United States – People’s Republic of China Blocked Assets and Claims Problem: International and Domestic Law

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NOTES AND COMMENTS

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I. INTRODUCTION

The United States Government recognized the Nationalist Government of the Republic of China in 1928.¹ This recognition continued through 1945 with the designation of the Nationalist Government to accept the Japanese surrender at the conclusion of World War II. In 1949 the People’s Republic of China (P.R.C.) was proclaimed. The reaction of the State Department was indecisive and ambiguous. The United States assistance to the Nationalist Government in its attempt to reassert control of the mainland was limited to indirect measures and economic sanctions against the P.R.C. in the form of a trade embargo.² The issue of recognition i.e., which Chinese government to accord recognition to, was not settled until shortly after the Chinese intervention in Korea on December 17, 1950. Reaction by the United States at this point was quick and decisive. The Treasury Department, under the authority of the Trading With The Enemy Act,³ initially blocked all assets and accounts of both Chinese governments and all Chinese nationals. The P.R.C. responded with the declaration on December 29, 1950 nationalizing all public and private assets of the United States. The initial hesitation of the State Department and President Truman to extend recognition to the P.R.C. hardened into a twenty-five year period of non-recognition. Recognition of the P.R.C. and the settlement of financial claims by the United States citizens arising out of the P.R.C.’s nationalization of U.S. assets in 1950 are two

aspects of the complex bilateral international situation currently existing between the two countries.

A. The International Political and Legal Milieu

There exist three main components of the U.S.-P.R.C. impasse. Firstly, the P.R.C. maintains that the United States recognition of the Nationalist Government of China is a continuing intervention in a civil war. This intervention is symbolized by the 1954 Security Treaty between the United States and the Nationalist Government. Secondly, both Chinese Governments maintain the position that each is the government of all of China in spite of the fact that in reality each is the government only of the territory that it controls. The final component of this complex international situation is that the United States policy of recognition is against the tide of international practice. Since 1971, the Nationalist Government has been expelled from China’s seat at the United Nations and replaced by the P.R.C. Government. In addition to this, more than fifty states have severed diplomatic relations with the Nationalist Government leaving only 23 states that continue to recognize the Nationalist Government. Meanwhile the P.R.C.’s position in the international community has continued to strengthen. This is represented by the increase in the number of states from 47 in 1970 to 114 in 1977 that have accorded recognition to the P.R.C. The United States is the only major global power still according recognition to the Nationalist Government.

The Joint Communique issued at the conclusion of President Nixon’s China Trip in 1972 that has subsequently become known as the Shanghai Communique marked the beginning of the United States’ interest in extending recognition to the P.R.C. In this communique the P.R.C. stated three indispensable prerequisites for the establishment of full diplomatic relations between the two countries: 1) severance of relations with the Nationalist Government; 2) withdrawal of American troops from Taiwan; and 3) the abrogation of the security treaty between the United States and the Nationalist Govern-

6. One of the sources of international law is the practice of states. STATUTE OF THE INTERNATIONAL COURT OF JUSTICE art. 38; see also I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 1-32 (2d ed. 1973) [hereinafter cited as BROWNLIE].
7. Oksenberg, supra note 4, at 269-79.
8. Id.
9. Id.
10. Id.
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ment. This position has been reaffirmed by the P.R.C. within the past two years.12

Despite these recent reaffirmations, there have been indications that the P.R.C. regards its defense problem with respect to the U.S.S.R. as a more important problem than the Taiwan issue which has become of secondary importance.13 If this is so, then there is reason to believe that the conditions set forth in the Shanghai Communique are not as indispensable as the P.R.C. maintains. As the importance of their defense problem grows, so grows their desire for normalization of relations with the United States, since normalization would function to solidify the P.R.C.'s international position vis-a-vis the U.S.S.R.

The international economic situation of the P.R.C. deteriorated in 197614 and the P.R.C. re-initiated diplomatic level discussions with the United States regarding the settlement of the blocked assets and claims problem early in 1977.15 Until the claims problem is resolved the P.R.C. will not be eligible for the United States Export-Import Bank Credits.16 Other areas of possible economic assistance by the United States include benefits under the following programs:

1) Overseas Private Investment Corporation (OPIC)17
2) Most-Favored Nation Principle18
3) Export Administration Act of 196919
4) Johnson Debt Default Act20


13. See, e.g., Ball, Against Uncrowningly Yielding to Peking, N.Y. Times, Aug. 24, 1977, at 19, col. 1. For a discussion of the social and historical aspects of China's attempt to forge a foreign policy see Terrill, China and the World: Self-Reliance or Interdependence, 55 For. AfT. 295 (1977); see also Perkins, The Constraints on Chinese Foreign Policy and Robinson, Political and Strategic Aspects of Chinese Foreign Policy, in Hellman, supra note 4.


15. See N.Y. Times, Feb. 11, 1977, at 1, col. 3, for 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 Chinese on Financial Claims, N.Y. Times, May 2, 1977, at 1, col. 6.

16. But see Victor H. Li who writes: "Nothing in the language of the establishing act prohibits the Export-Import Bank from dealing with a country not recognized de jure by the United States, or with which there are not diplomatic relations." VICTOR H. LI, DE-RECOGNIZING TAIWAN: THE LEGAL PROBLEMS 21 (1977) [hereinafter cited as Li].


