

**UNITED STATES POLICY REGARDING
NATIONALIZATION OF AMERICAN
INVESTMENTS: THE PEOPLE'S
REPUBLIC OF CHINA'S
NATIONALIZATION DECREE OF 1950**

On December 17, 1950, when the People's Republic of China (PRC) intervened in Korea, the United States retaliated by freezing \$80.5 million of Chinese assets in the United States.¹ On December 28, 1950, the PRC responded by nationalizing approximately \$197 million of United States nationals' property in China.² At the time of the nationalization, the PRC failed to compensate the United States nationals for their property. These American investors made claims against the PRC for full compensation for nationalized property. The PRC, in turn, requested the unblocking of its assets. The claims of American investors against the PRC and the PRC's

1. The U.S. Treasury Department, under the authority of the Trading With the Enemy Act, carried out the decision made by President Truman. *See* Trading With the Enemy Act of 1917, 50 U.S.C. § 1 app. (1976); Proclamation No. 2914, 3 C.F.R. § 99 (1949-1953), *re-printed in* 50 U.S.C. § 1 app. (1976). Executive power to block foreign assets arises from amendments to § 5(b) of the Trading With the Enemy Act. The primary blocking provision is The Foreign Assets Control Regulations, 31 C.F.R. § 500.201 (1983). It should be noted, however, that blocking is a functionally descriptive term. Under 31 C.F.R. § 500.201, removal of assets was prevented, but other specified forms of transfer were permitted. Owners of assets could invest their assets in listed securities or transfer their funds from demand accounts to interest-bearing accounts. Telephone interview with David Rogers, General Counsel, China Claims Program, Foreign Claims Settlement Commission (Sept. 22, 1982). The result was that the assets were, *in effect*, blocked. For specific blocking authority, see 50 U.S.C. § 5(b) app., § 6 (1976); Exec. Order No. 9193, 3 C.F.R. § 1174 (1938-1943) (amending Exec. Order No. 9095, 3 C.F.R. 1121 (1938-1943)); 31 C.F.R. § 500 (1983).

2. The Chinese blocking controls on U.S. assets were imposed on December 28, 1950, by order of the Government Administrative Council of the Central People's Government. The Council is the highest governmental body charged with state administration. *See* The Organic Law of the Central People's Government of the People's Republic of China, Sept. 29, 1949, ch. III, in *FUNDAMENTAL LEGAL DOCUMENTS OF COMMUNIST CHINA* 104, 108-13 (A. Blaustein ed. 1962). The controls were intended to prevent the United States Government from engaging in economic disruption and endangering the interests of the people of China. After an initial freezing and inventory, general licensing authority over blocked American assets was vested in national and regional government agencies. Local agencies controlled the dispensation of blocked assets under guidelines issued by the national government. For text of the blocking order, see New China News Agency, Daily Press Release No. 586, at 208 (Dec. 30, 1950). *See also* Government Administrative Council Issues Order for the Control of American Government and Private Property in China (Dec. 28, 1950), *re-printed in* J. COHEN & H. CHIU, *PEOPLE'S CHINA AND INTERNATIONAL LAW* 686-87 (1974) [hereinafter cited as Administrative Council Order].

request for the unblocking of assets frozen by the United States constitute what has become known as the claims/assets problem.³

In 1966, the International Claims Settlement Act was amended to evaluate United States nationals' claims against the PRC.⁴ Finally, in 1979 the United States and the PRC entered into an agreement to settle the claims/assets problem.⁵ This agreement is called the "Agreement Between the Government of the United States of America and the Government of the People's Republic of China Concerning the Settlement of Claims" (PRC Claims Agreement).⁶

The PRC Claims Agreement permits the PRC to reclaim the assets and accounts frozen by the United States in 1950.⁷ This Agreement also provides that the PRC shall remit to the United States government a lump-sum payment.⁸ This lump-sum payment entitles the average United States claimant to a mere forty-one percent compensation for his property nationalized by the PRC.⁹ As a consequence, the PRC Claims Agreement has left many United States claimants dissatisfied.

This Comment will evaluate the international importance of the PRC Claims Agreement both from a legal and foreign policy viewpoint. This evaluation will begin with a presentation of a historical background leading up to the PRC Claims Agreement. United States claimants' rights to full compensation under international law and United States law will also be discussed.

Following this discussion, the United States' response to the claims/assets problem will be outlined. This presentation will begin with an examination of the jurisdiction of the Foreign Claims

3. "Claims/assets" is a term commonly used to refer to United States *claims* against the PRC and to PRC *assets* blocked by the United States.

4. The International Claims Settlement Act of 1949 was amended in 1964 by adding Title V. The purpose of Title V was to provide for the determination of the amount and validity of claims against the government of Cuba. Pub. L. No. 88-666, 78 Stat. 1100 (1964) (approved Oct. 16, 1964).

Title V was amended in 1966 in order to provide for the determination of the amount of the claims of United States nationals against the Chinese Communist regime. Pub. L. No. 89-780, 80 Stat. 1365 (1964) (approved Nov. 6, 1966).

5. See *supra* note 3.

6. Agreement Concerning the Settlements of Claims, May 11, 1979, United States—People's Republic of China, 30 U.S.T. 1957, T.I.A.S. No. 9306, reprinted in 18 INT'L LEGAL MATERIALS 337 (1979) [hereinafter cited as PRC Claims Agreement].

7. *Id.* art. II(b).

8. *Id.* art. II(a).

9. This 41% figure represents the ratio of 80.5 million dollars (the lump sum to be paid by the PRC under the PRC Claims Agreement) to 197 million dollars (the total value of United States claims to property nationalized in the PRC and compensated under the PRC Claims Agreement).

Settlement Commission (FCSC) to preadjudicate claims. This will be followed by an analysis of the significance of United States recognition of the PRC and an examination of the provisions of the PRC Claims Agreement.

The United States claimants' theories for recovery against the United States government for inadequate compensation will next be evaluated. A discussion of United States policy considerations with regard to foreign nationalization of United States foreign investments will follow. This discussion will demonstrate that the PRC Claims Agreement failed to properly consider the importance of economic relations as a part of foreign relations. Mindful of this consideration, this Comment will conclude with a proposed policy change directing the United States to require full compensation for American assets nationalized by foreign governments.

I. HISTORICAL BACKGROUND OF THE CLAIMS/ASSETS PROBLEM

The PRC Claims Agreement may have resolved, at least procedurally, the claims/assets problem.¹⁰ The Agreement covers United States claims against the PRC and PRC assets blocked by the United States. Although the claims/assets problem has extensive historical and political roots and far-reaching implications, its complexity can be reduced to a series of factual occurrences.

In 1928 the United States recognized the Nationalist government of the Republic of China.¹¹ This recognition continued without issue until the People's Republic of China was proclaimed on October 1, 1949.¹² The establishment of the PRC was the first of a number of occurrences which created an international, political and legal milieu complicating the United States' position toward both "Chinas."

During the Nationalist government attempts to reassert control over the mainland, the United States indirectly aided the Nationalists while imposing economic sanctions against the PRC in the form of a trade embargo.¹³ The United States' position with regard to

10. PRC Claims Agreement, *supra* note 6, art. II(a).

11. J. FAIRBANK, *THE UNITED STATES AND CHINA* 254-61 (3d ed. 1962); R. FERRELL, *AMERICAN DIPLOMACY* 344-46, 462-65 (1959).

12. This is the date of the establishment of the PRC. *See generally* 2 J. FAIRBANK, E. REISCHAUER & A. CRAIG, *A HISTORY OF EAST ASIAN CIVILIZATION* 678-88 (1965).

13. *See* Cohen, *Chinese Law and Sino-American Trade*, in *CHINA TRADE PROSPECTS AND U.S. POLICY* 312 (A. Eckstein ed. 1971); Lee & McCobb, *United States Trade Embargo on China 1949-1970: Legal Status and Future Prospects*, 4 N.Y.U. J. INT'L L. & POL. 1 (1971).

providing aid to the Nationalist government, therefore, evidenced a hesitation to address the problem of recognition. The United States had to decide which Chinese government should be accorded recognition. The most definitive action taken by the United States, with regard to its treatment of the PRC, came after the PRC's December 17, 1950, intervention in Korea.¹⁴

The claims/assets problem actually grew out of President Truman's response to the PRC's Korean involvement.¹⁵ Under the direction of President Truman and pursuant to the Trading With the Enemy Act,¹⁶ the United States Treasury Department blocked all assets and accounts of both Chinese governments and all Chinese nationals.¹⁷ On December 28, 1950, the PRC responded to this action by nationalizing all public and private assets of all natural and juridical citizens of the United States.¹⁸ The result was the claims/assets problem, which involved approximately \$80.5 million of Chinese assets blocked in the United States, and nearly \$200 million of United States claims to property nationalized in the PRC.¹⁹

The United States Congress recognized the need for a forum in

14. This action was the blocking, *in effect*, of all Chinese assets and accounts in the United States. See *infra* notes 15-19 and accompanying text.

15. Proclamation No. 2914, 3 C.F.R. § 99 (1949-1953), *reprinted in* 50 U.S.C.S. § 1 app. (Law Co-op. 1981). Citing the "recent events in Korea and elsewhere," President Truman declared that "world conquest by communist imperialism is the goal of the forces of aggression that have been loosed upon the world." *Id.* Truman then proclaimed "the existence of a national emergency, which requires that the military, naval, air, and civilian defenses of this country be strengthened as speedily as possible to the end that we may be able to repel any and all threats against our national security and to fulfill our responsibilities in the efforts being made through the United Nations and otherwise to bring about lasting peace." *Id.*

16. Trading With the Enemy Act of 1917, 50 U.S.C. § 1 app. (1970).

17. Proclamation No. 2914, 3 C.F.R. § 99 (1949-1953), *reprinted in* 50 U.S.C. § 1 app. (1976).

18. Administrative Council Order, *supra* note 2.

19. The United States Treasury Department investigated United States claims of property seized in the PRC and made an accounting of all PRC assets blocked in the United States. For an analysis of the blocking of Chinese assets in the United States, see Bayar, *The Blocked Chinese Assets: Present Status and Future Disposition*, 15 VA. J. INT'L L. 959 (1975); Lee, *The United States and the People's Republic of China: The Blocked Assets—Claims Problem*, 8 CORNELL INT'L L.J. 253 (1975).

On July 6, 1969, the Foreign Claims Settlement Commission (FCSC) concluded that 384 United States nationals had lost approximately 197 million dollars of property as a result of nationalization, expropriation, intervention or other taking by the Chinese Communist regime. UNITED STATES FOREIGN CLAIMS SETTLEMENT COMMISSION, ANNUAL REPORT TO THE CONGRESS 13-14 (1970).

An accounting by the Office of Foreign Assets Control revealed that as of July 1, 1970, roughly 76.5 million dollars of PRC assets were blocked in the United States. Office of Foreign Assets Control, U.S. Treasury Dep't 1970 Census of Blocked Chinese Assets in the

which United States citizens could bring their claims against the PRC regarding the taking, confiscation or nationalization of American property. Accordingly, the Foreign Claims Settlement Commission (FCSC) was established.²⁰ In 1966 the FCSC was authorized by an amendment to Title V of the International Claims Settlement Act of 1949 to determine claims of United States nationals against the Chinese Communist regime.²¹ Under Title V, the FCSC was given exclusive jurisdiction over such claims.²²

The FCSC was directed to "receive and determine the claims of United States nationals against the PRC, arising since October 1, 1949."²³ Accordingly, United States nationals with such claims were directed to follow specific filing procedures outlined by the FCSC.²⁴

The FCSC's program for the receipt and determination of

United States 1 (1970) (unpublished manuscript available from the Office of Foreign Assets Control).

The Office of Foreign Assets Control's estimates of PRC blocked assets were later revised to 80.5 million dollars at the time of the PRC Claims Agreement. United States Department of Treasury, Press Release (Sept. 28, 1979), *reprinted in* L.A. Times, Sept. 3, 1979, § 1, at 1, col. 1 [hereinafter cited as Press Release].

20. The FCSC was created by the President's Reorganization Plan No. 1 of 1954, 68 Stat. 1279 (codified in the International Claims Settlement Act of 1949, 22 U.S.C. § 1622 (1976)), which assigned the functions of the War Claims Commission and the International Claims Commission to the FCSC.

