, but is required to treat as the government of another state a regime that is in effective control of that state, except as set forth in Subsection (2).
>
> (2) A state has an obligation not to recognize or treat a regime as the government of another state if its control has been effected by the threat or use of armed force in violation of the United Nations Charter.
>
> (3) A state is not obligated to maintain diplomatic relations with any other state.

relations, unlike withdrawal of recognition of governments,[61] however, it may lead to even more arbitrary and unstable practice.

The significance of the abandonment of the device of recognition of governments has been modified in the case of the United States by that government's subsequent resort to the language of recognition in particular cases. For example, in 1979 the United States withdrew its recognition of the Taiwanese government as the *de jure* Chinese government and formally recognized the government of the People's Republic of China; in the same year it formally recognized the government of Prime Minister Mehdi Bazargan of Iran; in 1986 it formally recognized the Aquino government in the Philippines, and in 1988 the Devalle government of Panama. Moreover, in some cases, decisions whether or not to establish diplomatic relations with a regime have become a surrogate form of recognition. In 1989, for example, the United States announced that it would not recognize the Afghan 'government in exile' formed by Afghan resistance fighters in Pakistan until it met the appropriate criteria for diplomatic relations. These were listed as 'control over territory, a functioning civil administration, broad popular support, and an ability to honor international .obligations'.[62] These conditions parallel some of those insisted upon by the United States during the heyday of its use of recognition as a tool of foreign policy.

(iii) *The United Kingdom*

The 1977 statement of the United States recognition policy was presented as a confirmation of the *status quo*.[63] The new British policy on recognition, by contrast, was an apparently clean break with former practice. In 1980 Lord Carrington, the British Foreign Secretary, told the House of Lords that the policy of formal recognition of revolutionary regimes had 'sometimes been misunderstood'. Despite statements to the contrary, recognition of governments had been regarded as implying approval. 'In circumstances where there might be legitimate public concern about the violation of human rights by the new regime, or the manner in which it achieved power,' Lord Carrington added, 'it has not sufficed to say that an announcement of "recognition" is simply a neutral formality.'[64] For these reasons,

> we have conducted a re-examination of British policy and practice concerning the recognition of Governments. . . . [W]e have decided that we shall no longer accord recognition to Governments. The British Government recognises States in accordance with common international doctrine.

[61] Recognition of a government is considered to end only with the fall of the recognized government and cannot be withdrawn by the recognizing government. Starke, *op. cit.* n. 28, 140; Peterson, *op. cit.* n. 27, 49.

[62] See 'Afghan rebels must meet test: US' *Age* (Melbourne), 27 February 1989.

[63] 'In recent years, U.S. practice has been to deemphasize and avoid the use of recognition in cases of change of government and to concern ourselves with the question of whether we wish to have diplomatic relations with the new governments.' (1977) 77 *U.S. Department of State Bulletin* 462. Exceptions to this include the United States non-recognition of the MPLA government in Angola in 1975 because of Cuban and Soviet military support for the MPLA and the non-recognition of the Viet Cong regime in South Vietnam in 1975. See Galloway, *op. cit.* n. 25, 121-4.

[64] The change was apparently prompted by the case of the Rawlings regime in Ghana which, after recognition by the United Kingdom in 1979, embarked on a massacre of former government officials. See Symmons, C. R., 'United Kingdom Abolition of the Doctrine of Recognition of Governments: A Rose by Another Name?' [1981] *Public Law* 249.

> 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 continue to decide the nature of our dealings with regimes which come to power unconstitutionally in 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.[65]

In a later answer to a Parliamentary Question, it was said on behalf of the Foreign Secretary:

> 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.[66]

The new United States and British policies on dealing with revolutionary governments are quite distinct. The United States 1977 statement suggests that its action with respect to unconstitutional regimes is not governed by an abstract rule but by a political decision as to whether the United States is interested in diplomatic relations with the revolutionary government. Effective control is apparently a necessary, but not sufficient, condition for the establishment of relations. The British approach to dealings with an unconstitutional regime, by contrast, is apparently governed only by objective criteria: whether a regime is able to effectively control state territory and whether it seems likely to do so. Apart from abandoning the formal act of recognition of governments, the main change from the previous policy is that regimes must be able 'of themselves' to govern effectively, implying that if they are supported by a foreign power, or perhaps even if their accession to power was a result of outside intervention,[67] the British government will have no dealings with them.[68]

(iv) *Australia*

The Australian change of recognition policy makes no reference to a test of effective control as a basis for establishing relations with unconstitutional regimes, although this may be implicit. Indeed, no threshold conditions for the conduct of relations are spelled out and the government's statement offers guidance only as to the ascertainment of Australia's 'attitude' to a new foreign regime. Australia's attitude in a particular case is said to be indicated *inter alia* by the establishment of diplomatic or other contacts. As in the American statement of recognition policy, the Australian position seems to contemplate that the decision to have some sort of dealings with a new regime will rest primarily on political factors. However, it allows a greater range of dealings than simply the establishment of diplomatic relations to be considered in the assessment of the Australian attitude towards an unconstitutional regime.

Despite the modern trend to deemphasise, or abandon, the device of recogni-

65 United Kingdom, *Parliamentary Debates*, House of Lords, 28 April 1980, cols 1121-2.
66 United Kingdom, *Parliamentary Debates*, House of Commons, 23 May 1980, col. 385.
67 Brownlie, *op. cit.* n. 12, 639.
68 This was apparently the basis of the British refusal to recognize the Vietnamese-supported Heng Samrin regime in Kampuchea in 1980. See Warbrick, *op. cit.* n. 24, 244-5. An inconsistent approach was taken in the British recognition in 1979 of the Lule regime in Uganda at a time when its effective control was made possible by Tanzanian troops. *Ibid.* 245 n. 67.

tion of governments, some jurists have argued strongly that it should be retained. One argument put for retention is that the distinction between democratically elected and revolutionary governments is otherwise obliterated.[69] But the distinction may not always be a useful one: revolutions can oust authoritarian and repressive governments as well as democratically elected ones and definitions of 'democracy' can vary widely. This rationale for recognition of governments can be easily manipulated to mask intervention in the affairs of another nation.