5) Arms Transfers Programs
6) Immigration Status

These are important carrots for their faltering international economy. Furthermore, property of the P.R.C., such as ships, are subject to court attachment in American territory by U.S. claimants.

United States policy toward the P.R.C. has been cautious but there are indications that a normalization of relations may occur in the future. The United States Asia policy has recently "conspicuously ignored" the Nationalist Government. Senator Kennedy and former Senator Hugh Scott have been strong advocates of shifting formal recognition from the Nationalist Government to the P.R.C. In fact, this has been the unofficial practice of the United States. The Nationalist Government, with a fully staffed embassy in Washington, theoretically has a higher level of representation than the P.R.C., which conducts diplomatic relations with the United States through a liaison office. Yet, Taiwan's Ambassador James Shen has not met with an American Secretary of State since 1973, while Peking's top envoy has met frequently with Kissinger, Vance and even with the President himself.

B. The Problem

The Carter Administration's desire to normalize relations with the P.R.C. in areas other than recognition, in order to avoid having to face the prospects of the "derecognition" of the Nationalist Government, appears to be based on sound diplomatic practice, i.e., seeking agreement first in areas of overlapping

21. 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).


23. Oksenberg, supra note 4, at 270.


25. See Recognizing Peking, Protecting Taiwan, N.Y. Times, Aug. 18, 1977, at 20, col. 1, supporting a speech by Senator Kennedy calling for the shift of formal recognition to Peking allowing the mutual defense treaty to lapse, and promising Taiwan unilaterally that the U.S. would offer protection and continued economic aid. For Senator Scott's position, see N.Y. Times, Aug. 18, 1977, at 9, col. 1. For a discussion of some of the problems involved if formal recognition is withdrawn from the Republic of China and an attempt to discourage such a policy, see Chiu, Normalizing Relations with China: Some Practical and Legal Problems, 5 ASIAN AFFAIRS 67 (1977); H. Chiu, Legal Aspects of Recognizing the People's Republic of China: Selected Issues, (April 28, 1978) (unpublished paper delivered at the 72d Annual Meeting of the American Society of International Law) (copy available in the Boston College International and Comparative Law Journal offices).

interests and later in areas of conflict. However, as this Comment will demonstrate, recognition of the P.R.C. by the United States is a prerequisite to one of the less controversial issues between the two states that has received attention, namely the settling of the blocked assets-claims problem. The problem that exists regarding recognition is that there are two Chinese governments purporting to represent the entire Chinese nation. The United States currently recognizes the Nationalist Government of Taiwan which represents some 16 million Chinese who fled the mainland after the P.R.C. assumed control of the mainland in 1949. The P.R.C. governs the China mainland which consists of some 900 million people. The United States, for ideological and security reasons, has recognized and supported the Nationalist Government of Taiwan. Several possibilities exist for the United States as it seeks to re-evaluate the recognition policy toward the Chinese governments. One possibility is the “German Solution” which recognized the existence of two German states within one German nation. A second possibility is a “Swiss” or “Hong Kong” conception under which the P.R.C. would receive recognition as the Government of China and the Nationalist Government of Taiwan would become a neutral state or entity. The problem with these suggestions, as with others that will be discussed, is that the P.R.C. wants recognition extended to it as the sole government of China including Taiwan with eventual goal of reunification. However, as has been observed, there are indications that this desire has become of secondary interest.

Since it is clear that recognition of the P.R.C. by the United States is no longer a matter of “if” but rather of “when” and “how”, the desirability of accompanying a lump sum settlement of the claim-assets problem with the recognition of the P.R.C. will be examined. The reasons for this approach are two-fold: First, the international law of recognition and its application in the United States Courts requires that any settlement of the blocked assets-claims problem occur simultaneously with recognition of the P.R.C. as the Government of China. Secondly, there exist several factors in favor of negotiating a lump sum settlement agreement between the United States and the P.R.C. even though compensation to United States claimants would only be at twenty to thirty percent of their face value.

Presently there exist approximately eighty million dollars of Chinese assets in the United States and two hundred million dollars of nationalized United States nationals’ claims in the P.R.C. But since two governments purport to represent the Chinese nation in claiming the assets blocked in the United States, as soon as they are unblocked by Treasury Department regulations both “Chinas” would sue for recovery in United States Courts. This is why

27. For a full discussion, see Solomon, Thinking Through the China Problem, 56 FOR. AFF. 324 (1977).
28. See, e.g., notes 86-87 infra and accompanying text.
an executive determination of its policy of recognition toward the Chinese
governments must be clarified. Technically, if the assets in the United States
were unblocked today, the Nationalist Government as the officially recognized
government of China by the State Department would have rights to those
assets.\textsuperscript{29} Thus there would be no funds by which to effectuate a lump sum
agreement between the United States and the P.R.C. By recognizing the
P.R.C. as the Government of China, such an executive determination would
preclude the Nationalist Government from successfully litigating those funds
in United States Courts. In this way, the P.R.C., as the sole recognized
government of China by the United States, would have ownership capacity to
turn over the blocked assets in the U.S. to the U.S. government without the
Nationalist Government litigating the question of ownership and control of
these assets in U.S. courts.