21. Under the 1966 amendment of Title V of the International Claims Settlement Act of 1949, the FCSC was authorized to determine, in accordance with applicable principles of substantive law, including international law, the validity and amount of certain claims of U.S. nationals against the PRC. *See* Cuban Claims Act of 1964, 78 Stat. 1110 (1964) (codified as amended at 22 U.S.C. § 1643 (1976)). When Congress amended Title V to authorize the China Claims Program, it made no substantive changes other than to allow the determination of claims against the PRC arising since October 1, 1949. Thus, the statutory standards were the same in both the Cuban and China Claims Programs. *Id.*

22. FCSC Regulations, 45 C.F.R. § 503.1(b) (1983).

23. In the subcommittee hearing on S.3675, the bill authorizing the China Claims Program, Ambassador Richard D. Kearney, then Deputy Legal Advisor to the Department of State explained that:

[The] October 1, 1949, date was selected because it was only after that date that the Chinese Communist regime began to nationalize and take American property. This is the cutoff date by which we can determine that from that time on there were takings of American property by the regime on the basis of all the information we have.

Hearing on S.3675 Before the Subcomm. on the Far East and the Pacific of the House Comm. on Foreign Affairs, 89th Cong., 2d Sess., 4, 7 (1966). *See also*, Cuban Claims Act of 1964, 78 Stat. 1110 (1964) (codified as amended at 22 U.S.C. § 1643 (1976)).

24. FCSC Regulations, 45 C.F.R. § 531 (1983); *see* FCSC Form No. 780, *reprinted in* United States Foreign Claims Settlement Commission, Final Report of the China Claims Program, § III, at 431, *reprinted from* UNITED STATES FOREIGN CLAIMS SETTLEMENT COMMISSION ANNUAL REPORT TO THE CONGRESS (1972) (available from the FCSC, 1111 20th St. N. W., Washington, D.C. 20579) [hereinafter cited as FCSC 1972 ANNUAL REPORT].

United States nationals' claims, the China Claims Program, commenced on November 8, 1967, when appropriations for administering the statute were made available.²⁵ The deadline for filing such claims with the FCSC was July 6, 1969.²⁶ By that date, 508 claims totaling \$306,680,834 were filed with the Commission.²⁷ By July 6, 1972, the completion of the China Claims Program, 384 claims had been certified.²⁸ The total value of awards granted by the Commission was \$196,861,824.²⁹

On the international level, the Joint Communiqué (Shanghai Communiqué), issued at the conclusion of President Nixon's 1972 China trip, marked the beginning of the United States' interest in extending recognition to the PRC.³⁰ The Shanghai Communiqué expressed the positions of the PRC and the United States in regard to prerequisites for the establishment of full diplomatic relations between the two countries.³¹

Shortly after this rapprochement began, the two countries agreed to condition the unblocking of PRC assets with the settlement of United States claims for seized property.³² In 1973 an agreement in principle was reached.³³ United States officials expected a rapid resolution of the problem.³⁴ However, it was not until 1977 that the PRC actively sought to negotiate a final settlement agreement.³⁵

The international economic situation of the PRC had deteriorated by 1976.³⁶ As a result, the PRC reinitiated diplomatic level discussions with the United States early in 1977 regarding the set-

25. FCSC 1972 ANNUAL REPORT, *supra* note 24, at 417.

26. *Id.*

27. *Id.* at 506.

28. *Id.*

29. *Id.*

30. Joint Communiqué, Feb. 28, 1972, United States—People's Republic of China, 6 DEP'T ST. BULL. 435 (1972), reprinted in 11 INT'L LEGAL MATERIALS 443 (1972).

31. *Id.*

32. *Presidential Assistant Kissinger Visits Asia*, 68 DEP'T ST. BULL. 313, 315 (1973).

33. *Id.*

34. *Joint U.S.-Japan Committee on Trade and Economic Affairs Holds Meeting at Tokyo*, 69 DEP'T ST. BULL. 237, 239 (1973).

35. See N.Y. Times, Feb. 11, 1977, at A1, col. 3 for a report of the U.S. receiving indications that China would like to begin talks on settling financial claims on the way to the normalization of trade relations. See also Guertzman, *U.S. Quietly Begins Talks With China on Financial Claims*, N.Y. Times, May 2, 1977, at A1, col. 6.

36. See *China Said to Falter in Its Economy in '76*, N.Y. Times, Mar. 20, 1977, at A4, col. 1. For the relationship of the business climate between the PRC and the U.S., see *Doing Business With China*, N.Y. Times, May 9, 1977, at A30, col. 1. See also *The Chinese Seem to Mean Business*, N.Y. Times, Mar. 24, 1977, at A26, col. 1.

tlement of the claims/assets problem.³⁷ However, a final solution was not agreed upon until two years later.³⁸ The primary reason for the delay was that the United States could not make a binding settlement agreement until the PRC was granted recognition.³⁹

Recognition of the People's Republic of China occurred on January 1, 1979.⁴⁰ Negotiations for the final resolution of the claims/assets problem began almost immediately thereafter. While visiting the United States in January 1979, Vice Premier Deng Xiaoping met with President Carter and Treasury Secretary Blumenthal to discuss the claims/assets problem.⁴¹ Negotiations continued until May 11, 1979, when the PRC Claims Agreement was signed at Beijing by PRC Finance Minister Zhang Jingfu and U.S. Commerce Secretary Juanita Kreps.⁴²

The PRC Claims Agreement covered all claims of United States nationals arising between October 1, 1949, and May 11, 1979, and all PRC claims (to the blocked assets) arising between December 17, 1950, and May 11, 1979.⁴³ Under the Agreement, the PRC agreed to pay a lump sum of \$80.5 million to the United States government over a five-year period.⁴⁴ The United States government agreed to accept this payment as the full and final settlement of all United States nationals' claims covered by the Agreement.⁴⁵ Further, the United States agreed to unblock the \$80.5

37. See Guertzman, *supra* note 35.

38. See PRC Claims Agreement, *supra* note 6.

39. See *infra* notes 134-65 and accompanying text.

40. The United States officially recognized The People's Republic of China on January 1, 1979. See 79 DEP'T ST. BULL. 2022 (1979); see also *Establishment of Diplomatic Relations Between P.R.C. and U.S.A.*, PEKING REV., Dec. 22, 1978, at 8, 8-9.

41. The details of the settlement were negotiated within two months, and a draft of the PRC Claims Agreement was initialed by U.S. Treasury Secretary W. Michael Blumenthal and PRC officials in Beijing. *U.S. Trade Pact Initialed*, 39 FACTS ON FILE 369, 370, (1979) [hereinafter cited as *U.S. Trade Pact Initialed*].

On May 10, 1979, the United States officially upgraded its liaison office in Beijing to full embassy status and officially closed its embassy in Taipei, Taiwan. *Accord Reached on Assets*, 39 FACTS ON FILE 146 (1979) [hereinafter cited as *Accord Reached on Assets*].

An account of the negotiations process was given by Robert Mundheim, General Counsel of the Treasury Department at a July 27, 1979, meeting of the Advisory Committee on East-West Trade. For a summary of Mr. Mundheim's comments, see Mundheim, *Claims/Assets Agreement With PRC: What It Means, How It Was Negotiated*, BUS. AM. July 16, 1979, at 7, 8 [hereinafter cited as Mundheim].

42. The agreement was the same as a draft initialed in Beijing on March 1, 1979, by Chinese officials and U.S. Treasury Secretary W. Michael Blumenthal. *U.S. Trade Pact Initialed*, *supra* note 41. See also, PRC Claims Agreement, *supra* note 6.

43. PRC Claims Agreement, *supra* note 6, art. I.

44. *Id.* art. II(a).

45. *Id.*

million of PRC assets which had been frozen by the Treasury Department in 1950.⁴⁶ Under the terms of the PRC Claims Agreement, United States claimants receive an average of 41 cents on each dollar of his certified claim.⁴⁷ Under both international and United States law, United States claimants contend that they are entitled to full compensation for their nationalized property. Claimants further argue that the PRC Claims Agreement violates both international and domestic law.

II. NATIONALIZATION—THE RIGHT TO FULL COMPENSATION

United States claimants argue that they have a right, cognizable under international and United States law, to full compensation for their property taken by nationalization. Under international law, the theory of acquired rights supports their right to full compensation.⁴⁸ To determine whether United States law requires full compensation, (1) the *Restatement (Second) of the Foreign Relations Law*,⁴⁹ (2) the Foreign Sovereign Immunities Act,⁵⁰ (3) the act of state doctrine,⁵¹ and (4) the Hickenlooper Amendment⁵² will be examined.

A. International Law—Acquired Rights Theory

The duty to compensate involves the relationship between municipal law which creates property rights and international law.⁵³ A foreigner owns property abroad by operation of the local law of the host State, which either recognizes property rights acquired by the foreigner in other jurisdictions or allows their creation under municipal law.⁵⁴ Once property rights have been acquired and recognized, these rights become subject to the international law theory

46. *Id.* art. II(b). Article II(b) was amended by an agreement between the parties on September 28, 1979. As the PRC requested, the United States agreed to postpone the unblocking of the assets from October 1, 1979, to January 31, 1980. Agreement Amending the Agreement of May 11, 1979, September 28, 1979, United States-People's Republic of China, 31 U.S.T. 5596, T.I.A.S. No. 9675.

47. Soloman, *When 41 Cents on the Dollar is a Good Deal*, Christian Sci. Monitor, Mar. 28, 1979, at 23, col. 1 (Anthony M. Solomon reporting as Undersecretary for Monetary Affairs, U.S. Treasury Dep't).

48. *See infra* notes 53-59.

49. *See infra* notes 64-68.

50. *See infra* notes 69-80.

51. *See infra* notes 81-87.

52. *See infra* notes 88-89.

53. For an excellent discussion, see Cheng, *The Rationale of Compensation for Expropriation*, 44 TRANSNAT'L GROTIUS SOC'Y 267 (1959).

54. *Id.*

of acquired rights.⁵⁵ The theory of acquired rights does not preclude the enactment of laws changing legal institutions "closely connected with moral, political and economic motives and purposes," but requires only that "when the suppressed rights are of economic value, equity requires compensation to be given."⁵⁶

Several policy arguments support the acquired rights theory. First, there is the necessity for a confidence in the "continued efficacy . . . of judicial acts performed for the acquisition of rights according to prevailing law."⁵⁷ In other words, unless persons whose rights have been recognized by a foreign country have security in the future status of their rights, the acquisition and recognition of those rights would be meaningless. Second, compensation under the acquired rights theory does not represent reparation for a wrong, but provides for the alleviation of an inequitable hardship.⁵⁸ In this way, a determination of fault per se is not made, but an injured party is nevertheless made whole by the requirement of compensation. Finally, individuals whose property rights have been acquired and recognized can not be expected to sacrifice those rights unless they have been at fault themselves. The acquired rights theory protects these individuals by requiring compensation for the suppression of their economic rights.⁵⁹

55. The principle of acquired rights is a theory in which certain ownership rights (insofar as they may be classed as "rights" as opposed to expectancies), once acquired, are to some extent immutable despite certain changes in the law. In other words, certain rights are preserved despite changes in law. For a more detailed discussion, see Kaekenbeeck, *The Protection of Vested Rights in International Law*, 17 BRIT. Y.B. INT'L L. 1 (1936).

56. Kaekenbeeck contends that compensation is required only by principles of equity and not by law. *Id.* at 3-4.

57. *Id.* Kaekenbeeck concludes that the opposite principle "would be impractical and mean a perpetual revolution in the state of rights and property." *Id.*

58. *Id.* at 16.

Individual confiscation of property without indemnity undoubtedly falls short of the international standard of civilized society because it violates the sense of equity of the civilized world, on which its deepest legal convictions rest, which is at the root of all legislation on expropriation and which has been ratified by long international custom

Id.

Kaekenbeeck suggests that judicial elaboration is necessary to ascertain a worldwide international minimum standard for equitable compensation. According to Kaekenbeeck, judicial elaboration must occur with the clear understanding that the ground for compensation is not reparation of a wrong, but alleviation of an exceptional hardship. *Id.*

It is likely that other commentators would suggest that the payment of compensation is more a legal duty than a moral obligation. See, e.g., McNair, *The Seizure of Property and Enterprise in Indonesia*, 6 NEDERLANDS TIDSCHRIFT VOOR INTERNATIONAL RECHT 216, 221-37, 249-53 (1959).

59. Kaekenbeeck, *supra* note 58, at 3-4.

The PRC's nationalization of United States nationals' property is a situation to which the acquired rights theory could be applied. Prior to the PRC's nationalization decree, the PRC recognized the rights of United States nationals to their property located in the PRC. Hence, if the acquired rights theory were to be applied to the PRC's nationalization of American investments, the PRC would be obligated to pay full compensation to United States claimants. Therefore, under an acquired rights analysis, the PRC Claims Agreement violates international law since it does not provide for full compensation.

Unfortunately for United States claimants, the acquired rights theory is not the only law applicable to the claims/assets problem. United States law plays an important role in the determination of claimants' rights to full compensation.