Peterson suggests two advantages of recognizing governments. The first is in cases of extended civil war. If at particular times rival groups have equal grounds to claim that they are the government of a state, some mechanism must allow other states to make a formal decision as to which group is accepted as the government.[70] The second is in situations where revolutionary regimes come to power in states with which another state has no diplomatic relations. Peterson argues that recognition can operate to indicate a state's attitude to a new government.[71] These rationales for recognition of governments may have more force in the United States context where diplomatic relations are the sole official indicator of the state of relations between the United States and a new foreign regime. The Australian change in policy, by contrast, contemplates indication of attitudes by a wider range of factors, allowing a more nuanced response to governments in cases of extended civil war or absence of diplomatic relations.

Of the American policy on recognition of governments Professor Baxter wrote: 'The partial withdrawal of law from this area of international relations will facilitate the maintenance of relations with states in which extraconstitutional changes of government are taking place, and that in itself is a good thing.'[72] Can the same be said of the change in Australian recognition policy? The Australian government claimed two advantages of the change: speed and flexibility in reaction to unconstitutional changes of foreign government, and avoidance of assumptions of approval of regimes that were recognized. The new policy allows a spectrum of attitudes to be manifested towards revolutionary foreign governments and a reaction may be expressed gradually and flexibly. Moreover, although unstated in the official announcement, the rejection of formal statements of recognition allows a new regime to be accepted and dealt with without great public scrutiny.[73] The potential controversy of a formal act of recognition in a particular case may be dissipated by the new Australian policy, but the level of relations established with a new regime will have intense political significance. Indeed Dr Bavadra, the ousted Fijian Prime Minister, argued that the fact of the Australian change in recognition policy itself '[w]hile . . . not . . . intended

69 Jessup, P. C., *A Modern Law of Nations* (1968) 62-4. See also Galloway, *op. cit.* n. 25, 149-50.

70 Peterson, *op. cit.* n. 27, 44. Lauterpacht makes a similar point: '[S]o long as revolutionary changes within States take place, recognition of governments is a substantial and necessary act. . . . For a decision must often be made . . . as to which of the rival authorities is in power with a reasonable prospect of permanency. . . . In the long run . . . the international position of the State in question cannot be regularised without a clear finding on the part of other states as to who is competent and authorised to represent the country.' *Op. cit.* n. 13, 156.

71 Peterson, *op. cit.* n. 27, 44-6.

72 Foreword to Galloway, *op. cit.* n. 25, xi.

73 Compare the continuing reaction to Australia's 1978 *de facto* and 1979 *de jure* recognition of the Indonesian takeover of East Timor.

to bring about recognition of the current regime, unfortunately ... will be construed clearly as such.' In a plea to the Australian Labor Party to dissuade the government from adopting the changed policy, he wrote: 'The move will give the regime a lot of comfort and it will be paraded about as a clear indication of Australian support.'[74] Similarly, assumptions of approval would certainly be drawn if former levels of Australian military aid were now restored to Fiji. The change in policy, then, may fulfil the first of the asserted goals but it is unlikely to fulfil the latter.

A major problem with the new Australian policy on recognition is that it does not disentangle the distinct questions of the status of, communications with and approval of revolutionary regimes.[75] It purports to sever the link between status and approval by making the status of a new regime depend on the level and type of communication with it. The question of approval, although officially removed from the calculus, is an inevitable concomitant of the new linkage. An alternative would be to make all decisions about the status of a new regime depend simply upon the (admittedly often complex) question of whether or not the regime is in effective control of a state, provided that effective control had not been secured in violation of international law.[76] Decisions about the sort of communication desired with the new government would then rest, appropriately, on the political attitude held towards it and would be manifested in diplomatic relations or other contacts, provision of aid and public statements.

4. *DOMESTIC LEGAL CONSEQUENCES OF THE CHANGE IN RECOGNITION POLICY*

Another significant, related, concern created by the change in policy is how it is to be put into effect by Australian courts. Recognition of other states and governments may have considerable implications in the domestic law of the recognizing state. In common law states[77] recognition of a foreign state or government by the executive has traditionally had important consequences for its status before national courts:[78] the acts of an unrecognized state or government

74 'Open letter to Mr Bob McMullan, Secretary of the Australian Labor Party', *Weekend Australian* (Sydney), 16-17 January 1988.

75 Peterson makes this point generally about moves to abolish recognition of governments. *Op. cit.* n. 27, 47.

76 Compare Peterson's view that a test of effective control alone is appropriate for recognition: *ibid.* 47-8. He rather glibly rejects any condition that effective control must not be secured by foreign intervention on the grounds that such a condition does not have general support and that 'such proposals are simply excuses for continuing to play political games with recognition ...'. *Ibid.* 49 n. 61.

77 For a survey of the effects of non-recognition in some European countries see Nedjati, Z. M., 'Acts of Unrecognised Governments' (1981) 30 *International and Comparative Law Quarterly* 388, 407-13.