II. RECOGNITION

A. The International Law of Recognition

1. Constitutive v. Declaratory Views

There are two main views concerning the nature and legal significance of
recognition: the "constitutive view" and the "declaratory view." According
to the constitutive view an entity becomes a state exclusively through the acts
of recognition by other states.\textsuperscript{30} Under the constitutive view a state has no legal existence before recogni-
tion. Such a position entails several difficulties.\textsuperscript{31} Fitzmaurice discusses the
constitutive view and its implications stating:

On this view, an entity may have in all respects the characteristics of,
and indeed be, a fully sovereign independent State, but yet it cannot
rank as an international person unless it receives recognition as such
from the existing members of the international society. According to
this view, recognition — even if it does not create the statal entity —
does create the international rights and obligations . . . . The more
moderate supporters of the constitutive view do not go so far as that.
They admit that once the marks and characteristics are there, a duty
to recognize arises. But they still maintain that unless recognition is
in fact accorded, there is, in law, no new international person.\textsuperscript{32}

\textsuperscript{29} This is not entirely true since some are assets of private individuals blocked because of their
connection with the PRC.

\textsuperscript{30} BROWNLIE, supra note 6, at 93.

\textsuperscript{31} \textit{E.g.}, BRIERLY, THE LAW OF NATIONS 138-39, (6th ed. Waldock 1963) [hereinafter cited as
\textit{BRIERLY}].

\textsuperscript{32} Fitzmaurice, \textit{The General Principles of International Law, Considered From the Standpoint of the
Rule of Law}, 92 HAGUE RECUEIL DES COURS 5, 19-20 (II, 1957) [hereinafter cited as
Fitzmaurice].
In contrast, the declaratory view does not promise recognition by other states as the only vehicle for a state to become an international person, i.e., recognition does not bring into existence a state that did not exist prior to the recognition. Further,

[a] state may exist without being recognized, and if it does exist in fact, then, whether or not it has been formally recognized by other states, it has a right to be treated by them as a state. The primary function of recognition is to acknowledge as fact something which has hitherto been uncertain, namely the independence of the body claiming to be a state, and to declare the recognizing state's readiness to accept the normal consequences of that fact, namely the usual courtesies of international intercourse.\(^{33}\)

Fitzmaurice clearly distinguishes the former position from that of the latter.

The essence of the declaratory view is that recognition does not create or constitute the new international person but, on the basis of the facts, registers, records, certifies, or witnesses to its existence as such. . . . It does not create or constitute it, but it certifies — what might otherwise be doubtful or uncertain — that it exists, i.e., that the entity concerned does indeed possess the characteristics of an independent State, and that it therefore is an international person. It is not of course the fact that the declaratory view predicates recognition on the basis of the mere existence of an entity as an entity of a statal or para-statal character. This view requires the entity to bear the marks, and have the characteristics, of a fully sovereign independent State. All it says is that when those marks and characteristics do exist, then there is an international person.\(^{34}\)

Article three of the *Convention On Rights and Duties of States*\(^{35}\) signed at Montevideo stated what is essentially the declaratory view.

Art. 3. The political existence of the state is independent of recognition of other states. Even before recognition the state has the right to defend its integrity and independence, to provide for its conservation and prosperity, and consequently to organize itself as it sees fit, to legislate upon its interest, administer its services, and to define the jurisdiction and competence of its courts.

The exercise of these rights has no other limitation than the exercise of the rights of other states according to international law.\(^{36}\)

Conflict between the declaratory view and the constitutive view is

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33. BRIERLY, *supra* note 31, at 139.
34. Fitzmaurice, *supra* note 32.
36. *Id.*
manifested by the issue of whether or not there is a duty to recognize political communities that have fulfilled the conditions prescribed by international law for statehood. In emphasizing the political nature of recognition DeVisscher explains the controversy concerning the declaratory or constitutive effects of recognition:

Legally, recognition is simply a declaratory act. Politically, it is not so. Recognition puts an end, for the recognized State, to an uncertain situation, and the positive advantages that it secures not only for the recognized but also for the recognizing State create a new situation.

Much of the difficulty arising from the application of the constitutive view is eliminated if several points can be conceded. It has been argued, however, that if such points are conceded it is no longer the constitutive view. First, although an unrecognized entity may not be a full international person it is not devoid of all international personality and may possess a measure of international personality. Secondly, such a measure of international personality provides it with the minimum rights and obligations necessary to function with states. Thirdly, although implicit recognition by conduct or otherwise may occur, such a position results from the facts of the situation and not from the formal act of recognition.

There exists a divergence of opinion concerning the duty of states to extend recognition to an entity that meets the requirements of statehood. On the one hand Lauterpacht emphasizes that recognition in such instances is an obligation:

The emphasis — and that emphasis is a constant feature of diplomatic correspondence — on the principle that the existence of a

37. The concept of the State has been defined in varying ways: 1) Convention on Rights and Duties of States, supra note 35, art. 1 states: "The state as a person of international law should possess the following qualifications: (a) permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other states; 2) RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 4 (1965) states: "Except as otherwise indicated 'state' as used in the Restatement of this subject, means an entity that has a defined territory and population under the control of a government and that engages in foreign relations."; (3) Fitzmaurice supra, note 32, at 13 states:

A State for international purposes may, however, perhaps be described generally as an entity which, possessing certain physical characteristics in the way of territory, a population, and governmental institutions, is self-contained and not part of a wider political unit; and which also has the capacity to enter into relations on the external plane with other States — either directly (in the case of fully sovereign independent States), or mediatelly, through other States (in the case of protected States).


state (or of a government) is a question of fact signifies that, whenever the necessary factual requirements exist, the granting of recognition is a matter of legal duty. 40

This view is not shared by the United States. It is maintained in section 99 (1) of the Restatement (Second) of Foreign Relations Law of the United States that:

A state is not required by international law to recognize an entity as a state or a regime as the government of a state.