B. *United States Law*

Under the *Restatement (Second) of Foreign Relations Law*, United States claimants have a strong argument that they are entitled to full compensation for their property which was nationalized by the PRC.⁶⁰ The PRC has two possible defenses to this assertion. First, they can claim immunity from suit by private United States citizens under the Foreign Sovereign Immunities Act.⁶¹ Second, they can assert the act of state doctrine to make their acts nonreviewable by the United States courts.⁶² The Hickenlooper Amendment is also important to this discussion of claimants' rights to full compensation. The Hickenlooper Amendment provides sanctions against foreign governments which nationalize United States nationals' property without providing full compensation.⁶³

1. *Restatement (Second) of Foreign Relations Law of the United States*. According to the *Restatement*, a taking by a State of the property of an alien is wrongful under international law if there is no reasonable provision for the determination and payment of just compensation.⁶⁴ The position of the United States in this re-

60. See *infra* notes 64-68 and accompanying text.

61. See *infra* notes 69-80 and accompanying text.

62. See *infra* notes 81-87 and accompanying text.

63. See *infra* notes 88-89 and accompanying text.

64. RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES Section 185 (1965) [hereinafter cited as RESTATEMENT (SECOND)]. The language of this section provides that: "The taking by a state of property of an alien is wrongful under international law if . . . there is not reasonable provision for the determination and payment of just

gard has been reflected in a number of commercial treaties. For example, Article VI, section 3 of the Treaty of 1953 with Japan provides:

Property of nationals of either Party shall not be taken within the territories of the other Party except for a public purpose, nor shall it be taken without the prompt payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof.⁶⁵

The United States policy on the protection of United States private property is clearly stated in the *Restatement*. At section 185 the United States recognizes the right of any country to expropriate the property of a United States investor, in the absence of specific governmental undertakings to the contrary, so long as the taking is nondiscriminatory; for a public purpose; and accompanied by prompt, adequate and effective compensation.⁶⁶

A public statement issued by the Department of State on December 30, 1975, entitled "Foreign Investment and Nationalization," reiterates the policy of the *Restatement*.⁶⁷ The text of the statement includes the following language:

With regard to current or future expropriations of property or contractual interests of U.S. nationals, . . . the Department of State wishes to place on record its view that foreign investors are entitled to the fair market value of their interests. Acceptance by U.S. nationals of less than fair market value does not constitute acceptance of any other standard by the United States government. As a consequence, the United States government reserves its rights to maintain international claims for what it regards as adequate compensation under international law for the interests

compensation, as defined in section 187" Section 187(a) specifies "adequate" compensation, as indicated in section 188. Section 188(1) imposes a requirement of "full value of the property taken" which is defined at comment b as "fair market value as reasonably defined in light of the international standard of justice." *Id.* § 188(l) comment b. In addition, the *Restatement* suggests that the rules it presents on this issue "are probably less widely recognized than most rules of international law." *Id.* § 184 comment c. The Hickenlooper Amendment is similar. Foreign Assistance Act of 1971, 22 U.S.C. § 2370(e)(1)(c) (1972).

65. Treaty of Friendship, Commerce and Navigation, Apr. 2, 1953, United States-Japan, art. VI, § 3, 2 U.S.T. 2063, 2068, T.I.A.S. No. 2863, 206 U.N.T.S. 143.

66. RESTATEMENT (SECOND), *supra* note 64, § 185(b).

67. U.S. Dep't State, Foreign Investment and Nationalization (Dec. 30, 1975), *quoted in* Smith, *The United States Government Perspective on Expropriation and Investment in Developing Countries*, 6 VAND. J. TRANSNAT'L L. 517, 520-21 (1976).

nationalized or transferred.⁶⁸

This statement further supports the claimants' contention that they are entitled to full compensation for their property which was nationalized by the PRC. However, whether full compensation should be provided largely depends upon the validity of the PRC's defenses under the theories of foreign sovereign immunity and the act of state doctrine.

2. *The Foreign Sovereign Immunities Act.* Under the Foreign Sovereign Immunities Act of 1976, the PRC could invoke immunity from the exercise of jurisdiction by the United States over the PRC's sovereign activities.⁶⁹ Prior to the Foreign Sovereign Immunities Act, the accepted international law theory was that States and other international legal persons were immune from the exercise of jurisdiction by another State over sovereign acts.⁷⁰ Originally, a State could invoke jurisdictional immunity irrespective of the nature of its sovereign acts.⁷¹ In recent years, as States have become increasingly involved in commercial activities, the application of the theory of sovereign immunity has been limited.⁷² One exception to the general theory of foreign sovereign immunity, recognized by the United States, is provided in the Foreign Sovereign Immunities Act of 1976.⁷³ Under this Act, a foreign State shall not be immune from the jurisdiction of either United States federal or state courts in any case in which its action is based upon commer-

68. *Id.* at 521-22.

69. The Foreign Sovereign Immunities Act of 1976 establishes exceptions to the general principle of foreign sovereign immunity. The inapplicability of any such exceptions would result in immunity for the PRC from suit by U.S. private citizens. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1391, 1602, 1604, 1605(a) (1976).

70. The theory of absolute sovereign immunity was applied by the United States Supreme Court in *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812). This theory supports absolute and territorial jurisdiction in every sovereign which may only be waived in certain specific instances. The Court outlined three instances where such a waiver may occur. First, where the person of the foreign sovereign is present in the foreign territory, he shall be exempted from arrest or detention within the foreign territory. Second, where foreign ministers are present in the foreign territory, they shall be immune from suit. Third, where a sovereign allows the troops of a foreign prince to pass through his sovereign territory, he shall be understood to have ceded a portion of his territorial jurisdiction. *Id.* at 138-40. This theory supports the authority of the PRC to nationalize property within its territorial boundaries.

71. *Id.*

72. *Dralle v. Republic of Czechoslovakia*, 17 I.L.R. 155 (Aus. Sup. Ct. 1950). *See also* Letter of Acting Legal Adviser, Jack B. Tate, to Acting Attorney General, Philip B. Perlman (May 19, 1952), *reprinted in* 26 DEP'T ST. BULL. 984 (1952).

73. *See supra* note 69.

cial activities carried on within the United States.⁷⁴

This commercial activity exception to foreign sovereign immunity was held applicable in *Jackson v. The People's Republic of China*.⁷⁵ In *Jackson*, a United States district court held that the PRC was subject to United States jurisdiction.⁷⁶ *Jackson* involved bearer railroad bonds issued by the Imperial Chinese government in 1911.⁷⁷ These bonds were in default, and United States investors brought suit to compel payment on them.⁷⁸ Based upon the finding that United States investment in the bonds was solicited by the Imperial Chinese government, the district court invoked the commercial activity exception of the Foreign Sovereign Immunities Act and held that the PRC was not immune from United States jurisdiction.⁷⁹ The Court subsequently entered a default judgment against the PRC.⁸⁰

74. Claimants can assert that the Foreign Sovereign Immunities Act of 1976 provides jurisdiction to United States courts. Section 1605 specifically provides:

General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the states in any case— . . .

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States

Foreign Sovereign Immunities Act of 1976, 19 U.S.C. § 1605(a)(2) (1976).

75. *Jackson v. People's Republic of China*, 550 F. Supp. 869 (N.D. Ala. 1982).

76. *Id.* at 872-73.

77. *Id.* at 871.

78. Plaintiffs in the *Jackson* case brought a class action as holders of the bonds. The *Jackson* plaintiffs (Russell Jackson, the lead plaintiff) had purchased the bonds at a reduced rate from the original purchasers. *Id.* at 870.

79. *Id.* at 872-73.

80. *Id.* at 877. For a cogent analysis of the *Jackson* case and an excellent discussion of the issues involved in the claims/assets problem, see Jung & Salper, *U.S. Claims Against China: Are They Settled?*, 2 CHINA L. REP. 89 (1982).

For the PRC's reaction to the *Jackson* decision, see Parks, *Peking Upset: U.S. Court Wants 1911 Bonds Paid Off*, L.A. Times, Feb. 10, 1983, at 1, col. 5; see also *China Rejects U.S. Court Ruling* 26 BEIJING REV., Feb. 21, 1983, at 8.

For a strong criticism of the *Jackson* decision, see Zhu, *U.S. Court Trial Violates International Law*, 26 BEIJING REV., Mar. 14, 1983, at 24. Subsequent to the *Jackson* decision, the Executive Branch was requested by Chinese officials to intervene in the decision and deny its effect. See Wren, *Separation of Powers? You Must Be Kidding Says China*, N.Y. Times, Mar. 20, 1983, § IV, at 5, col. 1.

In January of 1984, the U.S. government filed a "statement of interest" in the case with U.S. District Court Judge U.W. Clemon, urging that the default judgment against China be set aside. An accompanying declaration by Secretary of State George Shultz noted that the default judgment had become a "significant issue in bilateral U.S.-China relations" and that Chinese leader Deng Xiaoping had raised the issue forcefully with him during the Secretary's visit to Peking in 1983. "The manner in which these proceedings are finally resolved

In sum, if the United States claimants can establish that their investments in China were solicited by the PRC, they could argue that the commercial activity exception to foreign sovereign immunity should apply to the claims/assets problem. If the exception were applied, the PRC would not be immune from suit. However, even if United States jurisdiction were established, the PRC could assert that the act of state doctrine prevents a United States court from reviewing its nationalization decree.

3. *The Act of State Doctrine.* The classic American definition of the act of state doctrine is found in *Underhill v. Hernandez*. There the Supreme Court stated:

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 obtained through the means open to be availed of by sovereign powers as between themselves.⁸¹

This doctrine is often used by the United States to avoid determining whether acts of foreign governments are in violation of international law.⁸²

The Supreme Court invoked the act of state doctrine to avoid making such a determination in *Banco Nacional de Cuba v. Sabbatino*.⁸³ In *Sabbatino*, the Court considered whether expropriation of United States nationals' property by the Cuban government,

can be expected . . . to have ramifications for other important U.S. interests with respect to China," the Secretary added. Mr. Shultz also made it clear that Beijing officials had implied that China would seize U.S. property in China if the Alabama court ordered the seizure of Chinese property in the U.S. to satisfy the default judgment.

W. Eugene Rutledge, the Birmingham attorney representing the bondholders, said he intended to fight against dismissal of the case and, failing that, would "appeal as far as we can appeal it. I am concerned that a foreign government that has incurred debt tries to avoid payment and that [the U.S. government] will assist them in it. . . . It is a terrible precedent . . . that will come back to haunt us." Kramer, *Judge Sets Aside \$43 Million Judgment Against China After the U.S. Intervenes*, Wall St. J., Feb. 29, 1984, at 30, col. 4.

Judge Clemon set aside the *Jackson* judgment on February 27, 1984. Clemon said in a telephone interview on the same day that he would allow both sides 14 days to request a hearing on the merits of the case. See Chen, *Judge Voids Judgment on Chinese Bonds*, L.A. Times, Feb. 28, 1984, § 1, at 3, col. 3.

81. *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897). See also *United States v. Pink*, 315 U.S. 203 (1942); *United States v. Belmont*, 301 U.S. 324 (1937); *Shapleigh v. Mier*, 299 U.S. 468 (1937); *Ricaud v. American Metal Co.*, 246 U.S. 304 (1918); *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918); *American Banana Co. v. United Fruit Co.*, 213 U.S. 347 (1909).

82. RESTATEMENT (SECOND), *supra* note 64, § 185 reporter's note 1.

83. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964).

without compensation, constituted a violation of international law.⁸⁴ The Supreme Court agreed with the lower court that the taking violated international law but reversed their decision on other grounds.⁸⁵ In *Sabbatino*, the Court determined that there was insufficient reason to deny the application of the act of state doctrine.⁸⁶

The language in the closing section of the *Sabbatino* opinion indicates a seemingly necessary, yet reluctant application of the act of state doctrine.

However offensive to the public policy of this country and its constituent States an expropriation of this kind may be, we conclude that both the national interest and progress toward the goal of establishing the rule of law among nations are best served by maintaining intact the act of state doctrine in this realm of its application.⁸⁷

Under a *Sabbatino* analysis, the PRC's nationalization decree would be respected no matter how offensive it was to United States public policy regarding the taking of United States citizens' property without just compensation. Although this analysis may be a correct projection of the application of *Sabbatino*, the United States still has a vehicle with which it may voice its disapproval of such an act. This vehicle is the concurrent application of the Hickenlooper Amendment.⁸⁸

84. *Id.* at 408.

