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Foreign Asset Control - The Power of the Executive to Block Funds during Times of National Emergency

Keywords

Refugees, Corporations, Sanctions

FOREIGN ASSET CONTROL—THE POWER OF THE EXECUTIVE TO BLOCK FUNDS DURING TIMES OF NATIONAL EMERGENCY. *Tran Qui Than v. Blumenthal*, 469 F. Supp. 1202 (N.D. Cal. 1979).

As a result of the fall of South Vietnam to the Provisional Revolutionary Government (PRG), Don Phuong Bank (Bank), a commercial bank established in 1968 under the laws of the Republic of Vietnam, came under communist control. The Bank was an assignee of monies owed to several Vietnamese contractors by the United States Army and Navy. Tran Qui Than, a Vietnamese national admitted to the U.S. with parole status granted by the Attorney General,¹ was the principal shareholder, director, and president of the Don Phuong Bank. As such, he instituted a claim on behalf of the director-shareholders to receive the money owed to the Bank. Although the Navy made efforts to settle its account, the Army declined to make payments on the ground that the money was blocked pursuant to section 500.201 of the Foreign Assets Control Regulations.² Despite Qui Than's efforts to comply with these regulations by applying for a license with the Treasury Department's Office of Foreign Assets Control, he was denied on the basis that the Bank was a national of a designated foreign country.³ Accordingly, the sums already paid by the Navy also were blocked and the Secretary of the Navy sent subpoenas requesting information about those payments.

Foreign Assets Control Regulations

The Foreign Assets Control Regulations were promulgated under the Trading with the Enemy Act.⁴ Section 500.201(3)(b) of the Regulations bars all transactions that involve U.S.-based property "in which any designated foreign country or any national thereof, has at any time or since the effective date of this section had any interest of any nature whatsoever direct or indirect"⁵ unless such transactions have been specifically authorized by the Secretary of the Treasury by means of, *inter alia*, a license. The effective date of this prohibition is based upon the date when the country is classified as a "des-

1. The Immigration and Nationality Act, 8 U.S.C. § 1182(d)(5) (1976), grants the Attorney General the discretionary power to grant aliens seeking admission to the United States temporary parole status so that they may enter the United States.

2. 31 C.F.R. § 500.201 (1978).

3. The term "national" includes a citizen of a designated foreign country or a corporation either organized under the laws of the designated country or under the effective control of a designated foreign country. 31 C.F.R. § 500.302.

4. 50 U.S.C. App. §§ 1-44 (1976).

5. 31 C.F.R. § 500.201.

ignated foreign country," which was for South Vietnam on April 30, 1975.⁶

Qui Than claimed that the Bank was not a designated national since a shareholder's meeting was held prior to the fall of the Republic of Vietnam to dissolve that branch of the Bank in Vietnam, to preserve the existence of the Bank outside of Vietnam, and to transfer the interest of the Bank's foreign assets to those shareholders-directors who escaped Vietnam. Moreover, Qui Than asserted that the takeover of the Bank of PRG was tantamount to its destruction, and therefore, there was no longer a "designated national" having an interest in the money.

In reviewing these claims, the court considered section 500.801 of the Regulations that specify the procedure whereby an applicant for a special license may make an "oral presentation" or elect to "argue the application." Since Qui Than did not choose to make use of this procedure, the court was limited to the standard of judicial review authorized by the Administrative Procedure Act (APA). Section 706 of the APA⁸ limits the scope of review available to the courts:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

6. The term "designated foreign country" means a foreign country in the following schedule and the terms "effective date" and the term "effective date of this section" mean with respect to any designated foreign country, or any national thereof, 12:01 a.m. eastern standard time of the date specified in the following schedule, except as specifically noted after the country or area:

SCHEDULE
COUNTRY AND EFFECTIVE DATE

1. China: December 17, 1950.
2. North Korea . . . : December 17, 1950.
3. Cambodia: April 17, 1975.
4. North Viet-Nam . . . : May 5, 1964.
5. South Viet-Nam . . . : April 30, 1975 at 12:00 p.m. e.d.t.

31 C.F.R. § 500.201(d).

7. 31 C.F.R. § 500.801(b)(3).

8. 5 U.S.C. § 706 (1976).

- (B) contrary to constitutional right, power, privilege, or immunity;
- (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right. . . .