2. De Facto v. De Jure Recognition

The difference between de facto and de jure recognition exists initially from the perspective of the state extending the recognition. If it is the judgment of the recognizing state that the new state is not yet in a position to fulfill all of the conditions of statehood, it may extend de facto recognition which is provisional in nature. By contrast, de jure recognition is of a full and complete nature. 41

Fitzmaurice elaborates on the nature of de facto recognition writing:

De facto recognition is therefore a provisional measure of recognition, given by a state which considers that at least the most important condition of statehood and international personality is present — namely possession of specific territory on a basis of freedom from external control — but is not yet satisfied as to the permanence of this state of affairs. . . . De facto recognition, whether of a new government or particular authority of a government or administration within a certain territory or areas, is on a basis of freedom from external control. 42

De jure recognition carries with it membership in international organizations, and more importantly for the issues under discussion, the right to retain title to and control over assets situated abroad. De facto recognition, since it is based on effective control only within the territory, concerned carries with it no recognition of external authority. In addition, representatives of a government may not be entitled to full diplomatic immunities. 43

Since recognition or non-recognition is so closely connected with international law, certain generally accepted rules and norms are usually given deference when at issue in the domestic courts of States. For instance, States normally allow recognized states to bring proceedings in their domestic courts.

40. H. LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 24 (1947) [hereinafter cited as LAUTERPACHT].
41. W. L. TUNG, INTERNATIONAL LAW IN AN ORGANIZING WORLD 51 (1965); see also Waldock, General Course on Public International Law, 106 HAGUE RECUEIL DES COURS 138 (II, 1962); Jennings, General Course on Principles of International Law, 121 HAGUE RECUEIL DES COURS 349 (II, 1967).
42. Fitzmaurice, supra note 32, at 27.
43. Fitzmaurice, supra note 32, at 29; LAUTERPACHT, supra note 40, at 343-46.
Likewise, a recognized state, as a rule, cannot be subjected to proceedings to foreign domestic courts without its consent. Of course, the interpretation and application of these general rules varies from state to state according to the circumstances.

B. The United States Policy Regarding Recognition

The U.S. government policy of non-recognition of the P.R.C. has been marked by both ambiguity and complexity. According to a statement in the U.S. State Department Bulletin, the U.S. viewed the P.R.C. as de facto in the sense of being temporary and hostile to U.S. interests, but not to the extent that the P.R.C. did not exercise control over its territory. De facto recognition has also been assigned to the Regime by so eminent a scholar as Quincy Wright who wrote in 1968:

The Chinese communist government had gained control of substantially all of mainland China by the end of 1940 and has apparently increased the effectiveness of that control since then.

It appears that the Communist government is a general de facto government in the sense used in the Tinoco Arbitration and in the traditional practice of States. Lauterpacht has commented that state practice does not deny such a status to government whose predecessor holds out in an "isolated fortress." The de jure recognition accorded the Nationalist Chinese government by the U.S. government must be tempered with Wright’s conclusion:

That government [Taiwan] is however, de facto the government only for Formosa and the Pescadores and of some of the small islands off the mainland coast opposite Formosa. Sporadic hostilities have occurred in some of these small islands, but substantially the Nationalist government is the de facto government of the former Japanese territory of Formosa and the Pescadores.

45. Wright, The Chinese Recognition Problem, in INTERNATIONAL LAW IN THE TWENTIETH CENTURY 602 (Gross ed. 1968) [hereinafter cited as Wright].
46. LAUTERPACHT, supra note 40. On the matter of recognition and the problems involved, see Briggs, Recognition of States, 43 AM. J. INT’L L. 113 (1949); Brown, The Legal Effects of Recognition, 44 AM. J. INT’L L. 617 (1950); CHEN, INTERNATIONAL LAW OF RECOGNITION (1951); Lauterpacht, Recognition of States in International Law, 53 YALE L.J. 385 (1944); Kelsen, Recognition in International Law: Incrretical Observations, 35 AM. J. INT’L L. 605 (1941); Borchard, Recognition and Non-Recognition, 36 AM. J. INT’L L. 108 (1942); 1 G. HACKWORTH, DIGEST OF INTERNATIONAL LAW 161, 166-67, 319-20 (1940); 1 L. HYDE, INTERNATIONAL LAW 148-204 (2d ed. 1945); Lauterpacht, Recognition of Governments, 45 COLUM. L. REV. 815 (1945); Patel, Recognition in the Law of Nations (1959); Meeker, Recognition and the Restatement, 41 N.Y.U.L. REV. 83 (1966); 1 J.B. MOORE, INTERNATIONAL LAW DIGEST 72-164 (1906) (see especially 72-74).
47. Wright, supra note 45, at 605.
An explicit distinction between de jure recognition and de facto recognition of foreign entities appears infrequently in the statutory law of the United States, although there has been some confusion in the courts of the United States. In the wake of this scenario lie the problems surrounding the Chinese claims to blocked U.S. assets and the U.S. nationals' claims to assets nationalized by the P.R.C. The necessary consequences of U.S. recognition of the P.R.C. involve a complex determination depending upon, inter alia: 1) the coincident circumstances surrounding recognition and; 2) the nature of that recognition. The relationship between recognition and a possible lump sum claim settlement will be discussed in detail later in this comment.