85. *Id.*

86. *Id.*

87. *Id.*

88. Originally called the Sabbatino amendment due to its relationship to the *Sabbatino* case, the amendment is now known as the Hickenlooper Amendment since it was proposed by Senator Hickenlooper. The Senate Foreign Relations Committee's report on the Hickenlooper Amendment stated in part:

The amendment is intended to reverse in part the recent decision of the Supreme Court in *Banco de [sic] Nacional de Cuba v. Sabbatino*. The act-of-state doctrine has been applied by U.S. courts to determine that the actions of a foreign sovereign cannot be challenged in private litigation. The Supreme Court extended this doctrine in the *Sabbatino* decision so as to preclude U.S. courts from inquiring into acts of foreign states, even though these acts had been denounced by the State Department as contrary to international law The effect of the amendment is to achieve a reversal of presumptions. Under the *Sabbatino* decision, the courts would presume that any adjudication as to the lawfulness under international law of the act of a foreign state would embarrass the conduct of foreign policy unless the President says it would not. Under the amendment, the Court would presume that it may proceed with an adjudication on the merits unless the President states officially that such an adjudication in the particular case would embarrass the conduct of foreign policy.

S. REP. NO. 1188, pt. 1, 88th Cong., 2d Sess. 24 (1964); see also Metzger, *Act-of-State Doctrine Refined: The Sabbatino Case*, 1964 SUP. CT. REV. 223, 244 n. 53.

4. *The Hickenlooper Amendment*. The Hickenlooper Amendment requires the suspension of foreign aid assistance to the government of a State which, after taking the property of any United States citizen or corporation which is at least fifty percent owned by such citizens, "fails within a reasonable time . . . to take appropriate steps, which may include arbitration, to discharge its obligation under international law toward such citizen or entity, including speedy compensation for such property in convertible foreign exchange equivalent to the full value thereof, as required by international law" ⁸⁹ Applying the Hickenlooper Amendment to the claims/assets problem, assistance to the PRC should have been suspended until the PRC made full compensation to United States claimants for nationalized property.

C. *A Summary of the Legal Implications of the PRC Nationalization*

The PRC's nationalization decree gave rise to claims by United States nationals for full compensation. United States claimants' assertion that they have a right to full compensation for assets nationalized by the PRC finds support both under international and United States law. Under the international law theory of acquired rights, property rights acquired and recognized cannot be abrogated without full compensation.⁹⁰ If the acquired rights theory were to be applied to the claims/assets problem, the United States claimants would have a right to full compensation.

According to the *Restatement*, a taking by a state of the property of an alien is wrongful under international law if there is no reasonable provision for just compensation.⁹¹ Although United States claimants may have a right to full compensation, whether United States claimants receive full compensation depends upon the applicability of the Foreign Sovereign Immunities Act, the act of state doctrine, and the Hickenlooper Amendment.

Under the Foreign Sovereign Immunities Act, if the United States claimants can establish that their investments were solicited by the PRC, the defense of foreign sovereign immunity would not be applicable.⁹² Even assuming that United States claimants could establish that their investments were solicited, application of the act

89. 76 Stat. 260 (1962), 22 U.S.C. § 2370(e) (1976).

90. See *supra* notes 53-59 and accompanying text.

91. See *supra* notes 64-68 and accompanying text.

92. See *supra* notes 69-80 and accompanying text.

of state doctrine would likely bar their recovery.⁹³

The act of state doctrine holds that a United States court cannot review the actions of a foreign sovereign.⁹⁴ Even though the act of state doctrine prevents recovery by United States claimants, the Hickenlooper Amendment imposes sanctions against countries which nationalize property without providing full compensation.⁹⁵

The Hickenlooper Amendment requires suspension of assistance, under the foreign aid program, to foreign governments which fail to provide for full compensation.⁹⁶ The Hickenlooper Amendment was, in fact, applied to suspend foreign aid to the PRC. This encouraged the PRC to negotiate with the United States government concerning the settlement of the claims/assets problem.

While in principle communist countries do not recognize a responsibility for the taking of property of aliens or nationals of other countries, their interests in international claims negotiations have, in practice, compelled such responsibility.⁹⁷ Considerations, such as the desire to obtain funds frozen in foreign bank accounts, commercial credits or foreign aid, have induced communist countries to make lump-sum payments in settlement of claims for expropriations.⁹⁸

With reference to the claims/assets problem, such considerations unquestionably encouraged the PRC to negotiate a final claims settlement agreement. The international economic situation of the PRC had deteriorated by 1976. Consequently, in 1977 the PRC reinitiated diplomatic-level discussions with the United States.⁹⁹ These discussions were prompted by the fact that prior to resolution of the claims/assets problem the PRC was not eligible for the United States' Export-Import Bank credits.¹⁰⁰ Other areas of economic assistance refused by the United States pending resolution of the claims/assets problem included benefits under the fol-

93. See *supra* notes 81-87 and accompanying text.

94. *Id.*

95. See *supra* notes 88-89 and accompanying text.

96. *Id.*

97. See generally R. LILICH, INTERNATIONAL CLAIMS: THEIR ADJUDICATION BY NATIONAL COMMISSIONS (1962); Doman, *Postwar Nationalization of Foreign Property in Europe*, 48 COLUM. L. REV. 1125 (1948); Drucker, *The Nationalization of United Nations Property in Europe*, 36 TRANSNAT'L GROTIUS SOC'Y 75 (1951).

98. RESTATEMENT (SECOND), *supra* note 64, § 185 reporter's note 3 (1965).

99. See *supra* notes 35-37 and accompanying text.

100. "Nothing in the language of the act prohibits the Export-Import Bank in dealing with a country not recognized *de jure* by the United States, or with which there are not diplomatic relations." V. LI, DE-RECOGNIZING TAIWAN: THE LEGAL PROBLEMS 21 (1977).

lowing: (1) Overseas Private Investment Corporation;¹⁰¹ (2) Most-favored-nation principle;¹⁰² (3) Export Administration Act of 1969;¹⁰³ (4) Johnson Debt Default Act;¹⁰⁴ (5) arms transfers programs;¹⁰⁵ and (6) immigration status.¹⁰⁶ In view of (1) the deteriorating international economy of the PRC; (2) the potential economic assistance that a resolution of the claims/assets problem might provide; and (3) the fact that property of the PRC, such as ships, was subject to court attachment in American territory by United States claimants,¹⁰⁷ the incentives for settlement of the claims/assets problem were apparent. As history reveals, these economic incentives outweighed the ideological vision of ignoring the obligation to compensate claimants aggrieved by a patent violation of international law.

101. Overseas Private Investment Corporation, 22 U.S.C. § 2191 (1970) (as covered by the provisions of the Foreign Assistance Act of 1961, 22 U.S.C. § 2370(b), (f), (t) (1976)).

102. Most-favored-nation principle, 19 U.S.C. § 1881 (1976); *see also* Tariff Act of 1930, 19 U.S.C. § 1202 (1970).

103. Export Administration Act of 1969, 50 U.S.C. § 2401 (1970); 19 C.F.R. § 1341.1 (1977).

104. Johnson Debt Default Act, 18 U.S.C. § 955 (1970). The Johnson Debt Default Act prohibits United States residents from supplying funds to countries in default on obligations to the United States government and describes punishments to be meted out against those who violate the proscription. *Id.*

105. Arms transfers are governed by several provisions that have been brought together under a unified statutory scheme: The International Security Assistance and Arms Control Export Act of 1976, 22 U.S.C. § 2151 (Supp. 1978).

106. Immigration and Nationality Act of 1952, 8 U.S.C. § 1152 (1970). For an in-depth discussion of this provision and all of the provisions discussed in notes 100-05 *supra*, see V. Li, *supra* note 100, at 21-30.

107. *E.g.*, Oksenberg, *The U.S. and China*, in CHINA AND JAPAN: A NEW BALANCE OF POWER 270 (D.C. Hellman ed. 1976). Claimants can also assert that sections 1605(a)(2) and 1610(b)(2) of the Foreign Sovereign Immunities Act of 1976 provide jurisdiction to United States courts and permit the attachment and execution of Chinese nondiplomatic property in the U.S. Foreign Sovereign Immunities Act of 1976, 19 U.S.C. §§ 1605(a)(2), 1610(b)(2) (1976). For an explanation of the application of § 1605(a)(2), *see supra* note 74. Section 1610(b)(2) reads:

(b) In addition to subsection(a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in and of execution, or from execution upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if—

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2), (3) or (5), or 1605(b) of this chapter, *regardless of whether the property is or was used for the activity upon which the claim is based.*

Id. (emphasis added).

III. UNITED STATES GOVERNMENT'S RESPONSE TO THE CLAIMS/ASSETS PROBLEM

Before the United States government could resolve the claims/assets problem, two preliminary legal issues had to be resolved. First, the United States government had to provide a forum in which American citizens' claims against the PRC could be evaluated. Second, it had to resolve the problem of recognition of the PRC. Once these preliminary legal problems were resolved, the government responded to the claims/assets problem by negotiating the PRC Claims Agreement.

A. *International Claims Settlement and the FCSC*

Claims for compensation are subject to the control of the United States national who has suffered the injury, unless and until his claim is espoused by the United States government.¹⁰⁸ According to the *Restatement*, a claim is considered to have been espoused when the United States, usually through diplomatic channels, makes a formal claim for reparation to be paid to the United States by the government responsible for the injury.¹⁰⁹

It should also be understood that espousal is a matter of discretion.¹¹⁰ This discretion is vested in the President and exercised on his behalf by the Secretary of State.¹¹¹ Once a claim has been espoused, the President may waive or settle the claim without the approval of the claiming national.¹¹² Should the determination be to settle the claim, the reparation is received and distributed by the

108. RESTATEMENT (SECOND), *supra* note 64, § 211.

This section reads:

When a foreign state is responsible for an injury to a national of the United States, the resultant claim for reparation, until and unless espoused by the United States, and except as otherwise provided by law, is subject to the control of the national who has suffered the injury, and he is entitled to any reparation paid to him by the foreign state.

109. *Id.* comment b.

110. RESTATEMENT (SECOND), *supra* note 64, § 212.

This section provides:

The government of the United States has discretion as to whether to espouse the claim of a United States national for injury caused by conduct attributable to a foreign state that is wrongful under international law. This discretion is vested in the President and exercised on his behalf by the Secretary of State.

111. *Id.*

112. RESTATEMENT (SECOND), *supra* note 64, § 213.

The provision reads as follows:

The President may waive or settle a claim against a foreign state based on the responsibility of the foreign state for an injury to a United States national, without the consent of such national.

United States government in the form of a lump-sum settlement.¹¹³ This distribution is (1) made in reasonable compliance with statutory requirements, (2) not subject to judicial review, and (3) conclusive as to the United States national affected.¹¹⁴

In conformance with the *Restatement* principles, claims resulting from nationalizations, expropriations and other takings in violation of international law are customarily espoused by the United States government and settled through claims settlement agreements.¹¹⁵ Claims settlement agreements of the United States have usually been executive agreements and have provided for the apportioned awards of the reparation funds to individual claimants.¹¹⁶

Currently claims settlements in the United States mainly involve the activities of the Foreign Claims Settlement Commission.¹¹⁷ The FCSC was created by the President's Reorganization Plan No. 1, which assigned the functions of the War Claims Commission and the International Claims Commission to the FCSC.¹¹⁸ Each time a new international claims settlement issue arises, the International Claims Settlement Act is amended to provide for the determination of claims of United States nationals against the foreign State involved.¹¹⁹ The amendment relating to United States nationals' claims against the PRC was passed in 1966.¹²⁰

In 1966 the FCSC was authorized by an amendment to Title V of the International Claims Settlement Act of 1949 to determine such claims.¹²¹ Under Title V of the Act, the FCSC was given exclusive jurisdiction over the claims.¹²² The FCSC was directed to

113. RESTATEMENT (SECOND), *supra* note 64, § 214.

This provision reads:

When the United States government receives reparation from a foreign state in the form of a lump sum in settlement of claims arising from injuries to numerous nationals of the United States, and distributes such sum in compliance with reasonable procedures prescribed by a statute that provides that such distribution shall not be subject to judicial review, the distribution is conclusive as to the United States nationals affected.

114. *Id.*

115. *Id.* reporter's note 2.

116. *Id.*

117. International Claims Settlement Act of 1949, 22 U.S.C. § 1622 (1976).

118. *Id.*

119. For amendments concerning claims against Yugoslavia, Bulgaria, Hungary, Rumania, Italy, the Soviet Union, Czechoslovakia, Cuba, China and the German Democratic Republic, see International Claims Settlement Act of 1949, 22 U.S.C. §§ 1623-44 (1976).