78 Recognition has generally been held to be retrospective by national courts and thus a change in status between hearing at first instance and appeal may be crucial. See, *e.g. Luther v. Sagor* [1921] 1 K.B. 456, [1921] 3 K.B. 532; *Haile Selassie v. Cable and Wireless Ltd (No. 2)* [1939] Ch. 182. Whether recognition by the government is *de jure* or *de facto* has had significance in British cases. The claims and status of a *de facto* government would be recognized only in respect of persons and property within the territory it was recognized as governing. A government recognized *de jure* when another regime was recognized as the *de facto* authority could claim only extra-territorial powers; for example it could sue for a debt recoverable outside the state's territory. *Haile Selassie*, *supra*; *Bank of Ethiopia v. National Bank of Egypt and Liguori* (1937) 1 Ch. 513.

will not be given effect,[79] it has no standing to sue,[80] and, at least in the United Kingdom, no claim to jurisdictional immunity.[81] If effective control were in practice the only condition for recognition of an unconstitutional government, these repercussions of non-recognition would not be controversial. The operation of recognition policy has not been so simple, and many problems have arisen through the courts' failure to recognize effective authorities.[82]

The principle that the acts of an unrecognized state or government will not be given effect by the courts of the forum state has sometimes been modified by a judicial preparedness to look beyond the fact of recognition. United States courts exercised discretion earlier than their British counterparts in determining the legal effects of acts of unrecognized governments in domestic law.[83] In *Carl Zeiss Stiftung v. Rayner & Keeler Ltd (No. 2)*[84] the validity of certain acts of the East German government, which was then unrecognized by the United Kingdom, was in question. Two members of the House of Lords indicated doubts

[79] *Luther v. Sagor* [1921] 1 K.B. 456; *Carl Zeiss Stiftung v. Rayner & Keeler* [1965] Ch. 596. This principle has been recently modified by statute in Australia. The Foreign Corporations (Application of Laws) Act 1989 (Cth) provides that an Australian court, when called upon to apply a foreign law relating to a foreign corporation, should apply 'the law applied by the people in the place in which the foreign corporation was incorporated' whether or not the Australian government recognizes the government of the place in question: s. 7 (3). One of the particular objects of the legislation was to deal with companies incorporated in Taiwan. Similar legislation, the Foreign Corporations Bill, was introduced into the House of Lords in the United Kingdom on 22 April 1991.

[80] *City of Berne v. Bank of England* (1804) 9 Ves. Jun. 347; 32 E.R. 636; *Republic of Panama v. Republic National Bank of New York*, 681 F. Supp. 1066 (S.D.N.Y. 1988); *Republic of Vietnam v. Pfizer, Inc.* 556 F. 2d 892 (8th Cir. 1977); *Guaranty Trust Co. v. United States* 304 U.S. 126 (1938); *Russian Socialist Federated Soviet Republic v. Cibrario* 139 N.E. 259 (1923). *Cf. Banco Nacional de Cuba v. Sabbatino* 376 U.S. 398 (1964) (a recognized government with which the United States has no diplomatic relations does have standing before United States courts). Unrecognized governments have been able to bring actions in United States courts, however, on certain conditions: if consistent with the executive's foreign policy (*e.g. National Petrochemical Co. v. M/T Stolt Sheaf* 860 F. 2d 551 (2d Cir. 1988), cert. denied 109 S. Ct 1535 (1989); *Transportes Aereos de Angola v. Ronair Inc.* 544 F. Supp. 858 (1982)); and if an instrumentality of an unrecognized foreign government is independent from its political activities (*e.g. Upright v. Mercury Business Machines Co.* 213 N.Y.S. 2d 417 (1961); *Federal Republic of Germany v. Elicofon* 358 F. Supp. 747 (1972) aff'd sub nom. *Kunstsammlungen zu Weimar v. Elicofon* 478 F. 2d 231 (2d Cir. 1973)). Generally, commercial claims by unrecognized governments may be heard if the court finds that the executive branch has implicitly sanctioned relations with the government, not if the government is hostile to the United States (*Republic of Vietnam v. Pfizer, supra*). American courts have always deferred to the determination of the executive as to the foreign policy implications of allowing an unrecognized government to bring an action. See *infra* nn. 101-10 and accompanying text.

[81] *The Annette and the Dora* [1919] p. 105; 35 T.L.R. 288; 88 L.J. (P.D.A.) 107. *Cf. Wulfson v. Russian Socialist Federated Soviet Republic* 138 N.E. 24 (1923).

[82] See Warbrick, C., 'The New British Policy on Recognition of Governments' (1981) 30 *International and Comparative Law Quarterly* 568, 580-2.

[83] A well known statement of the American approach is that of Chief Justice Pound when dealing with the status of a Soviet decree expropriating the plaintiff's property in *Salimoff & Co. v. Standard Oil Co. of New York* 186 N.E. 679 (1933), 682: '[W]hat is Soviet Russia? A band of robbers or a government? We all know that it is a government. The State Department knows it, the courts, the nations and the man on the street. . . . To refuse to recognize that Soviet Russia is a government regulating the internal affairs of the country is to give to fictions an air of reality which they do not deserve.' It is important to note that in *Salimoff* the Court had before it a letter from the State Department stating that despite the non-recognition of the Soviet government by the United States, it was 'cognizant of the fact that the Soviet regime is exercising control and power in the territory of the former Russian Empire and . . . [had] no disposition to ignore that fact' 681. See also *Texas v. White* 74 U.S. 700 (1869), 733; *Sokoloff v. National City Bank* 239 N.Y. 158 (1924); 145 N.E. 917 (1924). In some cases no effect was given to Soviet decrees because of the private international law rule that courts may not give effect to acts of a foreign government which are against the public policy of the forum state. *E.g. United States v. President & Directors of the Manhattan Co.* 12 N.E. 2d 518 (1938). See also *The Maret*, 145 F. 2d 431 (1944).