C. Recognition in United States Courts

The issue of recognition must be looked at from the perspective of U.S. Federal municipal law because as Greig has cogently commented:

Although the practice of state does establish the existence of both de fact and de jure recognition, any legal distinction between the two arises in the municipal law of the recognizing state rather than in the sphere of international law.

Like the Act of State Doctrine which precludes judgment by U.S. Courts with regard to the acts of state of another government within its own territory, the exercise of discretion over whether or not to give effect to an act of state affecting property under the jurisdiction of U.S. Courts is tied to public policy and executive policy. According to the Restatement (Second) of Foreign Relations Law of the U.S. acts of state are to be given effect in the U.S. only if they are consistent with public policy. In Vladikavkazsky R. Y. Co. v. N.Y. Trust Co. it was concluded that


50. See the discussion of recognition and Lump Sum in § IV infra.


53. 263 N.Y. 369, 189 N.E. 456 (1934).
confiscation of corporate assets is contrary to public policy in the U.S. A deviation from this view is asserted in *U.S. v. Belmont* and *U.S. v. Pink* where federal executive authority in the field of foreign relations was held to be determinative. The latter two decisions indicated that recognition requires the state to give extraterritorial effect to all acts of state of a previously unrecognized state only when coincident with executive sanction as was expressed in these cases by the Litvinov Assignment.

This qualification was determinative in the holding in the *Republic of Iraq v. First National City Bank*. There the principal question raised was the application of the act of state doctrine to foreign confiscation decrees purporting the affect property within the U.S., *i.e.*, property located outside the nationalizing state. In this decision the court held that such extraterritorial application of a confiscation decree was contrary to public policy in the U.S. Furthermore, in the absence of executive pronouncements to the contrary, the court denied the extraterritorial application of the decree in the U.S.

The absence of an executive pronouncement, played an important role in two other cases associated with *Republic of Iraq*. In *Vladikavkazsky* the court stated:

> It is hardly necessary to state that the arbitrary dissolution of a corporation, the confiscation of its assets and the repudiation of its obligations by decrees, is contrary to our public policy and shocking to our sense of justice and equity. That the confiscation decree in question, clearly contrary to our public policy, was enacted by a government recognized by the U.S., offers no controlling reason why it should be enforced in our courts.

In the second case, *Dougherty v. Equitable Life Assurance Society*, the court stated:

> Recognition does not compel our courts to give effect to foreign laws if they are contrary to our public policy. Some writers have suggested that non-recognition was an insufficient reason for the refusal of our courts to enforce the laws of another country, rather it should have been that those were contrary to our public policy.

Also in this group of cases holding that determinative effect should be given to the public policy if the U.S. in the absence of executive pronouncements are *Russian Reinsurance Company v. Stoddard* and *Russian S.F.S. Republic v. Cibrario*. When there is conflict between public policy and comity, justice and

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54. 301 U.S. 324 (1937).
55. 315 U.S. 203 (1942).
56. See § IV, *infra*; see also note 68 *infra*.
57. 353 F.2d 47 (2d Cir. 1965).
58. Note 53 *supra*, at 460.
59. 266 N.Y. 71, 193 N.E. 897, 903 (1934).
60. 240 N.Y. 149, 147 N.E. 703 (1925).
61. 235 N.Y. 255, 139 N.E. 259 (1923).
equity, as embodied in public policy, must prevail. Laws and decrees of foreign governments have effect in the United States as a privilege of comity, not of right.

Municipal courts will look to the Executive as well as public policy for guidance. When public policy is not to the contrary, the approach of the court will be from the perspective of fairness and justice when it will not harm the self-interest of the nation to do so, as was the situation in both *Upright v. Mercury Business Machines Co.* and *Carl Zeiss Stiftung v. Rayner and Keeler Ltd.*

The second group of cases is made up of those in which executive pronouncements are determinative of public policy or in place of public policy as perceived by the judicial branch. The cases relevant to discussion in this context include *Belmont*, *Pink*, *United States v. Curtiss-Wright Corp.*, and *Guaranty Trust Co. v. United States.* In *Pink* the Court required that full credit be accorded to those acts expressly sanctioned by the executive. Such executive sanctions are not to be implied from recognition per se. This decision assigned supremacy to the executive in foreign relations and advanced such (in form of an international compact of which the Litvinov Assignment was a part) as a controlling factor in allowing the U.S. claim to assets confiscated by Russian decrees simultaneous with the recognition of the Soviet government by the U.S. It was in this context that recognition operated retroactively to validate Russian claims to assets located extraterritorially.