120. International Claims Settlement Act of 1949, 22 U.S.C. § 1622 (1976).

121. *Id.*

122. *Id.*

“receive and determine the claims of United States nationals against the PRC, arising since October 1, 1949.”¹²³

United States nationals with claims against the PRC were directed to follow filing procedures outlined by the FCSC.¹²⁴ According to the Act, claims filed must have resulted from actions taken by or under the authority of the Chinese Communist regime.¹²⁵

Claims validated by the FCSC were to be paid with funds made available by international settlements, liquidation of foreign assets in the United States, or public funds authorized by Congress.¹²⁶ The disbursement of funds was to be made by the United States Treasury under the direction of the FCSC.¹²⁷

In preadjudicating claims, the FCSC was to determine the amount and validity of claims according to the 1966 amendment to the Act.¹²⁸ In validating claims under the 1966 amendment, the FCSC was directed to apply “(1) the provisions of the applicable claims agreement as provided in this subsection, and (2) the applicable principles of international law, justice, and equity.”¹²⁹

“Applicable principles of international law, justice, and equity” is an elusive concept which may be clarified by a comment on the function of the FCSC written by one of its Commissioners:

The Commission interprets these principles in its decisions which then become precedents in the adjudication of future cases. Thus the Commission helps to promote the development of a consistent body of law and precedent concerning international claims. Unlike its predecessors, the Commission is able to utilize the cumulative judicial and administrative experiences of its own prior programs to assure a prompt and equitable adjudication of all claims. Because of its status as a ‘court of last resort’, its decisions assume even greater importance as ‘valuable evidences of international claims law’ which manifests the progress and current status of the law of international claims and state responsibility.¹³⁰

123. FCSC 1972 ANNUAL REPORT, *supra* note 24, at 417.

124. *Id.* at 431.

125. *See id.* at 417.

126. FCSC Regulations, 45 C.F.R. § 503.1(b) (1983).

127. *See* Lichtenstein, *The Claims Settlement Agreement Between the United States and the People's Republic of China*, 1 CHINA L. REV. 25 (1980).

128. *See* FCSC 1972 ANNUAL REPORT, *supra* note 24, at 417.

129. International Claims Settlement Act of 1949, 64 Stat. 12 (1950), 22 U.S.C. § 1623(a) (1976).

130. *See generally* Re, *The Foreign Claims Settlement Commission: Its Functions and Jurisdiction*, 60 MICH. L. REV. 1079, 1101 (1962). On the matter of judicial review by the

On the reviewability of FCSC decisions, it seems that as long as the Commission accords procedural due process to claimants, its final decisions will be held not reviewable.¹³¹

The FCSC Report of 1972 (Final Report Of The China Claims Program) states:

The decisions of the Commission under the War Claims Act of 1948 and the International Claims Settlement Act of 1949, as well as under all other statutes administered, are final and conclusive on all questions of law and fact and are not subject to review by any other official, department, agency, or any establishment of the United States, or by any court of mandamus or otherwise.¹³²

This statement further supports the proposition that FCSC's validation of claims is not reviewable.

By amending the International Claims Settlement Act to give the Foreign Claims Settlement Commission exclusive jurisdiction over the claims of United States nationals against the PRC, the United States government provided a forum in which American citizens' claims could be evaluated.¹³³ Even after establishing such a forum, the United States was still faced with the problem of recognition.

B. Recognition

Prior to the United States' recognition of the PRC, the settlement of any claims arising out of the PRC nationalization declaration of 1950 was not feasible. Even though Congress gave jurisdiction over all claims to the FCSC, the settlement of the claims/assets problem, as with other international claims settlements involving the United States, could not be achieved until a binding international claims settlement agreement was reached.¹³⁴ For an international agreement to be enforceable, the parties to

FCSC, see Lillich, *Judicial Review and the F.C.S.C.*, 15 AD. L. REV. 72 (1963) [hereinafter cited as *Judicial Review*]; see also Redick, *The Jurisprudence of the Foreign Claims Settlement Commission: Chinese Claims*, 67 AM. J. INT'L L. 728 (1973). For a discussion of the history, procedure and role of the FCSC, see Lillich, *The Foreign Claims Settlement Commission and the Protection of Foreign Investment*, 48 IOWA L. REV. 779 (1963); Re, *The Foreign Claims Settlement Commission: Completed Claims Programs*, 3 VA. J. INT'L L. 101 (1963) [hereinafter cited as *The FCSC: Completed Claims Programs*]; see also Freidberg, *A New Technique in the Adjudication of International Claims*, 10 VA. J. INT'L L. 282 (1970).

131. *Judicial Review*, *supra* note 130, at 72.

132. FCSC 1972 ANNUAL REPORT, *supra* note 24, at 4.

133. International Claims Settlement Act of 1949, 22 U.S.C. § 1622 (1976).

134. H. LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 24 (1977).

such an agreement must recognize each other.¹³⁵ Hence, the United States could not enter into a binding international claims settlement agreement until it recognized the PRC.

The issue of recognition and its effect on the final settlement of the claims/assets problem is not susceptible to a cursory analysis. To facilitate a clear and comprehensive understanding of this issue, the following section will discuss the status of the claims/assets problem both before and after United States recognition of the PRC.

In considering the pre-recognition status of the claims/assets problem, three interactive circumstances will be examined: (1) the international law of recognition,¹³⁶ (2) the United States policy toward recognition of the PRC,¹³⁷ and (3) the status of blocked Chinese assets in United States courts.¹³⁸

1. *The International Law of Recognition*. The international law of recognition provides two approaches to the subject of recognition. One approach is known as the "constitutive view"¹³⁹ and the other, the "declaratory view."¹⁴⁰

The constitutive view provides that an entity shall be considered a State exclusively through the acts of recognition by other States.¹⁴¹ This view denies a State legal existence until it has been recognized by other States.¹⁴² Thus, an entity having all of the characteristics of a fully sovereign and independent State cannot rank as an international person unless it receives recognition as such from the existing members of the international society.¹⁴³ Under the constitutive view, although the characteristics of statehood gives rise to a duty to recognize, absent actual recognition there is, in law, no new international person.¹⁴⁴

The declaratory view, on the other hand, does not propose that recognition alone brings a State into existence.¹⁴⁵ Supporters of

135. *Id.*

136. *See infra* notes 139-49 and accompanying text.

137. *See infra* notes 149-54 and accompanying text.

138. *See infra* notes 155-65 and accompanying text.

139. I. BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 93 (2d ed. 1973).

140. *Id.*

141. Fitzmaurice, *The General Principles of International Law, Considered From the Standpoint of the Rule of Law*, 92 *HAGUE RECUEIL DES COURS* 5, 19-20 (pt. II, 1952).

142. *Id.*

143. *Id.*

144. *Id.*

145. J. BRIERLY, *THE LAW OF NATIONS* 139 (6th ed. 1963).

this view assert that the primary functions of recognition are (1) to acknowledge the independence of the entity claiming to be a State and (2) to ascertain the position of the recognizing State toward such an independent State.¹⁴⁶ Under this view, recognition signals the recognizing State's readiness to accept the normal consequences of recognition, namely, the extension of the usual courtesies of international intercourse.¹⁴⁷

The conflict between these two views becomes significant when determining whether or not there is a duty to recognize a political community or State entity. Article III of the Convention of Rights and Duties of States supports the declaratory view in delineating the requirements of statehood.¹⁴⁸ This, however, is not the last word on the subject. Consequently, States may have their own opinions on the duty to extend recognition to an entity that meets the requirements of statehood.

The United States maintains a position on recognition that is contrary to the position that the factual requirements of statehood give rise to a legal duty to grant recognition. The United States' position may be found in section 99(1) of the *Restatement* which provides: "A state is not required by international law to recognize an entity as a state or regime as the government of a state."¹⁴⁹ The position of the United States on recognition becomes clearer upon an examination of United States policy with regard to recognition of the PRC.

2. *The United States Policy Toward Recognition of the PRC.*

The United States government maintained a policy of nonrecognition of the PRC for many years. The United States accorded only *de facto* recognition until official recognition in 1979.¹⁵⁰ The effect of such recognition was to concede that the PRC maintained terri-

146. *Id.*

147. *Id.*

148. Convention on Rights and Duties of States, Dec. 26, 1933, 49 Stat. 3097, T.S. No. 881, 165 L.N.T.S. 19.

149. RESTATEMENT (SECOND), *supra* note 64, § 99(1).

150. See *EAST ASIA: U.S. Normalizes Relations With the People's Republic of China*, 79 DEP'T ST. BULL., Jan. 1979, at 25 [hereinafter cited as *U.S. Normalizes Relations With the People's Republic of China*]. See also *Establishment of Diplomatic Relations Between P.R.C. and U.S.A.*, PEKING REV. Dec. 22, 1978 at 8, 8-9. For an in-depth discussion of the United States policy of nonrecognition, see Tsen-ming, *Is the Policy of Non-Recognition Consistent With Rules of International Law?*, 1 ANNALS CHINESE SOC'Y INT'L L. 40 (1964).

torial control of the Chinese mainland.¹⁵¹ Prior to 1979, the absence of a *de jure* recognition of the PRC also marked the nonexistence of the PRC's right to maintain title and control over assets situated in the United States.¹⁵² The PRC was also denied the right to bring proceedings in United States courts, as were its nationals.¹⁵³

Clearly, the United States follows the constitutive view of recognition, and for all intents and purposes, accorded to the PRC a *de facto* recognition from 1949 until 1979.¹⁵⁴ Without more formal recognition, the PRC and its nationals were also denied standing in United States courts.¹⁵⁵

3. *The Status of Blocked Chinese Assets in United States Courts.* In order to highlight the status of blocked Chinese assets in the United States, court decisions made prior to PRC recognition must be examined. The PRC and the Nationalist government both filed suits in United States courts, claiming both government and corporate assets which were blocked in the United States.

In *Bank of China v. Wells Fargo Bank and Union Trust Company*,¹⁵⁶ the PRC and the Nationalist government brought suit to recover the same assets blocked by the Treasury Department in 1950. The Bank of China had been organized in 1912 under Chinese law.¹⁵⁷ At that time, the Imperial Chinese government was the owner of two-thirds of the Bank's stock, and the Wells Fargo Bank and Union Trust Company was the depository for a substantial sum of the corporation's money.¹⁵⁸ When the PRC gained control of mainland China, the Bank's main office was moved to Hong Kong, and PRC authorities subsequently took over the former

151. Wright, *The Chinese Recognition Problem*, in INTERNATIONAL LAW IN THE TWENTIETH CENTURY 602 (L. Gross ed. 1968).

152. *Id.*

153. *Bank of China v. Wells Fargo Bank & Union Trust Co.*, 92 F. Supp. 920 (N.D. Cal. 1950), *aff'd*, 190 F.2d 1010 (9th Cir. 1951), *judgment rendered*, 104 F. Supp. 59 (N.D. Cal. 1952), *modified & aff'd*, 209 F.2d 467 (9th Cir. 1953). *Chase National Bank v. Directorate General of Postal Remittance & Savings Bank*, 112 N.Y.S.2d 14 (N.Y. Sup. Ct. 1950), *modified*, 278 A.D. 820, 824; 105 N.Y.S.2d 416, *reh'g granted*, 278 A.D. 936, 105 N.Y.S.2d 924, *orig. determination upheld*, 278 A.D. 935, 105 N.Y.S.2d 923, *motion for leave to appeal denied*, 279 A.D. 576, 107 N.Y.S.2d 542 (1951). *See also infra* notes 156-65 and accompanying text.

154. *U.S. Normalizes Relations with the People's Republic of China*, *supra* note 150.

155. *Chase National Bank*, 105 N.Y.S.2d at 923.

156. *Bank of China v. Wells Fargo Bank and Union Trust Co.*, 92 F. Supp. 920 (N.D. Cal. 1950).

157. *Id.* at 921.

158. *Id.* at 922.

main office.¹⁵⁹ Thus, there existed two main offices for the corporation, one under PRC control and the other under the control of the Nationalist government in Hong Kong. When the Hong Kong directors brought suit to recover the deposit with the Wells Fargo Bank, the PRC claimed that it was the rightful recipient of the deposit.¹⁶⁰

The case was originally brought in the United States district court in California in 1950.¹⁶¹ The court continued the case *sine die*¹⁶² rather than decide the rightful representative and recipient of the Bank of China claim. The opinion of the court is significant in its treatment of the problem with which it was faced. According to the court: "The only solution which gives promise of affording protection to the Bank of China, its stockholders, depositors, and at the same time supporting the foreign policy of the United States, is to leave these funds where they are for the present."¹⁶³

Although the final result of the litigation was to award the funds to the Nationalist government, the court's initial nonresolution of the problem was very significant. It was apparent that the district court, in the absence of an executive determination regarding recognition, was avoiding a determination of ownership of Chinese assets blocked in the United States. Two possible reasons for this decision were that (1) the United States courts were not in a position to make a factual determination of ownership because of the lack of necessary information and (2) a determination based upon United States policy toward the Nationalist government or the PRC would necessarily have had complex international political repercussions.