[84] [1967] 1 A.C. 853.

about the principle of giving no legal effect to the acts of unrecognized foreign authorities. Lord Reid pointed out that if all the executive and judicial acts performed by officials appointed by the East German government were invalid, the consequences in many areas, ranging from trade to personal status, would be far-reaching.[85] Lord Wilberforce also apparently indicated support for a more realistic approach to the question of the authority of the effective government, at least with respect to acts dealing with private rights or of everyday occurrence or of a perfunctory nature.[86] The case was actually decided, however, on the more contrived ground that the acts of the East German government could be attributed to the Soviet Union, which was recognized as the *de jure* government of East Germany by the United Kingdom.[87]

In *Hesperides Hotels Ltd v. Aegean Turkish Holidays*[88] Lord Denning less equivocally advocated looking to the reality of political control, rather than to the attitude of the government towards a particular entity, in determining the domestic effect of acts of a foreign entity. In this case Lord Denning received evidence as to the state of affairs in northern Cyprus despite a Foreign Office Certificate which stated that the British government did not recognize the administration known as the Turkish Federated State of Cyprus as the government of an independent *de facto* sovereign state. Lord Denning found that 'there is an effective administration in northern Cyprus which has made laws governing the day to day lives of the people' and argued that such laws should be given effect in British courts.[89] In one of the few Australian decisions on the domestic effect of recognition, the Full Court of the Victorian Supreme Court took a similar approach.[90]

Information on the status of a particular entity in the eyes of the forum state is acquired by national courts usually through a request to the branch of the executive responsible for foreign relations. A response is typically in the form of

[85] *Ibid.* 907. Lords Hodson, Guest and Upjohn concurred with Lord Reid.

[86] *Ibid.* 953-4.

[87] For a detailed analysis and criticism of the case see Greig, D. W., 'The Carl Zeiss Case and the Position of an Unrecognised Government in English Law' (1967) 83 *Law Quarterly Review* 96.

[88] [1978] Q.B. 205.

[89] *Ibid.* 218. Lord Justices Roskil and Scarman did not support this approach. When the British government has recognized no government in a particular territory, courts have been willing to accept evidence that an effective government was in fact in control. *E.g. Luigi Monta of Genoa v. Cechofracht Co. Ltd.* [1956] 2 Q.B. 552 (Formosa); *Re Al-Fin Corporation* [1970] Ch. 160; [1969] 3 All E.R. 396 (North Korea).

[90] On whether effect could be given to a German decree with respect to Czechoslovakia, despite a letter from the Department of External Affairs before the Court stating Australia's non-recognition of German sovereignty over that country, the Court said:

> Where doubts exist as to what Government has or had the administration of a particular territory at a given time the question may be best resolved by obtaining a statement on the point from one of His Majesty's Ministers of state. ... But where no difficulties of this kind occur, *de facto* occupation ... may be proved by other evidence or the fact may be notorious as a matter of common public knowledge not calling for sworn testimony at all. ... The occupation and control of Czechoslovakia by the German Government falls ... within the latter category. ... The question of *de facto* control in this case is only one of importance for the just determination of private rights and has nothing to do with the interests, merits or demerits of the occupying power.

Anglo Czechoslovak & Prague Credit Bank v. Janssen [1943] V.L.R. 185, 197-9.

what is known in Australia and the United Kingdom as an executive certificate[91] whose content can range from a confirmation of recognition or non-recognition[92] to a vaguely worded statement effectively passing the decision on the status of a regime to the courts.[93] Evidence which would contradict the executive certificate is considered inadmissible.[94]

In Australian and British law, decisions about whether or not to recognize a state or government are considered part of the Crown prerogative, unreviewable by domestic courts.[95] Courts have accepted the statement of the executive as to its policy in a particular case as conclusive because, in Lord Atkin's words, '[o]ur State cannot speak with two voices on such a matter, the judiciary saying one thing, the executive another.'[96] In the United States, by contrast, deference by the judiciary to the executive's foreign policy is explained in terms of the doctrine of the separation of powers.[97]

The operation of the 'one voice' doctrine in Australia and the United Kingdom has been criticized. Some jurists have pointed out that there is no reason in principle why the courts should not guard their independence as jealously in international matters as in municipal matters especially now that the distinction between the two spheres is increasingly blurred.[98] The respective roles of the executive and the judiciary with regard to recognition and other foreign affairs are quite different: the executive's concern is with the international consequences of recognition, while the concern of the courts is with the just resolution of disputes between individual parties, subject to private international law considerations of public policy.[99] Moreover, it is possible that the executive branch may act contrary to international law in particular cases of recognition and there is no reason why the courts should be bound to give effect to this action.

What effect have the United States and United Kingdom changes in recognition policy had on decisions by national courts in cases implicating foreign governments or their official acts? It might be thought that abandoning recognition of regimes would lead to a rethinking of the traditional rules on the domestic

91 On executive certificates generally see Edeson, W. R., 'Conclusive Executive Certificates in Australian Law' (1976-7) 7 *Australian Year Book of International Law* 1; Wilmshurst, E., 'Executive Certificates in Foreign Affairs: The United Kingdom' (1986) 35 *International and Comparative Law Quarterly* 157.

92 *E.g. Corporate Affairs Commission v. Bradley* (1974) 24 F.L.R. 44.

93 *E.g. The Arantzazu Mendi* [1939] A.C. 256.

94 *Carl Zeiss* [1967] 1 A.C. 853, 901, 957; *Gur Corporation v. Trust Bank of Africa Ltd* [1986] 3 W.L.R. 583, 602.

95 *Duff Development Co. Ltd v. Government of Kelantan* [1924] A.C. 797.

96 *The Arantzazu Mendi* [1939] A.C. 256, 264. See also *Chow Hung Ching v. The King* (1948) 77 C.L.R. 449, 467; *Van Heyningen v. Netherlands-Indies Government* [1949] St R. Qd 54, 60. This principle has been codified in some circumstances: *e.g.* s. 40 of the Foreign States Immunities Act 1985 (Cth), modelled on s. 21 of the State Immunity Act 1978 (U.K.), provides that a certificate issued by the Minister for Foreign Affairs for the purposes of the Act as to whether a particular country is a foreign state or part of a foreign state and whether a particular person is head or part of the government of a foreign state is conclusive as to those issues. The conclusiveness of the certificate will, of course, depend on the terms in which it is couched.