In *Curtiss-Wright Corp.*, the Executive right to remove impediments to recognition was emphasized. In such situations the Litvinov Assignment, recognition, establishment of diplomatic relations, and the assignment of assets of nationalized corporations in the U.S. to the custodianship of the U.S. under the terms of the Assignment, were recognized as part and parcel of an international agreement. In such a context, recognition was interpreted to...
involve the extraterritorial application of the acts of state in question. 69

D. Status of Blocked Chinese Assets in United States Courts.

The two largest categories of Chinese assets blocked by the United States are:
1) assets of the Chinese government and agencies and;
2) assets of Chinese corporations.

Suits were filed by both the P.R.C. and the Nationalist Governments claiming the government and the corporate assets. Representative of suits for the government and agency assets is Chase National Bank v. Directorate General of Postal Remittances and Savings Bank. 70 This case was eventually dismissed on appeal, 71 the court denying the P.R.C. standing 72 because of United States executive determination and refusal to extend recognition. Hence, the Nationalist Government of China remained the only claimant with standing. 73

行使的全部权力，因为它们被分列出在 United States v. Pink。应该发
现这必要，然而，案件坚持其作为国际协议，执行在广义的条约权力内，可能从宪法上产生一个持久效果在内国家法律内。”Id. at 553; see also Comment, Self-Executing Agreement: A Separation of Powers Problems, 24 BUFFALO L. REV. 137 (1974) 而针对具体问题如果分权问题出现。然而，“[given the present state of law, there is no reason to believe that they would not defer to such a conceptually similar device as a Chinese assignment, especially if concluded as part of a clear foreign affairs function such as recognition of a foreign state, as was its predecessor, the Litvinov Assignment.” Bayer, infra note 110, at 1005. For a full discussion see L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION (1972); Moore, Treaties and Executive Agreements, 20 POLITICAL SCI. Q. 385 (1905); CORWIN, THE PRESIDENT, OFFICE AND POWERS 228-40 (1940); McDougall & Lans, Treaties and Congressional, Executive or Presidential Agreements: Interchangeable Instruments of National Policy, 54 YALE L.J. 181, 534 (1945); Matthews, The Constitutional Power of the President to Conclude International Agreements, 64 YALE L.J. 345 (1955); U.S. Dep't of State, Circular No. 175, (December 13, 1955) reprinted in 50 AM. J. INT'L L. 784 (1956) (outlining the appropriate uses for executive agreements). For a recent view see Rovine, Separation of Powers and International Executive Agreements, 52 IND. L. J. 397 (1977).


71. 303 N.Y. 800, 104 N.E.2d 360 (1952).

A second case involving assets of the pre-1949 Chinese Government or an agency thereof is the Republic of China v. American Express Company. In this instance, procedural matters held up the P.R.C.'s attempt to claim the assets in United States courts until Chase National Bank was decided. By viewing the P.R.C. agency as an arm of the P.R.C. Government, hence denying it standing, the court in Chase National Bank discouraged the P.R.C. from continuing to pursue its claim in American Express Company.

Two cases are illustrative of the P.R.C. and the Nationalist Governments litigating in U.S. courts for Chinese corporate assets that are blocked by the U.S. Treasury Regulations. They are: Chase Manhattan Bank v. United China Syndicate, Ltd. and Bank of China v. Wells Fargo Bank and Union Trust Company.

accorded by the U.S., a number of other decisions were rendered, including Vladikavkazsky Ry. Co. v. N.Y. Trust Co., 263 N.Y. 369, 189 N.E. 456 (1934); Dougherty v. Equitable Life Assurance Society, 266 N.Y. 71, 193 N.E. 897 (1934).

Where the issue has been dealt with in the above-mentioned cases, the result has been that, prior to recognition of the Soviet government by the U.S., the courts have generally declined to give recognition to the extraterritorial effect of the Soviet confiscation decrees by which Russian corporations, in existence at the time of the commencement of the existence of the Soviet government, were nationalized with regard to assets in the U.S. Such decisions have been rendered on the grounds that such acts were contrary to the public policy of the State of New York and the U.S. In two of these cases, Fred S. James & Co. and Vladikavkazsky Ry., it was suggested that the decisions reached would have been rendered even after recognition.

In Equitable Life Assurance Society, which involved contracts made by Russian national to be performed in Russia, the U.S. government's recognition of the Soviet government validated all of the Soviet government's decrees from the time of its inception. Most importantly, however, the courts have not held that "the effect of such decrees either before or after recognition can compel our courts to refrain from proceeding according to the laws and policies of our forum as to the assets of the nationalized corporation within our jurisdiction." United States v. President and Directors of Manhattan Co., 276 N.Y. 396, 12 N.E.2d 518, (1938),522. In United States v. Belmont, 85 F.2d 542 (2d Cir. 1936), the court held that the nationalization decree, if enforced, would give effect to a nationalization act contrary to N.Y. and U.S. public policy. The Supreme Court, in reversing this decision, 301 U.S. 324 (1937), gave notice to the coincident Litvinov Assignment as being part of the act of recognition by the U.S., the executive policy as determine and that the effect of all of this, by executive intent, was to validate all acts of the Soviet government from the commencement of its existence. The validity of such confiscation decrees was accorded in, and only in, the large context of the coincident Litvinov Assignment in so far as the rights of U.S. nationals and counterclaims thereto were given access in courts for assertion of those claims.