The United States clearly was not willing to place itself in a contest between the two "Chinas" over rightful ownership of the blocked assets. The United States courts logically awaited recognition of the PRC before allowing the adjudication of cases involving blocked Chinese assets in the United States. An executive determination, such as recognition, was judicially necessary to preclude the Nationalist government from seeking a resolution to the problem of

159. *Id.*

160. *Id.*

161. *Id.* at 920.

162. This term literally means "without day," but as used here, it refers to the final dismissal of a cause without appointing a day for defendant to reappear, thus discharging him from any further appearance in court. BLACK'S LAW DICTIONARY 1242 (rev. 5th ed. 1979).

163. 92 F. Supp. 920. *See* R. SWIFT, INTERNATIONAL LAW: CURRENT AND CLASSIC 66-70 (1969).

the blocked Chinese assets in United States courts.¹⁶⁴

Prior to PRC recognition, the PRC and its nationals were denied standing to sue in United States courts. The Nationalist government was formerly the only recognized representative of China with standing in United States courts.¹⁶⁵ Therefore, prior to PRC recognition, if the United States had released the frozen Chinese assets, the Nationalist government would have claimed these assets. This would have removed \$80.5 million from United States jurisdiction which could have been used to partially satisfy investors' claims against the PRC. By withholding blocked Chinese assets, the United States retained some bargaining power over the PRC.

Once the United States recognized the PRC, it was then able to use the blocked assets as leverage in its negotiations of a solution to the claims/assets problem. It is highly likely that the blocked Chinese assets played an important role in resolving the claims/assets problem since the PRC Claims Agreement provides for a lump-sum payment to the United States of \$80.5 million, which approximately equals the value of the blocked Chinese assets.¹⁶⁶

C. *The Agreement*

Considering of the significance of United States recognition of the PRC in the settlement of the claims/assets problem, it is not surprising that negotiations for the final resolution began almost immediately after recognition on January 1, 1979.¹⁶⁷ Negotiations continued until May 11, 1979, when the Agreement was signed by PRC Finance Minister Zhang Jingfu and U.S. Commerce Secretary Juanita Kreps.¹⁶⁸

Article II outlines the actions to be taken by the two governments under the Agreement. Under Article II, the PRC agreed to pay a lump sum of \$80.5 million to the United States govern-

164. This is true since an Executive determination that the People's Republic of China was the representative of the Chinese government would deny the Nationalist government standing to bring suit in United States courts. The United States recognized the Nationalist government from 1928 through 1978. In 1979 the U.S. State Department officially recognized the People's Republic of China as the government of China. *See supra* note 40. *See also Accord Reached on Assets, supra* note 41.

165. Since the Nationalist government was officially recognized by the United States State Department, no other representative of the Chinese nation was granted standing to sue in United States courts. *Accord Reached on Assets, supra* note 41.

166. *See supra* note 19.

167. *See supra* note 40.

168. PRC Claims Agreement, *supra* note 6.

ment.¹⁶⁹ The United States correspondingly agreed to accept this as full and final settlement of all of the claims specified in Article I of the Agreement.¹⁷⁰ Further, the United States agreed to release the assets which had remained blocked since the initial action of the Treasury Department under the direction of President Truman in 1950.¹⁷¹

Provisions for the PRC to make installment payments to the United States government over a five-year period were included in Article III. Under this payment schedule, the PRC was to make an initial payment of \$30 million and thereafter to pay the \$50.5 million balance in five annual installments of \$10.1 million.¹⁷² The final installment is to be paid on October 1, 1984.¹⁷³

Through this payment procedure the PRC receives what Western investors would refer to as an interest-free loan.¹⁷⁴ Although the concepts of interest and appreciation do not play as significant a role in the PRC as they do in the United States' market economy, the interest-free time-deferred payment permitted by the Agreement poses equity considerations to the Western economist. The equity of the payment procedure, to Western thinking, is nonexistent. The actual benefit, although small, inures to the PRC, while the burden or loss, which is substantially greater, falls upon the the United States claimants.

In Article IV of the Agreement, the United States government was given exclusive authority to distribute the payments made by the PRC.¹⁷⁵ This comports with the foreign relations law of the United States.¹⁷⁶ This Article of the Agreement gave extensive and nonreviewable control to the United States government which exercises its authority through the FCSC and the Treasury Department.¹⁷⁷

Article V included provisions whereby, after the effective date

169. *Id.* art. II(a).

170. *Id.*

171. *Id.* art. II(b).

172. *Id.* art. III.

173. *Id.* art. III. Although not explicitly stated in the PRC Claims Agreement, the date has been calculated by applying the provisions of Article III. *Id.*

174. By allowing the PRC to defer payment of 50.5 million dollars of the 80.5 million dollar lump-sum payment, while at the same time failing to charge interest on the unpaid portions, the United States has in effect loaned 50.5 million dollars to the PRC for five years, interest-free.

175. PRC Claims Agreement, *supra* note 6, art. IV.

176. *See supra* note 113.

177. *See supra* notes 109-33 and accompanying text.

of the Agreement, neither government would present to the other any claim which was covered by the Agreement.¹⁷⁸ In substance, Article V expressed the finality of the Agreement as a settlement of claims between the two countries. The final section of the Agreement, Article VI, declared the effective date of the Agreement to be the date of its signing, May 11, 1979.¹⁷⁹

The PRC Claims Agreement is a lump-sum settlement which provides United States claimants with 41 cents on every dollar of their preadjudicated award. Hence, the PRC Claims Agreement does not provide full compensation to American investors for property nationalized by the PRC. As a result of this lack of full compensation, United States claimants may seek to challenge the legality of the PRC Claims Agreement.

IV. CLAIMANTS THEORIES FOR RECOVERY AGAINST THE UNITED STATES GOVERNMENT

Claimants who are dissatisfied with the 41-cents-per-dollar recovery have three possible theories of recovery against the United States government. First, claimants may argue that President Carter lacked the power to enter into a settlement agreement concerning the property of United States citizens without the express authority of Congress.¹⁸⁰ Second, claimants may assert the PRC Claims Agreement does not supply full compensation for assets nationalized. Therefore, another type of settlement should have been made.¹⁸¹ Third, claimants may assert that the Agreement does not provide full compensation for the taking of property rights which allegedly arose when the FCSC validated their claims against the PRC. Therefore, the PRC Claims Agreement is arguably in violation of the due process clause of the United States Constitution.

A. Lack of Presidential Power to Enter into the Agreement

Claimants may argue that President Carter lacked the power to enter into a settlement agreement concerning the property of United States citizens without the express consent of Congress. The government could rebut this argument by asserting that President Carter's activities were a valid exercise of his implied power to conduct foreign relations.

178. PRC Claims Agreement, *supra* note 6, art. V.

179. *Id.*

180. *See infra* notes 182-99 and accompanying text.

181. *See infra* notes 200-30 and accompanying text.

The President's power to enter into executive agreements, such as the PRC Claims Agreement, without obtaining the express consent of Congress has been contested on a number of previous occasions.¹⁸² The most recent precedent supporting this Presidential power is a 1981 Supreme Court decision.¹⁸³

Dames & Moore v. Regan involved President Reagan's actions with regard to the national emergency created by the Iranian hostage crisis.¹⁸⁴ The dispute involved various executive orders and regulations by which the President: (1) nullified attachments and liens on Iranian assets in the United States, (2) directed these assets be transferred to Iran, and (3) suspended claims against Iran that might have been presented to an international claims tribunal such as the FCSC.¹⁸⁵

In *Dames & Moore*, the Supreme Court upheld the actions of the President.¹⁸⁶ The Court reasoned that: (1) the *Restatement (Second) of the Foreign Relations Law of the United States* recognized the President's power to "waive or settle a claim against a foreign state . . . even without the consent of the [injured] national";¹⁸⁷ (2) "[t]he practice of settling claims is supported by the fact that since 1952 the President has entered into at least 10 binding settlements with foreign nations, including an \$80 million settlement with the People's Republic of China";¹⁸⁸ (3) the demonstration of Congress' continuing acceptance of the President's claim settlement authority could be found in Congress' frequent amendments to the International Claims Settlement Act;¹⁸⁹ and (4) in addition to congressional acquiescence to the President's power to settle claims, the Court had previously also recognized that the "President does have some measure of power to enter into executive agreements without obtaining express congressional consent."¹⁹⁰

The landmark precedent cited by the Court involved the Litvi-

182. See *United States v. Pink*, 315 U.S. 203 (1941); *United States v. Belmont*, 301 U.S. 324 (1937). In these cases, the Supreme Court ruled that the Litvinov Assignment with the Soviet Union in 1937 had legal effect in United States courts. This assignment had been entered into by the President without congressional approval.

183. *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

184. *Id.*

185. *Id.*

186. *Id.*

187. See *supra* note 112.

188. *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

189. *Id.*

190. *Id.*

nov Assignment which settled claims arising out of Russian nationalization decrees and is notably analogous to the present claims/assets problem. The case, *United States v. Pink*, was decided by the Court in 1941.¹⁹¹ The rule stated in *Pink* is:

The powers of the President in respect to the recognition of a foreign government, includes the power to remove such obstacles to full recognition as the settlement of claims of our nationals The powers of the President in the conduct of foreign relations included the power, without the consent of the Senate, to determine the public policy of the United States with respect to the Russian nationalization decrees.¹⁹²

Since the circumstances of the Litvinov Assignment are analogous to the circumstances of the PRC Claims Agreement, a United States court would likely hold that the PRC Claims Agreement was a valid exercise by the President of his executive power to conduct foreign relations.

Claimants, however, could argue that the signing of the PRC Claims Agreement infringed upon the congressional power to regulate foreign commerce.¹⁹³ This argument was raised in *United States v. Guy W. Capps Inc.*, a fourth circuit case decided in 1953.¹⁹⁴ There, the Supreme Court affirmed the decision of the lower court stating that "the congressional power to regulate foreign commerce is not a limitation to presidents' implied powers."¹⁹⁵ In *Consumer's Union of the United States Inc. v. Rogers*, the Supreme Court further stated that the President was vested with the independent authority normally reserved for Congress so long as his activities are sufficiently connected with the furtherance of international relations.¹⁹⁶

Under the foregoing authorities, President Carter's negotiation of the PRC Claims Agreement could be held proper for two reasons. First, President Carter's prerecognition negotiations involving the claims/assets problem were conducted in the interest of removing obstacles to recognition of the PRC.¹⁹⁷ The negotiations, therefore, were made in the interest of furthering United States for-

191. *Pink*, 315 U.S. at 203.

192. *Id.* at 205. See also Cardozo, *The Authority on Law of International Treaties: The Pink Case*, 13 SYRACUSE L. REV. 544 (1962).

193. This argument was raised in *United States v. Guy W. Capps Inc.*, 204 F.2d 655 (4th Cir. 1953), *aff'd*, 348 U.S. 296 (1955).

194. *Id.*

195. *Id.*

196. *Consumer's Union of U.S., Inc. v. Rogers*, 352 F. Supp. 1319, 1323 (D.D.C. 1973).

197. *Pink*, 315 U.S. at 229.

eign relations with the PRC. Second, the postrecognition negotiations and subsequent Agreement were sufficiently connected with furthering of international relations as to vest in the President the independent authority normally reserved for Congress.¹⁹⁸

The conspicuous absence of congressional disapproval lends additional support to the validity of the Agreement. According to the *Dames & Moore* decision, the frequent amendment by Congress of the International Claims Settlement Act demonstrates Congress' continuing acceptance of the President's claims settlement authority.¹⁹⁹

The Agreement, therefore, stands as a valid exercise of the President's powers absent congressional approval or authorization. This is so because: (1) it was made with respect to the recognition of a foreign government and (2) by settling the claims of United States nationals, it attempted to remove obstacles to *de jure* recognition and the subsequent furtherance of international relations.

B. Sufficiency of the Lump-Sum Settlement

Claimants may also argue that since the PRC Claims Agreement did not provide full compensation for assets nationalized, another type of settlement should have been made. The opposing argument holds that the lump-sum settlement agreement sidesteps many of the difficulties which accompany an assignment-type settlement agreement.²⁰⁰ Since an assignment-type settlement is the only other type of settlement which could have been considered in the resolution of the claims/assets problem, claimants would not likely prevail on this theory.

The clearest example of the difficulties which accompany an assignment-type agreement is the Litvinov Assignment.²⁰¹ This

198. 352 F. Supp. at 1319.

199. *Dames & Moore*, 453 U.S. at 654. Absence of congressional disapproval also supports the President's authority to enter into the PRC Claims Agreement without the express approval of Congress. See also N.Y. Times, Mar. 2, 1979, at A5, col. 1. which reported that [t]he normalization of U.S.-PRC relations was generally favored in Congress, and no congressional resistance to the Agreement has developed. A challenge to the Executive's authority could still come, however, from U.S. claimants dissatisfied with the Agreement's \$0.41 per dollar compensation terms.