97 United States Constitution, art. II, ss 2, 3; *United States v. Pink* 315 U.S. 203, 223-6 (1942); *Restatement*, *op. cit.* n. 17, s. 204.

98 Mann, F. A., 'Judiciary and Executive in Foreign Affairs' (1943) 29 *Transactions of the Grotius Society* 143, 146; Warbrick, C., 'Executive Certificates in Foreign Affairs: Prospects for Review and Control' (1986) 35 *International and Comparative Law Quarterly* 138, 156. See also *Corporate Affairs Commission v. Bradley* (1974) 24 F.L.R. 44, 54-8 (Hutley J. A.).

99 *E.g. Oppenheimer v. Cattermole* [1975] 1 All E.R. 538, 567.

effects of recognition. However, as Professor Crawford notes in relation to the United Kingdom, a policy of deemphasis or abolition of recognition of governments 'does not involve an abandonment of the *idea* that recognition is decisive [in domestic courts]'.[100] It may merely alter the way information about recognition is transmitted.

(i) *The United States*

The change in recognition policy in the United States has not meant a complete discontinuance of the practice of recognition of governments: non-recognition then may be simply the result of the new policy[101] or it may be an expression of disapproval of a regime.[102] The policy of deemphasizing recognition has been invoked as a reason for the courts not to give traditional domestic force to the absence of formal recognition but rather to accept the views of the executive on the status to be accorded to a foreign government in a particular case as conclusive.

In *National Petrochemical Co. of Iran v. The M/T Stolt Sheaf*[103] a subsidiary of a wholly owned company of the government of Iran (N.P.C.) brought an action for damages arising out of a scheme it had entered into in order to avoid the United States trade embargo on Iran. In 1980 the United States had broken off diplomatic relations with the Khomeini administration. It did not subsequently make a formal statement of recognition of the Iranian government. The defendants pointed to the non-recognition of the Khomeini government by the United States to assert N.P.C.'s lack of standing. The defence was accepted by the District Court for the Southern District of New York, which relied on a letter written by the State Department in an unrelated case stating that the United States had not recognized the Iranian government. On appeal in *National Petrochemical Co.*, the United States appeared as *amicus curiae* and argued that Iran and its instrumentality should be allowed to have access to United States courts 'for purposes of resolution of the instant dispute'.[104] The argument was that the 'non-recognition' of the Iranian government was simply the result of the policy of deemphasizing recognition, and had no further significance.[105]

In its decision allowing the appeal, the Second Circuit Court of Appeals referred to the United States new recognition policy and noted that its consequence was that 'the absence of formal recognition cannot serve as the touchstone for determining whether the Executive Branch has "recognized" a foreign

100 'Decisions of British Courts During 1985-6 Involving Questions of Public or Private International Law' (1986) 57 *British Yearbook of International Law* 405, 409.

101 After the 1979 coup in El Salvador, for example, a State Department spokesperson referred to the policy of recognition of states and not governments as the reason for the lack of formal recognition of the new government. See Fountain, E. L., 'Out From the Precarious Orbit of Politics: Reconsidering Recognition and the Standing of Foreign Governments to Sue in U.S. Courts' (1989) 29 *Virginia Journal of International Law* 473, 499 n. 127.

102 For example, the continuing United States non-recognition of the Vietnamese government.

103 671 F. Supp. 1009 (S.D.N.Y. 1987), 860 F. 2d 551 (2d Cir. 1988), cert. denied 109 S. Ct 1535 (1989).

104 Quoted 860 F. 2d 551, 555.

105 Amicus Brief, reprinted in [1988] Iranian Assets Litigation Reporter 15, 673, 16.

nation for the purpose of granting that government access to United States courts'.[106] As the power to deal with foreign nations rested with the executive branch alone, and because 'in today's topsy-turvy world governments can topple and relationships can change in a moment', that branch had a 'broad, unfettered discretion in matters involving such sensitive, fast-changing, and complex foreign relationships'.[107] The executive branch's views could be determined either through an express statement to the Court or through other evidence, such as the existence of bilateral treaties between the foreign state and the United States.[108]

The domestic interpretation of the United States change in recognition policy increases the dominance of the executive's foreign policy and reduces the independence of the judicial branch. Formal recognition of a foreign government as a prerequisite for standing offered a relatively stable standard as recognition may not be withdrawn during the tenure of the foreign government. Basing the right of unrecognized governments to sue on the executive's position at a particular time in a particular case, however, means that the courts' jurisdiction will vary according to possibly constantly changing executive assessments of relations with foreign governments or according to its interpretation of various executive acts with respect to those governments. In *National Petrochemical Co.* the Court considered an argument by the defendants that complete deference to the executive branch's views would encourage arbitrary and unpredictable pronouncements on foreign governments. The Court avoided a direct response to this contention because it found the executive's views in this case to be neither arbitrary nor *ad hoc*. But it left open the question whether the Court would regard itself as bound if the executive arbitrarily allowed some actions by an unrecognized government while disallowing others.[109]

The domestic effects of the United States policy of deemphasis of recognition of governments, then, have been somewhat ironic. The rationale for the reduced emphasis on recognition internationally was the avoidance of connotations of approval or disapproval. But the new policy has been interpreted by the courts as mandating a determination of the status of particular governments in light of the

106 860 F. 2d 551, 554.

107 *Ibid.* 555.