One question under consideration in the present situation concerns the necessary consequences of recognition of the Communist Regime in China by the U.S. government for assets in the U.S. of China and Chinese corporations and if that recognition did occur would the Regime get hold of some or all of these assets either through proceedings in U.S. Courts or otherwise? Secondly, would there be a difference in this respect between de jure and de facto recognition?
With regard to the latter case, the Bank of China was organized under Chinese law in 1912, the Chinese government owned two thirds of the Bank’s stock and a substantial deposit was held with the Wells Fargo Bank and Union Trust Co. After the P.R.C. Regime gained control of the mainland, the main office of the Bank was moved to Hong Kong with P.R.C. authorities taking over the old main office. Later the Hong Kong directors of the bank sought to recover the deposit with the Wells Fargo Bank, as did the P.R.C.

The initial District Court decision continued the case sine die rather than decide in favor of either group purporting to represent the Bank of China. The court stated in its opinion that recognition of the acts of the Regime, insofar as they relate merely to a Chinese corporation, might not be contrary to the U.S. policy of non-recognition. Moreover, the court surmised that U.S. policy toward the P.R.C. Regime appeared to be one of intervention and that placing 626,860.07 dollars in its possession would be contrary to such a U.S. policy. "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 U.S., is to leave these funds where they are for the present."79

At a later stage of litigation, reconsidering the case in light of changing world conditions (Korean War),80 the District Court ordered funds to the Bank of China as represented by the Nationalist government.81 The determinative nature of Executive policy was present in this holding also. In its


And so we come to the immediate situation before us. The short of the matter is that we are not dealing with an attempt to bring a recognized foreign government into one of our courts as a defendant and subject it to the rule of law to which non-governmental obligors must bow. We have a foreign government invoking our law but resisting a claim against it which fairly would curtail its recovery. It wants our law, like any other litigant, but it wants our law free from the claims of justice. It becomes vital, therefore, to examine the extent to which the considerations which led this Court to bar a suit against a sovereign in The Schooner Exchange are applicable here to foreclose a court from determining according to prevailing law, whether the republic of China's claim against the National City Bank would be unjustly enforced by disregarding legitimate claims against the Republic of China. As expounded in The Schooner Exchange, the doctrine is one of implied consent by the territorial sovereign to exempt the foreign from its "exclusive and absolute" jurisdiction, the implication deriving from standards of public morality, fair dealing, reciprocal self-interest, and respect for the "power and dignity" of the foreign sovereign.

80. While initially freezing the assets from both governments, after the perceived hostility in the Korean War the court awarded the funds to the Nationalist Government.

decision, the court stated that it was not proper for a domestic court to determine which government best represents the interests of the Chinese State. However, the court went on noting that if there were only one government in a position to act effectively for the Chinese State "the Court might be justified in accepting such a government as the proper representative of the State, even though our executive declined to deal with it." Thus, in the absence of Executive guidance, the court based its decision on the government purporting to represent the State of China that the U.S. State Department deemed would best suit the interests of the U.S. Here public policy would prevail because it would not have been contrary to the Executive determination.

In essence, viewing both claimants (the P.R.C. and Nationalist Governments) as functionally capable of assuming control of the assets the court looked to the Executive. In both cases ultimate disposition was to the Nationalist Government. Originally, all Chinese assets were blocked by the Treasury Department; but following U.S. recognition of the Nationalist Government in Taiwan, the assets of Taiwanese nationals were unblocked.

E. Possibilities of Recognition by the United States

Regarding the problem of recognition four possible solutions can be discerned. The P.R.C. asserts that it is the sole Government representing China and that the Nationalist Government is not even a de facto government of Formosa. Under the first possibility, the Nationalist Government in Taiwan would be an unrecognized entity. If this had been the initial U.S. position, the P.R.C. would have had claim to all of the assets blocked in the U.S. Presently, the P.R.C. could only get the percentage of assets not already claimed by Nationalist Government agencies.

A second possibility is the "Two Chinas" or the German solution. This plan would recognize two Chinese governments and two Chinese nations. Under the auspices of this solution both Chinese governments would have standing to sue with the claims proportionately divided relative to the percentage of territory controlled.

Thirdly, is the "China-Taiwan" alternative. Under this proposal the P.R.C. would succeed to the rights of the Chinese state and Taiwan would be recognized as seceding from China. This would provide the Nationalist Government in Taiwan with standing in the courts of the United States but

82. Id. at 66.
84. See 31 C.F.R. § 500.328 (1977) which excluded those areas under the control of the Nationalist Government from the term "designated foreign country" as the term was used in the prohibitions set forth in § 500.201.
not to the extent of asserting governmental rights of the Chinese State which would have been acknowledged to be the P.R.C.\textsuperscript{85}

Fourthly, and perhaps most desirable in view of the problems discussed in this Comment, is the "Japanese Formula" which was adopted by Japan. It consists of moving the embassy from Taiwan to Peking (\textit{de jure} recognition) and moving the liaison office from Peking to Taiwan (\textit{de facto} recognition).\textsuperscript{86}