200. For a discussion of these difficulties, see Comment, *Assignment of Claims by the Russian Government to the United States*, 28 AM. J. INT'L L. 545 (1934) [hereinafter cited as Comment, *Assignment of Claims*]; Note, *The Effect Since Recognition of Soviet Decrees on Property Located in the United States*, 4 GEO. WASH. L. REV. 355 (1936); Comment, *International Law—Soviet Decrees Nationalizing Russian Insurance Companies—Assignment of Assets to the United States—Extraterritoriality*, 13 ST. JOHN'S L. REV. 163 (1938).

201. See Comment, *Assignment of Claims*, *supra* note 200.

Agreement was employed by the United States in the settlement of claims arising out of the nationalization of United States nationals' property in Russia in the 1930's.²⁰² The Litvinov Assignment was not sufficiently determinative and final with regard to the claims it was designed to settle. The result was extensive litigation by United States and USSR nationals over the bilateral claims supposedly settled by the Agreement.²⁰³

In addition to avoiding the postagreement litigation of an assignment-type settlement, there were four other factors which contributed to the choice of a lump-sum agreement. First of all, the socioeconomic situation of the PRC provided little confidence that any funds in excess of those blocked in the United States would ever become available for negotiation purposes.²⁰⁴ Second, the inadequacy of the funds available for negotiation was not an issue of first impression for the FCSC, since most all foreign settlement programs have provided a less than full payment on claims.²⁰⁵ Third, the United States government was not required to compensate its nationals for the difference between the amount of validated claims and the actual amount of funds received under any lump-sum settlement.²⁰⁶ Fourth, a large portion of total claims held by a relatively small number of claimants suggested the possibility of mitigation with regard to the satisfaction of those claims.²⁰⁷

1. *The Socioeconomic Situation of the PRC.* The likelihood that the PRC would be willing to transfer any funds in excess of those blocked in the United States was slight. As one commentator concluded:

[T]he particular circumstances of Chinese history, including unequal treaties, foreign commercial domination as a general result of the inferior military position of China, and the general Communist opposition to the cultural and political imperialism and exploitation which allegedly accompanied many of these financial and educational activities, will have their impact on an acceptable settlement of claims. Moreover, in order to accept as valid all certified claims, the PRC would have to admit that cer-

202. See Comment, *Recognition of Russia*, 28 AM. J. INT'L L. 90 (1934); see also Comment, *Russian Claims Negotiations*, 29 AM. J. INT'L L. 290 (1935); see generally Comment, *Assignment of Claims*, *supra* note 200.

203. *Id.*

204. See *infra* notes 208-09 and accompanying text.

205. See *infra* notes 210-17 and accompanying text.

206. See *infra* notes 218-25 and accompanying text.

207. See *infra* notes 226-30 and accompanying text.

tain of its previous governmental decrees were against international law; for example, the claims resulting from the de facto "ransom" demands of the PRC would seem particularly troublesome.

If one sets the present day value of claims, with interest, at \$400,000,000, China would have difficulty, in the absence of an overall trade package with the United States in securing the foreign exchange to settle them, even if it should wish to do so. While the United States might settle for Chinese payment over a period of twenty years, as in the case of Poland, and more recently in the case of Hungary, China may not be willing to accept such a long-term debt. Moreover, with the PRC now entering an expansive period of foreign policy, the need for \$100-200 million annual foreign exchange surplus will be even greater.²⁰⁸

In a practical sense, the PRC could not afford to remit full compensation to the United States in settlement of the claims/assets problem. Thus, the socioeconomic status of the PRC supported the negotiation of a lump-sum settlement.²⁰⁹

2. *Inadequacy of Funds Not an Issue of First Impression for the FCSC.* The inadequacy of funds did not present a great difficulty in the settlement of the claims/assets problem. Most of the foreign claims settlement agreements prior to the claims/assets resolution had not, in fact, provided full value compensation to claimants.²¹⁰ At the time of the PRC Claims Agreement, settlements had already been concluded with Yugoslavia,²¹¹ Rumania,²¹² Bulga-

208. Redick, *supra* note 130, at 739.

209. *Id.*

210. See *infra* notes 211-15 and accompanying text.

211. The United States accepted payment of 17 million dollars on 876 certified claims totalling \$18,817,890 exclusive of interest. A total of 1,556 claims were originally filed. Claims Settlement Agreement, July 19, 1948, United States-Yugoslavia, 62 Stat. 2658, T.I.A.S. No. 1803. See Clay, *Aspects of Settling Claims Under the Yugoslav Claims Agreement of 1948*, 48 GEO. L.J. 582 (1955); Coerper, *The Foreign Claims Settlement Commission and Judicial Review*, 50 AM. J. INT'L L. 868 (1956); *The FCSC: Completed Claims Programs*, *supra* note 130, at 105.

212. The United States accepted a lump sum of \$24,526,370 as the final settlement of all claims against Rumania. With interest, these claims amounted to 85 million dollars. The fund was made up of blocked assets plus an additional 2.5 million dollars payable in five installments between July 1, 1960, and July 1, 1964. The 498 certified claims received approximately a 219% return of which 26% came from the additional 2.5 million dollar payment. Claims Settlement Agreement, Mar. 30, 1960, United States-Rumania, 11 U.S.T. 317, T.I.A.S. No. 4451. See Christenson, *The United States-Rumanian Claims Settlement Agreement of March 30, 1960*, 55 AM. J. INT'L L. 617 (1961).

ria²¹³ and Poland.²¹⁴ None of these settlements provided for full compensation.²¹⁵ In fact, of all the foreign claims settlement agreements that preceeded the PRC Claims Agreement, there are only two settlements with Communist countries in which higher returns were paid.²¹⁶ Both of these settlements are distinguishable by reason of special circumstances.²¹⁷

3. *Nonliability for Disbursement to Claimants of Less-than-Full Value for Validated Claims.* There is little possibility of any successful litigation against the United States government for its decision to negotiate a less-than-full settlement with the PRC. As previously discussed, the foreign relations law of the United States does not impose a requirement on the United States government to settle the international claims of its nationals.²¹⁸ Instead, espousal is a matter of discretion vested in the President.²¹⁹ Further, once a claim has been espoused, the President may waive or settle the claim without the approval of the injured national.²²⁰ Finally, should the President decide to settle the claim, the lump-sum repa-
ration would be distributed by the United States government.²²¹ The distribution must be: (1) in reasonable compliance with statu-

213. The U.S.-Bulgarian Agreement of 1963 was a lump sum settlement of \$3,543,398. There were 391 claims filed with the FCSC, of which only 217 were certified. The total value of certified claims was \$6,571,825 which represented \$4,684,187 of principal and \$1,887,638 of interest. The \$3,543,398 lump sum was composed of \$3,143,398 worth of blocked assets in the U.S., and the additional \$400,000 was supplied by an additional payment by the Bulgarian government. This total represented a 53.9% return on the total value of claims as established by the FCSC. Claims Settlement Agreement, July 2, 1963, United States-Bulgaria, 14 U.S.T. 969, T.I.A.S. No. 5387.

214. Claims Settlement Agreement, July 16, 1960, United States-Poland, 11 U.S.T. 1953, T.I.A.S. No. 4545. The Agreement provided that 40 million dollars be paid to the United States government over a 20 year period beginning in January 1961. There were 5,147 certified claims, only half of the approximate 10,169 claims which had been filed. The value of certified claims was \$100,737,581. The approximate return paid on FCSC awards was 36%. See FCSC 1972 ANNUAL REPORT, *supra* note 24, at 3435; *see also* Note, *The American-Polish Claims Agreement of 1960*, 55 AM. J. INT'L L. 452 (1961).

215. *See supra* notes 211-15 and accompanying text.

216. One of these settlements was the Yugoslav Settlement of 1948. This settlement yielded approximately 90 cents on the dollar. In that case, the United States agreed to give Yugoslavia 40 million dollars in gold, which the United States held, when the Yugoslavian government paid the 17 million dollars in cash. The next highest percentage return settlement was the Bulgarian settlement which involved a cash payment of \$400,000 and yielded 73 cents on the dollar. *See* Mundheim, *supra* note 41.

217. *Id.*

218. *See supra* notes 109-14 and accompanying text.

219. *Id.*

220. *Id.*

221. *Id.*

tory requirements, (2) not subject to judicial review, and (3) conclusive as to the affected United States national.²²²

The decision by the Court of Claims in *Seery v. United States*, also supports nonliability for the United States government's obligation to its nationals for negotiating a less-than-full settlement.²²³ In a special report involving the American-Turkish Claims Settlement, the nonliability issue was clearly stated: "A state is under no obligation to its nationals in the international settlement of the claims of those nationals. Any amount received seems legally to be a national fund on which no claimant has a lien."²²⁴ Therefore, since the United States government has no liability to its nationals for a less-than-full settlement, a lump-sum settlement gains even greater support. A final factor which arguably supported the negotiation of a lump-sum settlement agreement was the "deep pocket" nature of those claimants holding the largest claims.²²⁵

4. *Large Portion of Total Claims Held Disproportionately by Few Claimants—Mitigating Aspects.* Considering the previously discussed factors supporting a lump-sum settlement, the probability of a such a settlement raised the question of how an equitable disbursement of the inadequate funds would be effected. A breakdown of the total claims reveals an important mitigating factor in this respect. Sixteen claimants held \$116 million of the \$197 million of FCSC certified claims.²²⁶ This fact may be responsible for the FCSC's three-part fund disbursement procedure which provides a progressively smaller percentage return on claims of pro-

222. *Id.*

223. *Seery v. United States*, 127 F. Supp. 601 (Ct. Cl. 1955); *see also* A. NIELSON, AMERICAN-TURKISH CLAIMS SETTLEMENT, OPINIONS AND REPORTS (1937).

224. *See* A. NIELSON, *supra* note 223, at 4-5.

225. *See generally* W. PROSSER, THE LAW OF TORTS (4th ed. 1971).

226. The FCSC determined that the following corporations have certified losses of one million dollars or more:

1. Shanghai Power Company	\$ 53,832,885
2. Esso Standard	\$ 27,026,602
3. Caltex Limited	\$ 5,443,700
4. IT&T Corporation	\$ 7,765,315
5. General Electric Company	\$ 4,546,200
6. International Standard Electric Corporation	\$ 3,228,853
7. Western District Power Company Shanghai	\$ 1,758,685
8. First National City Bank	\$ 1,562,145
9. Shanghai Wharf and Warehouse Company	\$ 1,042,862
Total	\$116,207,447

FCSC 1972 ANNUAL REPORT, *supra* note 24, at 508.

portionately greater value.²²⁷ This procedure spreads losses to “deep pockets,” but is supported by the fact that should additional funds somehow become available, each claimant stands to receive full compensation for his claim.²²⁸ The countervailing argument is that in most claims settlements agreements, additional funds rarely become available.²²⁹

The preceding factors, viewed in the light of the litigation accompanying the Litvinov Assignment, augured for a lump-sum settlement of the claims/assets problem. The use of a lump-sum settlement was arguably the most effective method for final resolution of the claims/assets problem and created little or no international diplomatic turmoil. The issue of domestic turmoil, however, is another matter.

Under the present analysis, claimants who are dissatisfied with a less-than-full value settlement may present one additional theory for recovery against the United States government. Claimants could argue that the Agreement violated the United States Constitution.²³⁰

C. The Constitutionality of the Agreement

Claimants could argue that the Agreement violated the United States Constitution. Claimants could assert that in preadjudicating their claims, the “awards” granted by the FCSC conferred upon them a property right.²³¹ The basis of this contention is the due process and equal protection clauses of the fourteenth amendment.²³²

Assuming the awards of the FCSC conferred property rights, claimants could assert that since they receive only 41 cents per dollar on their awards, the United States government has deprived them of fifty-nine percent of their property without due process. Claimants could assert the absence of due process on the ground that they had nothing to say about the settlement of their claims.

This contention, however, is unpersuasive since the *Restatement (Second) of Foreign Relations Law of the United States* sup-

227. See Lichtenstein, *supra* note 127.

228. See FCSC 1972 ANNUAL REPORT, *supra* note 24, at 32.

229. However, this would entail renegotiation of the PRC Claims Agreement. Additional funds of this kind have not been supplied after the initial settlement of *any* of the previous claims settlement agreements. See *supra* notes 210-17 and accompanying text.

230. U.S. CONST. amend. XIV.

231. *But see supra* notes 223-24 and accompanying text.