108 *Ibid.* See also *Transportes Aereos de Angola v. Ronair Inc.* 544 F. Supp. 858 (1982), where the defendants in a breach of contract action challenged the standing of the plaintiff, an instrumentality of the Angolan government, to sue on the grounds that the Angolan government was unrecognized by the United States. The United States had no diplomatic relations with Angola, but considerable trading links. One response made by the plaintiff to this challenge was that the change in United States recognition policy made the application of the traditional rule denying standing inappropriate. A letter from the State Department was submitted to the Court, referring to the significant commercial contacts between Angola and the United States and stating that allowing access to United States courts in this case would be consistent with the foreign policy interests of the United States (at 861). The Court regarded the State Department letter as conclusive on the issue of standing. It also suggested that in some contexts evidence of significant contact between the United States and an otherwise unrecognized government may be enough to imply standing to sue (at 863-4). See also *Organization for Investment Economic and Technical Assistance of Iran v. Shack & Kimball* reprinted in 1989 Iranian Assets Litigation Reporter 16,830, discussed in Fountain, *op. cit.* n. 101, 505-6.

109 860 F. 2d 551, 555-6.

explicit or implicit attitude of the United States.[110] Connotations of approval or disapproval are therefore impossible to avoid.

(ii) *The United Kingdom*

The effect of the United Kingdom's change in recognition policy in its courts has highlighted quite different problems. In *Gur Corporation v. Trust Bank of Africa Ltd*[111] the status in British courts of the Republic of Ciskei, a 'bantustan' or 'independent homeland' created by South Africa in 1981, was at issue.[112] The creation of the bantustans was extremely controversial and the international community continues to refuse to recognize their independence from South Africa.[113] The Foreign Office certificate before the Court in *Gur* referred to the new British policy on recognition, noting that with respect to recognition of foreign governments 'the attitude of Her Majesty's Government is to be inferred from the nature of its dealings with the regime concerned and in particular whether Her Majesty's Government deals with it on a normal government to government basis'.[114] It went on to state that the Ciskei was not recognized as an independent sovereign state, either *de jure* or *de facto*, nor did the British government have any dealings with its government. A second question asked whether it would be contrary to the policy or attitudes of the English government for the courts to recognize either the government of Ciskei or its Department of Public Works as contracting parties and capable of suing or being sued in an English court. The Foreign Office answer was that this was for the court to determine in light of its answer to the first question.

In response to a further question as to what state was recognized as either entitled to exercise or in fact exercising governing authority over the territory of the Ciskei, a second certificate was issued. It said:

> beyond making it clear that it has not recognised as independent sovereign states Ciskei or any of the other Homelands established in South Africa Her Majesty's Government has not taken and does not have a formal position as regards the exercise of governing authority over the territory of Ciskei. ... Her Majesty's Government has made representations to the South African

110 The lack of domestic impact of the change in United States policy is underlined in *National Petrochemical Co.* where the United States' amicus brief asserted that '[a]n explicit statement by the Executive Branch that access would not be contrary to the foreign policy interests of the United States may substitute for a formal statement of recognition.' Amicus Brief, *op. cit.* n. 105. The *Restatement*, *op. cit.* n. 17, also assumes the continuation of the practice of recognition of governments. See *e.g.* s. 205.

111 [1986] 3 W.L.R. 583.

112 The plaintiff, Gur Corporation, had contracted with the Republic of Ciskei to construct some public buildings and had arranged for a guarantee of limited duration to be made available to the Republic to cover any claims for defective construction. Gur Corporation deposited money with the Trust Bank of Africa as security for the guarantee given by the Bank to the Republic. The Republic of Ciskei made a claim on the guarantee, which the Bank argued was after the guarantee's expiry. When the plaintiff brought an action to recover its deposit for the guarantee, the Bank attempted to join the Republic of Ciskei as third party. The Republic in turn counterclaimed against the Bank under the guarantee. The issue of whether the Republic of Ciskei could sue or be sued in British courts was raised not by the parties, who all had an interest in it being given standing, but by Steyn J., the judge at first instance.

113 G.A. Res. 31/6A; G.A. Res. 36/172. The Security Council has condemned the independence of the Ciskei as 'totally invalid' and called on 'all governments to deny any form of recognition to so-called independent bantustans'. (1982) 19 *U.N. Chronicle* 42, quoted in Harris, D. J., *Cases and Materials on International Law* (3rd ed. 1983) 89, n. 48.

114 Quoted [1986] 3 W.L.R. at 588.

> Government in relation to certain matters occurring in Ciskei . . . notably on matters relating to individuals, but has not in general received any positive response from the South African Government.[115]

At first instance Steyn J. interpreted the effect of these certificates, which he regarded as conclusive, as denying the Republic of Ciskei standing to sue or be sued. The crucial factor for Steyn J. was the lack of recognition of the Ciskei as an independent state by the United Kingdom. He argued that neither of the possible exceptions to the principle that the acts of unrecognized entities had no status before British courts identified by the House of Lords in *Carl Zeiss* applied.[116]

The Court of Appeal in *Gur* interpreted the executive certificates differently from Steyn J. It held that the certificates, when read in light of those parts of the Ciskei's constitution consistent with the executive certificate, clearly implied that South Africa was entitled, even if unwilling, to exercise sovereign authority over the territory of the Ciskei.[117] The Court directly applied the *Carl Zeiss* principle: the Ciskei had standing in British courts as a subordinate body established by South Africa to act on its behalf. While this analysis may accord with the Ciskei's status at international law,[118] it is a quite inaccurate description of the intention of South Africa in establishing the Ciskei. It seems prompted by the commercial consequences of not allowing the Ciskei to be sued.[119] Moreover, the *Carl Zeiss* principle is arguably inapplicable as dealing with the effect of government acts, rather than the issue of standing.[120]

The change in recognition policy was relied on by the Court of Appeal as an explanation for the difference in the wording of the executive certificates in *Carl Zeiss* from those before the Court in *Gur*, which had been influential in the decision of Steyn J.[121] While the *Carl Zeiss* certificate spoke of non-recognition of the East German state and government and recognition *de jure* of the Soviet state and government as the governing authority in East Germany, the certificate in *Gur* stated that the British government had no 'formal position as regards the exercise of governing authority over the territory of Ciskei' and referred to its own generally unsuccessful attempts to raise concerns over individuals in the bantustans with the South African government. The abolition of the recognition of governments, then, is regarded by the Court as simply constraining the use of the vocabulary of recognition of governmental authority by the British government, but not impinging at all on the content of the message.