On this basis, the court found that the Secretary's findings that the shareholders-directors meeting was ineffective in dissolving the Bank or transferring its assets (both parties admit the illegality of such an act under Vietnamese law), and that the Bank continued to operate under the PRG for an additional two months, were not arbitrary, capricious, or an abuse of discretion.

In the alternative, Qui Than claimed that if the Bank is a "designated national," the failure of the Secretary to issue a license was a violation of the fifth amendment of the U.S. Constitution, the 1961 treaty between the United States and the Republic of Vietnam,⁹ and contrary to the territorial limitations of the act of state doctrine. Since, under the principles of international law a treaty is terminated upon the extinction of one of the contracting parties, that issue did not need to be considered.¹⁰

Authority of the Secretary To Deny a License

In addition to the aforementioned sections of the Regulations, the Secretary based his power to deny a license to a designated foreign country or a national thereof on section 5(b) of the Trading with the Enemy Act (TEA).¹¹ Before its amendment in 1977,¹² section 5(b) of the TEA provided that the President may prohibit during war or any period of national emergency "transactions involving any right, power, or privilege with respect to, or transactions involving any property in which any foreign country or national thereof has any interest."

9. Article IV of the Treaty provides for compensation for the taking of property. Treaty of Amity and Economic Relations, signed Apr. 3, 1961, United States-Republic of Vietnam (South Vietnam), art. IV, 12 U.S.T. 1704, T.I.A.S. No. 4890.

10. RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 159 (1965), states:

Disappearance of State

If a state that is a party to an international agreement ceases to exist as a state, the agreement is terminated as to it, but the state into which it is incorporated or the states into which it is divided succeed to its rights and obligations under the agreement to the extent that

- (a) the agreement defines the boundaries of the territory of the former state. . . .

11. 50 U.S.C. App. § 1-44 (1976).

12. The Amendments to the Trading with the Enemy Act of 1977, Pub. L. No. 95-223, § 101, 91 Stat. 1625 (1977), changed the operative language from "during the time of war" to "during time of war or any other period of national emergency."

The TEA was passed during World War I as an economic weapon against Germany.¹³ Its purpose was to thwart the German war effort by denying the Germans use of U.S.-based German property, to prevent currency from going to Germany, and to prevent export of goods to Germany.¹⁴ Thus it allowed the President to deny hard currency to certain countries and their nationals,¹⁵ and to preserve assets for future American claims.¹⁶ In 1933, section 5(b) of TEA was expanded to allow the President to use his authority under that section during times of national emergency as well as war.¹⁷ As of June 1, 1977 the authority of the President to regulate foreign economic transactions during times of national emergency under the TEA of 1917 was repealed.¹⁸ Congress considered the presidential prerogative too great under section 5(b) and declared that the section "has become essentially an unlimited grant of authority for the President to exercise at his discretion, broad powers in both the domestic and international economic arena, without congressional review."¹⁹

Henceforth the power of the President to regulate foreign economic transactions during times of national emergency is derived from the International Emergency Economic Powers Act (IEEPA).²⁰ The President under the IEEPA must observe prescribed procedures in the exercise of his authority to regulate certain categories of international economic transactions and is limited in the exercise of such authority to an "unusual and extraordinary threat which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States"²¹

The amendment of the TEA will not affect the holding in this case since the President is permitted to continue exercising the authority from section 5(b) of the Act as a result of the national emergency declared by him prior to June 1, 1977.²² The authority is extended until September 14, 1978 and thereafter is terminated

13. See 55 CONG. REC. 4842-43 (1917).

14. See *Banco Mexicano de Comercio e Industria v. Deutsche Bank*, 289 F. 924, 927 (D.C. Cir. 1923), *aff'd*, 263 U.S. 591 (1924).

15. *Veterans & Reservists for Peace in Vietnam v. Regional Comm'r*, 459 F.2d 676 (3d Cir. 1972).

16. *Nielson v. Secretary of Treasury*, 424 F.2d 833 (1970).

17. 50 U.S.C. App. § 5 (1977) (historical notes).

18. Pub. L. No. 95-223, § 101, 91 Stat. 1625.

19. H.R. Rep. No. 7738, 95th Cong., 1st Sess. 7 (1977).

20. 50 U.S.C. § 1701 (Supp. I 1977).