232. U.S. CONST. amend. XIV, § 1.

ports: (1) the government's discretionary espousal of the claims of its nationals,²³³ (2) the nonreviewability of the distribution of reparation to nationals whose claims have been espoused and settled,²³⁴ and (3) the finality of a settlement made by the government as to the affected national.²³⁵

Claimants could also raise an equal protection argument based on the procedure established by the FCSC for the disbursement of funds to United States claimants.²³⁶ The procedure provides all holders of awards of one thousand dollars or less are to be paid in full, while holders of larger awards receive only one thousand dollars plus a prorated portion of the remaining funds available for disbursement.²³⁷ Claimants could argue that holders of the former claims are receiving full compensation, while holders of larger awards are suffering a loss which actually increases with the size of those awards. Therefore, claimants could assert that the fund disbursement procedure violated the equal protection clause of the United States Constitution.

The foreign relations law of the United States, however, supports the actions of espousal, settlement and ultimate disbursement of reparation for claims of United States nationals arising out of takings in violation of international law.²³⁸ Claimants, therefore, would likely not be successful in their constitutional arguments.

D. Summary

In conclusion, claimants who are dissatisfied with a "mere" forty-one-percent payment on their FCSC-certified claims have no standing to sue.²³⁹ Further, the PRC Claims Agreement appears to be a valid exercise of the President's executive power and can not be nullified on the grounds of an absence of such power.²⁴⁰ The provisions of the PRC Claims Agreement provide the United States claimants with no possibility of future adjudication of their claims in the PRC. In addition, the decisions of the FCSC and the manner of fund disbursement utilized by the United States Treasury

233. See *supra* notes 110-14 and accompanying text.

234. *Id.*

235. *Id.*

236. See FCSC 1972 ANNUAL REPORT, *supra* note 24, at 725.

237. See Lichtenstein, *supra* note 127.

238. See *supra* notes 110-14 and accompanying text.

239. See *supra* notes 182-237 and accompanying text.

240. See *supra* notes 182-99 and accompanying text.

Department are not reviewable.²⁴¹ Consequently, claimants will likely be unsuccessful in obtaining full compensation since the PRC Claims Agreement is final and binding. However, since the PRC Claims Agreement provided for only 41 cents on each dollar of FCSC certified claims, this inadequate compensation gives rise to the question of whether United States policy regarding claims settlement agreements should be changed.

V. POLICY CONSIDERATIONS

Generally, the United States seeks to encourage foreign relations. Since foreign relations includes both diplomatic and economic relations, claims settlement agreements should also consider both types of relations. The PRC Claims Agreement successfully encouraged diplomatic relations by allowing the United States to avoid adjudicating whether the PRC was in violation of international law. Such an adjudication would have been an insult, seriously injuring foreign relations between the United States and the PRC.

On the other hand, the PRC Claims Agreement seemingly has failed to properly weigh the importance of economic relations between the United States and the PRC. By providing inadequate compensation to United States nationals for nationalized property, the Agreement has not furthered the economic aspect of foreign relations. It is unquestioned that without the security of a full compensation requirement, United States private investment in foreign countries will be chilled.²⁴²

With the exception of terrorism, the event most feared by the entrepreneur doing business in a developing country is the expropriation of his property.²⁴³ In various studies concerning private investment in developing countries, the risk of expropriation consistently ranked highest in the category of risks which deter foreign investment.²⁴⁴ These risks, studies have shown, are very real. In the late 1960's a study of *Fortune* 500 companies disclosed that 187 of these companies had experienced an expropriation since the end

241. See *supra* notes 108-33 and accompanying text.

242. See *infra* notes 243-46 and accompanying text.

243. See, e.g., W. CLARKE, PRIVATE ENTERPRISE IN DEVELOPING COUNTRIES 31-44 (1965). Other noneconomic risks include war, revolution and exchange control regulation. Economic risks include such things as inflation, currency devaluation and inconvertibility of currency. ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, INVESTING IN DEVELOPING COUNTRIES 9-22 (1972).

244. *Id.*

of World War I.²⁴⁵ A research study by the State Department similarly indicated that there had been at least eighty-six instances of expropriation and related activity between July 1971 and July 1973.²⁴⁶ The absence of internationally applicable standards regarding the settlement of expropriations has done little to alleviate the chilling effect of possible expropriation or nationalization has had upon foreign investment in developing countries.

It is uncontested that the United States' policy throughout the post-World War II period has been to assist the developing countries in successfully meeting their developmental goals.²⁴⁷ This policy, although somewhat altruistic, manifests a sense of enlightened self-interest in that it recognizes that where legitimate aspirations of developing countries are frustrated, the likelihood of a comfortable world order is slight. In addition, the United States policy exhibits a conviction that substantial flows of private capital, with the technology, know-how and management skills that accompany it, are essential to this development process.²⁴⁸ Although bilateral and multilateral governmental aid is not insignificant, private resource transfers are an essential element.²⁴⁹

Inadequate compensation for expropriations and nationalizations constitutes a major threat to these essential private investments.²⁵⁰ This threat exists because private investors come from environments, such as the United States, where private property rights are recognized as the most significant benefits of citizenship and are protected accordingly. It is therefore unrealistic to suppose that investors will forego such protection by continually placing their assets at risk in countries where private property rights are not accorded similar protections.

In order to foster continued high levels of foreign investment

245. Root, *The Expropriation Experience of American Companies: What Happened to 38 Companies*, BUS. HORIZONS, Apr. 1968, at 69. The greatest disputes have involved Latin and South American countries, perhaps beginning with the Mexican nationalizations in the 1960's and Chilean copper nationalizations in the early 1970's. Regarding two of the most recent expropriations, one in Venezuela and one in Peru, see Gantz, *The Marcona Settlement: New Forms of Negotiation and Compensation for Nationalized Property*, 71 AM. J. INT'L L. 474 (1977) [hereinafter cited as *The Marcona Settlement*]; Gantz, *The United States Peruvian Claims Agreement of February 19, 1974*, 10 INT'L LAW. 389 (1976); Rossi-Guerrero, *The Transition from Private to Public Control in the Venezuelan Petroleum Industry*, 9 VAND. J. TRANSNAT'L L. 475 (1976).

246. *The Marcona Settlement*, *supra* note 245, at 474 n.2 (unclassified research).

247. Smith, *supra* note 67 at 521.

248. *Id.*

249. *Id.*

250. See *supra* notes 243-46 and accompanying text.

in developing countries, the United States government should take a strong position with regard to the issues of expropriation and nationalization. If economic relations between the United States and nationalizing countries are to be furthered, full compensation for nationalized property must be required. Moreover, the allowance for nonpayment or reduced payment in a situation involving large-scale nationalization proceedings may encourage further unwarranted nationalizations. Such an allowance may well develop into a defense of virtual inability to pay compensation. Toleration of this practice, absent a motive for mere deferral of compensation, would in turn create an incentive to take even larger sectors of the economy. If the United States is to encourage economic relations between itself and other countries through its private citizens, a mechanism must be provided for a private investor to receive full compensation for his property nationalized abroad.

In conclusion, the PRC Claims Agreement only partially encourages foreign relations between the United States and the PRC. Diplomatic relations were appeased by the PRC Claims Agreement since the United States avoided adjudicating whether the PRC was in violation of international law. Economic relations between the United States and the PRC, however, were weakened due to the absence of full compensation for certified claims. Therefore, United States policy regarding claims settlement agreements should be changed so as to weigh equally economic relations against diplomatic relations.

VI. PROPOSAL

In order to properly weigh economic relations against diplomatic relations when making claims settlement agreements, United States policy should follow a two-step analysis. First, in order to encourage nationalizing countries to negotiate claims settlement agreements, the United States should invoke the Hickenlooper Amendment to suspend assistance to countries which take the property of United States nationals without providing full compensation.²⁵¹ Second, in negotiating a claims settlement agreement, the United States should require full compensation, even where such a requirement, in view of the socioeconomic situation of the nationalizing country, would cause a great hardship. This hardship could be avoided by permitting the nationalizing country to pay the re-

251. Foreign Assistance Act of 1971, 22 U.S.C. § 2370(e)(1)(C) (1972).

quired compensation over an extended period of time. This period should be established by applying equity principles regarding the ability of the nationalizing country to make immediate and future payments toward full compensation. In this way, the United States would stand firm in its position that nationalization of United States nationals' property without a provision for full compensation will not be tolerated. Accordingly United States citizens would be provided with the security that their foreign investments will be protected. This policy will further foreign relations in the sense that economic relations will be properly weighed and protected. Diplomatic relations should not be overly damaged by this policy. Further, this policy does not prohibit foreign governments from nationalizing United States investments, but only requires full compensation for such nationalization. Hence, this policy does not attempt to control the acts of foreign governments. Moreover, foreign governments would benefit from the increased United States foreign investments encouraged under this policy.

VII. CONCLUSION

The claims/assets problem between the United States and the PRC arose in 1950.²⁵² On December 17, 1950, the United States Treasury Department froze all Chinese assets and accounts in the United States. The PRC responded by nationalizing all United States property in China on December 28, 1950.²⁵³ United States claimants asserted a right to full compensation for their nationalized property.

Under international law, the theory of acquired rights supports United States claimants' assertion of the necessity of full compensation.²⁵⁴ Under United States law, the *Restatement (Second) of Foreign Relations Law* reiterates the claimants' entitlement to full compensation.²⁵⁵ The PRC, however, has two possible defenses to this assertion. First, they can claim, under the Foreign Sovereign Immunities Act, immunity from suit by private United States citizens. Second, they can claim the act of state doctrine makes their acts nonreviewable by United States courts. If United States claimants can establish that the PRC solicited their investments, the de-

252. See *supra* notes 14-18 and accompanying text.

253. See Administrative Council Order, *supra* note 2.

254. See *supra* notes 53-59 and accompanying text.

255. See *supra* notes 64-68 and accompanying text.

fense of foreign sovereign immunity would not be available.²⁵⁶ The act of state doctrine, however, if applied to the claims/assets problem would bar suit by United States claimants.²⁵⁷

Although full compensation was not demanded of the PRC, the application of the Hickenlooper Amendment to the PRC's nationalization encouraged the PRC to negotiate an agreement with the United States to resolve the claims/assets problem.²⁵⁸ The United States responded to the claims/assets problem in 1966 by establishing a forum in which American citizens' claims against the PRC could be evaluated.²⁵⁹ This forum was the Foreign Claims Settlement Commission, which preadjudicated the claims of United States nationals against the PRC and certified approximately \$197 million of claims for compensation.²⁶⁰ However, payment on these claims could not be made until the United States recognized the PRC and entered into a claims settlement agreement.²⁶¹

On January 1, 1979, the United States recognized the PRC, and a claims settlement agreement was signed by the two countries on May 11, 1979.²⁶² The PRC Claims Agreement resolved all bilateral claims and counterclaims which arose between the two countries in 1950.²⁶³ The PRC Claims Agreement permitted the PRC to reclaim assets and accounts which were frozen by the United States Treasury Department in 1950.²⁶⁴ This Agreement also provided that the PRC would remit to the United States government a lump-sum payment equivalent to the value of unfrozen assets.²⁶⁵ This lump-sum payment of \$80.5 million constituted only partial compensation for the \$197 million of United States nationals' property.²⁶⁶

The United States government espoused the claims of United States nationals and agreed that the PRC Claims Agreement was a full and final settlement of the claims/assets problem.²⁶⁷ For this reason, United States nationals have no standing to contest the av-

256. See *supra* notes 69-80 and accompanying text.

257. See *supra* notes 81-87 and accompanying text.

258. See *supra* notes 35-37 and accompanying text.

259. See *supra* notes 20-23 and accompanying text.

260. See *supra* notes 20-29 and accompanying text.

261. See *supra* notes 40-42 and accompanying text.

262. *Id.*

263. PRC Claims Agreement, *supra* note 6, art. II(a).

264. See *supra* notes 14-17 and accompanying text.

265. *Id.*

266. See Administrative Council Order, *supra* note 2.

267. See *supra* note 3.

erage 41 percent compensation that they receive.²⁶⁸ This compensation indicates that United States policy with regard to foreign nationalizations and foreign investment fails to consider properly the economic effects of inadequate compensation.²⁶⁹

Although the PRC Claims Agreement arguably furthered diplomatic relations, the inadequate compensation provided has the effect of chilling United States private foreign investment. Therefore, it is proposed that in the future the United States require full compensation for property taken by foreign nationalizations.

Until the United States adopts such a proposed policy, United States foreign investors should be forewarned of the ultimate consequences of the nationalization of their foreign investments. Although the United States government may espouse United States foreign investors' claims against a foreign government which nationalizes their property, full compensation will not always be compelled. Investors must be made aware that it may be impossible for them to prevail when demanding full compensation for the taking of their property abroad. Accordingly, they may have to accept a small fraction of the value of their loss or be forced to defer receipt of any compensation for an extended period of time.

*Laurie A. Pinard**

268. *See supra* note 9.

269. *See supra* notes 242-51 and accompanying text.

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