115 Quoted *ibid.*

116 The 'exceptions' are: first, those suggested by Lords Reid and Wilberforce, for governmental acts dealing with private rights, 'everyday' acts or 'perfunctory acts of administration'; and second, the actual ground of the decision in *Carl Zeiss*, the acts of an unrecognized body which is subordinate to the entity recognized as *de jure* sovereign.

117 [1986] 3 W.L.R. 583, 602 (Donaldson M.R.). Although he agreed with this interpretation, Nourse L.J. was more critical of the terms of the executive certificate: 'The rule that the judiciary and the executive must speak with one voice presupposes that the judiciary can understand what the executive has said. . . . [I]n a case like the present, where there is a doubt, the judiciary must resolve it in the only way they know, which is to look at the question and then construe the answer given' (at 604).

118 See Crawford, *op. cit.* n. 15, 222-7.

119 [1986] 3 W.L.R. 583, 595-6 (*cf.* Steyn J., 592).

120 See Beck, A., 'A South African Homeland Appears in the English Courts: Legitimation of the Illegitimate?' (1987) 36 *International and Comparative Law Quarterly* 350, 355.

121 [1986] 3 W.L.R. 583, 600 (Donaldson M.R.).

The decision in *Gur* indicates that judicial inference of the executive's attitude towards a particular foreign government from vague and ambiguous certificates and other materials is a hazardous business: the equally plausible, but contrary, interpretations of the executive certificates at first instance and on appeal in *Gur* bear this out. Professor Crawford points to the tensions in this practice: 'the [British] executive certification policy at present combines the worst of both worlds: the certainty of the old practice, where the executive gave the courts answers to their questions and the courts followed them has gone . . . but it has not yet been replaced by a practice which allows the courts to look at the real world.'[122] The international duty of non-recognition of the South African homelands was not given any weight by the Court. *Gur* also highlights the shallowness of the judicial rhetoric that executive certificates must be considered conclusive because of the need to speak in one voice. The result in *Gur* — according standing to a non-recognized entity — is quite inconsistent with British foreign policy, which would indicate that the Republic of South Africa was an appropriate party in the circumstances of the case.[123]

A subsequent New Zealand case, *Attorney-General for Fiji v. Robt Jones House Ltd*,[124] is a less complex example of how Australia's new recognition policy may operate in Australian courts. The government of Fiji sought an injunction to prevent the defendant from re-entering into possession of premises leased to the Fijian government for its diplomatic mission. After the 1987 Fijian coup the defendant attempted to repossess the premises on the ground that it had leased them to the legal government of Fiji and that, since the coup, no legal government existed. In response to an interim injunction to prevent repossession, the defendant argued that the plaintiff had no standing in a New Zealand court as he was a member of a group unrecognized by the New Zealand government as the government of Fiji.

The High Court sought an executive certificate as to whether the Fijian government was recognized by New Zealand. The certificate stated that 'the New Zealand position has been for many years that formal acts of recognition in respect of new governments in other countries are unnecessary as a matter of international law and except in the most unusual cases, undesirable.'[125] Recognition therefore was to be inferred from the nature and level of New Zealand's dealings with new foreign governments.[126] The certificate went on to set out details of New Zealand's post-coup relationship with Fiji. It pointed out that diplomatic relations had been continued and concluded:

> Relations between States can rarely be characterised in black and white or absolutist terms. For much of the material time relations between New Zealand and Fiji have been at the very low end of the spectrum. The New Zealand Government has made clear its very strong and continuing disapproval of the two coups in Fiji. But since the installation of the present interim Government

122 Crawford, *op. cit.* n. 100, 410.

123 See Mann, F. A., 'The Judicial Recognition of an Unrecognised State' (1987) 36 *International and Comparative Law Quarterly* 348, 349.

124 [1989] 2 N.Z.L.R. 69.

125 Quoted *ibid.* 71.

126 The certificate noted that New Zealand recognition policy was consistent with that of most Western democratic countries as described in the 1980 Carrington statement (see n. 64 *supra*). *Ibid.* 72.

> in Fiji there has been some improvement in the level of relations. Contacts at Ministerial level have been undertaken and the development assistance programme to Fiji has been resumed. However, relations have not by any means returned to what they were before the coups in Fiji. Development of relations with the new Government beyond their present level will now depend on future developments in Fiji.[127]

Justice Jeffries acknowledged that the form of the certificate required considerable judicial interpretation. He refused to take into account evidence of the New Zealand government's attitude towards the government of Fiji which contradicted the certificate.[128] From the certificate, and an affidavit of the Fijian Chargé d'Affaires in New Zealand, Justice Jeffries concluded that the nature of dealings between the New Zealand and Fijian governments was 'ordinary and normal Government to Government dealings'.[129] For this reason he was prepared to grant standing to the plaintiff, and made the interim injunction permanent.[130]