21. *Id.*

22. *Id.* § 1706 (c)(2).

unless the President extends the exercise of such authority for successive one-year periods on the ground that it is in the national interest of the U.S.²³ Thus, in the case of Vietnam, the President may exercise his authority under section 5(b) as long as he can show that it is in the national interest of the U.S.

Constitutional Claim

The fifth amendment of the U.S. Constitution provides, *inter alia*, that no one is to be "deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation."²⁴ Aliens as well as citizens are entitled to the protection of the fifth amendment.²⁵ However, since a state is not barred by the fourteenth amendment from according priority to local creditors vis-à-vis foreign creditors whose claims originated abroad,²⁶ likewise, the fifth amendment does not limit the Federal Government from awarding itself or its nationals such a priority over foreign creditors.²⁷ Moreover, the court pointed out that the blocking of funds is a temporary action and therefore does not constitute a taking of property.

There are, however, some limitations to the blocking of funds. An indefinite blocking could be considered a taking under international standards if it "effectively deprive[s] an alien of substantially all the benefits of his interest in property."²⁸ The court did not find that limitation applicable because Qui Than failed to show that he and his shareholders-directors had a constitutionally protected interest in the funds, and there was no indication of how long the funds would be blocked.

Act of State Doctrine

As the Supreme Court stated in *Banco Nacional de Cuba v. Sabbatino*:

Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another, done within its own territory. Redress of grievances by reason of such acts must be availed of by sovereign powers as between themselves.²⁹

23. 50 U.S.C. App. § 5.

24. U.S. CONST. amend. V.

25. *Russian Volunteer Fleet v. United States*, 282 U.S. 481 (1931).

26. *Disconto Gesellschaft v. Umbreit*, 208 U.S. 570 (1908).

27. *United States v. Pink*, 315 U.S. 203 (1942).

28. RESTATEMENT, *supra* note 10, at § 192.

29. 376 U.S. 398, 416 (1964), quoting *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897).

Qui Than pointed out that the act of state doctrine does not apply to attempts of foreign governments to take U.S.-based property from its nationals without compensation. In fact, "foreign confiscatory decrees purporting to divest nationals and corporations of the foreign sovereign of property located in the United States uniformly have been denied effect in our courts."³⁰ Qui Than argued that since the court would not honor any claim of the funds derived from the confiscation of the Bank by the PRG, no legal basis existed for blocking the assets. The court dismissed the arguments on the basis that the validity of the confiscation was not at issue and that "a shield against the enforcement of claims derived from foreign expropriation" may not be converted into a "sword to frustrate the marshalling by the Executive Branch of assets to which a foreign government may lay claim in the future."³¹

Conclusion

The holding in *Tran Qui Than v. Blumenthal*³² reinforces the right of the Executive to block funds of designated nationals which are based in the U.S. The congressional limitation of the authority provided in section 5(b) of the TEA to wartime situations will not affect the holdings of courts in similar cases since the embargoes of North Korea, Vietnam, Cambodia, and Cuba continue and will continue as long as the President chooses to extend the use of his authority under section 5(b) to those countries each year.

In the future, the regulation of international economic transactions by the President during times of declared national emergency will be more strictly scrutinized and limited under the IEEPA.³³ However, this will not substantially affect the authority of the President to block funds in situations where the emergency emanates from a foreign source. The thrust of the congressional action amending the TEA and creating the IEEPA is to allow action such as the freezing of Iranian assets by President Carter³⁴ and at the same time to prevent the broad use of section 5(b) power as a political expedient.³⁵ Thus, the Executive has not lost its authority to regulate international economic transactions, but that authority is only subject to congressional review to the extent necessary to prevent the abuse of

30. *Maltina Corp. v. Cawy Bottling Co.*, 462 F.2d 1021, 1025 (5th Cir. 1972), quoting *F. Palico y Compania, S.A. v. Brush*, 256 F. Supp. 481, 488 (S.D.N.Y. 1966) *aff'd mem.*, 375 F.2d 1011 (2d Cir. 1967).

31. *Tran Qui Than v. Blumenthal*, 469 F. Supp. 1202, 1210 (N.D. Cal. 1979).

32. *Id.*

33. Note 21 *supra*.

34. 15 WEEKLY COMP. OF PRES. DOC. 2118 (Nov. 14, 1979).

35. Pres. Proc. No. 2039, Mar. 6, 1933.

presidential power without preventing the use of the tool of economic retaliation by the President.

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