(iii) *Australia*

The domestic implications of Australia's new recognition policy were not mentioned in the official announcement of the change in recognition policy and are not yet clear. Courts or litigants will no doubt continue to seek information on the status of unconstitutional foreign regimes from the Department of Foreign Affairs and Trade. If the content of the executive certificate follows the language of the new policy, it will make no mention of recognition or non-recognition of governments but rather provide information on the nature of Australia's policies towards and relations with an unconstitutional government, for example whether diplomatic relations exist with the new regime and what other types of contacts there are in place. The interpretation of such 'nature of dealings' information will be left up to the court. The task of Australian courts in cases involving unconstitutional foreign governments is thus made more difficult. They can no longer rely on recognition as a relatively straightforward benchmark and may be required to interpret inconclusive facts and the subtleties of foreign relations to determine whether there has been implied recognition of a foreign government. The new policy contemplates a wide range of possible relations with unconstitutional foreign governments, and also flexibility in their operation, and it may be difficult to tell at what point a regime should be accorded *locus standi* or jurisdictional immunity or whether its official acts will be given effect to.[131] No clearly identifiable criteria are available to determine whether Australia's relations with a new government constitute an acknowledgement of its authority. For example, while the existence of diplomatic relations may be construed as tantamount to recognition, it is unclear what status a foreign government with

127 *Ibid.*
128 *Ibid.* 75.
129 *Ibid.*
130 A year after the decision in *Attorney-General for Fiji*, the Fijian Embassy in Wellington agreed to leave Robt Jones House, three years before its lease expired. See 'Tycoon evicts NZ Fiji Embassy' *Weekend Australian* (Sydney), 16-17 December 1989.
131 The Foreign Corporations (Application of Laws) Act 1989 (Cth) resolves the issue with respect to the status and activities of foreign corporations. See n. 79 *supra*. Section 9(2) implicitly acknowledges the change in recognition policy by providing that 'it is also the intention of Parliament that the application of this Act is not to be affected by the presence or absence, at any time, of diplomatic relations between Australia and any foreign state or place.'

which Australia had no diplomatic relations but significant trading relations would be given in an Australian court. Information about Australia's dealings with unconstitutional governments may be of most practical guidance in cases where rival regimes claim to be the government of the foreign state and the nature of the dealings with different groups can be compared.

If the language of the new recognition policy is followed in executive certificates, the traditional view of executive certificates as conclusive on questions of recognition will be undermined. There is nothing for the certificate to be conclusive about: the voice of the state is deliberately muffled by the new policy, speaking only in the ambiguous language of 'dealings'. A court may well translate an executive certificate recounting attitudes and dealings in a different way to that intended by the executive. Courts, then, may be encouraged to display a greater independence in resolving disputes where the status of a foreign government is in issue, although the New Zealand High Court's decision in *Robt Jones House Ltd* illustrates the strongly deferential tendencies of the judiciary in this regard.

An alternative for future Australian practice would be for the Department of Foreign Affairs and Trade to supply information to a court similar to that now provided by the State Department to United States courts when the status of a foreign government is questioned. This includes a statement of the executive's view on whether a particular foreign government should be given access to the court in a particular case. The decision in *National Petrochemical Co.* suggests that even in the absence of an explicit executive statement, a court could infer the executive's attitude for itself from information about its dealings with the foreign government in question.[132] This practice offers clarity and consistency between judiciary and executive on foreign relations, but it compromises significantly the independence of the courts and their task to adjudicate between the parties, and may on occasion bring them into conflict with international law.

A more useful approach to the change in recognition policy than those taken by the English or United States courts would be for Australian courts to develop new ways of dealing with the status of foreign governments. As noted above, the new Australian recognition policy appears to link the status of foreign governments with both the level of communication Australia has with it and the Australian approval of the regime.[133] If the recognition policy separated status from approval, the domestic legal status of a foreign regime and its actions could be determined by the test of effective control, subject to considerations of the public policy of the forum and principles of international law,[134] without major repercussions for foreign policy.

The same result could be achieved, despite the tenor of the new policy, if Australian courts acted on a presumption that all effective foreign governments and their acts should be accorded status in Australian courts.[135] Although the

132 860 F. 2d 551, 555.
133 See n. 75 *supra* and accompanying text.
134 See nn. 29, 99 *supra* and accompanying text.
135 Fountain, *op. cit.* n. 101, 509-14, makes a comparable proposal for foreign government standing in United States courts.

1988 Australian statement on recognition policy makes no reference to effective control as a condition for the conduct of dealings with a new regime, as a basic condition of international law it can be assumed to be a *sine qua non*. Earlier British and Australian cases implied that only a limited class of the actions of an effective but unrecognized government could be given force, such as those affecting private rights and everyday or perfunctory acts of administration.[136] However, given that the new policy abandons the distinction between recognized and unrecognized governments, the principle of according full weight to the acts of certain governments and only partial weight to the acts of others would be meaningless. The presumption that the effective government should have full status in Australian courts would be strengthened if there had been public and/or private contacts with the regime in question. The presumption could be displaced if the laws of the effective government were contrary to the public policy of the forum or if effective control was obtained in violation of international law. Where a court is unable to determine which of two or more rival regimes is in effective control of a state, guidance could be sought from the executive.

5. *CONCLUSION*

The basis of the Australian abandonment of the practice of recognition of governments was the pursuit of flexibility in foreign relations and the avoidance of connotations of approval or disapproval. The new recognition policy certainly allows a greater range of reactions to be manifested towards unconstitutional foreign governments. Because no objective criteria were announced as the basis for the decision whether Australia will have dealings with other governments, however, the new policy may not discourage assumptions of Australia's approval or disapproval of a particular regime. On the domestic legal level, the change in recognition policy theoretically allows Australian courts greater independence in determining the legal status of foreign governments and their acts. But the linkage of the status of, communications with and approval of revolutionary regimes in the announcement of the new policy may mean that in both international and domestic practice the change is more one of form than of substance.

[136] See nn. 84-90 *supra* and accompanying text.