III. PREADJUDICATED CLAIMS OF CITIZENS OF THE UNITED STATES AGAINST THE P.R.C.

A. \textit{The Foreign Settlement Claims Commission}

In 1966 the Foreign Claims Settlement Commission (FCSC) was authorized to adjudicate claims to the remaining assets of the P.R.C. by amendment to Title II of the International Claims Settlement Act of 1949.\textsuperscript{87} The responsibility under Title V of the Act was to adjudicate and certify claims by U.S. nationals who had lost assets in mainland China pursuant to the Declaration of December 29, 1950. The FCSC was authorized to:

receive and determine in accordance with applicable substantive law, including, international law, the validity and amount of claims of nationals of the United States for: (1) losses resulting from the nationalization, expropriation, intervention, or other taking of, or special measures directed against, property of nationals of the United States; and (2) disability or death, resulting from actions taken by or under the authority of the Chinese Communist Regime. All such claims must have arisen since October 1, 1949. . . . This statute was enacted in order to obtain information concerning the total amount of claims of nationals of the United States against the Chinese Communist Regime. . . . The statute does not provide for the payment of awards granted by the Commission, but authorizes a presettlement of adjudication of claims for the purpose of any future negotiations with the Government of China.\textsuperscript{88}


\textsuperscript{86} Butterfield, \textit{Mr. Vance will Find the Main Topic in China is Still Taiwan}, N.Y. Times, Aug. 21, 1977, \textsection E, at 3, col. 1.


The International Claims Settlement Act of 1949 as amended specifically provides:

In the decision of claims under this [title], the Commission shall apply the following in the following order: (1) The provisions of the applicable claims agreement as provided in this subsection and (2) The applicable principles of international law, justice, and equity.\(^89\)

Commenting on the function of the FCSC its then Commissioner wrote:

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 decision assumes even greater importance as "valuable evidences of international claims law" which manifest the progress and current status of the law of international claims and state responsibility.\(^90\)

When the FCSC completed the China Claims Program on June 30, 1972 it had certified 384 out of 580 claims worth $196,861,834 without interest out of an original total claimed of $306,680,834.\(^91\)

The completion of the preadjudicated claims settlement program does little for U.S. claimants. The Act specifically precludes any authorization for appropriations for the payment of these claims. The awards are subject to future settlement. One commentator has concluded of the U.S. claimants:

Their sole hope lies in the negotiation of a settlement between the U.S. and the P.R.C. Therefore, it seems reasonable to assume that

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after all these years, virtually any substantial settlement would be accept­
able to them, even for less than the full value of their claims.92

B. Analytical Criteria for an Evaluation of the
Applicability of a Lump Sum Agreement

What are the analytical criteria for an evaluation of a lump sum agreement
similar to the Litvinov Assignment? One scholar has commented:

In appraising an en-bloc settlement by such terms, the judgments
which become necessary are, first, whether a more desirable settle­
ment would have been obtained or could be obtained at some future
time and, second, whether immediate advantages are
adequate. . . . Discounted by all factors weighing against a settle­
ment sufficient advantages remain in the lump sum agreement to
appraise it as the best possible solution.93

An examination of a lump sum settlement of the U.S.-P.R.C. blocked assets
and claims reveals the following observations: 1) in view of the realities of the
present socioeconomic situation of the P.R.C. there is little likelihood of addi­
tional funds being made available to supplement funds currently blocked in
the U.S.; 2) the “inadequacy of the funds” does not pose a serious problem
since previous U.S. claims settlement programs and foreign settlement claims
programs have usually been for less than full value; 3) a less than full settle­
ment would not necessarily subject the U.S. Government to liability for the
difference; and 4) the breakdown of the U.S. claimants reveals certain
mitigating aspects based upon the prospective distribution of the inadequate
funds.

1. The Realities of the P.R.C. Position

It is important to state initially that it is highly unlikely that the P.R.C.
would agree to transfer any additional funds other than those assets which are
already blocked in the U.S. This is so for several reasons:

The particular circumstances of Chinese history, including unequal
 treaties, foreign commercial domination as a general result of the in­
ferior military position of China, and the general Communist op­
position to the cultural and political imperialism and exploitation
which allegedly accompanied many of these financial and educa­
tional activities, will have their impact on an acceptable settlement of
the claims. Moreover, in order to accept as valid all certified claims,

92. Comment, The United States and the People’s Republic of China The Blocked Assets — Claims
Problem, 8 CORNELL INT’L L. J. 253, 264 (1975). This obvious conclusion was also expressed in
Comment, Blocked Assets and Private Claims: The Initial Barriers to Trade Negotiations Between the U.S.
the P.R.C. would have to admit that certain of its previous governmental decrees were against international law; for example, the claims resulting from the de facto "ransom" demands of the P.R.C. would seem particularly troublesome. If one sets the present day value of the 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 P.R.C. now entering an expansive period of foreign policy, the need for $100-200 million annual foreign exchange trade surplus will be even greater.\(^9\)

Also, while the general rule of international law as expressed in the Restatement (Second) of Foreign Relations Law of the United States\(^9\) is that uncompensated taking of property is illegal:

> It is doubtful that the Chinese attitude toward international law is completely reconcilable with our own. While the record of the P.R.C.'s compliance with international agreements which that government entered into is good, the attitude of the P.R.C. toward pre-1949 agreements between the Republic of China and foreigners is generally unfavorable. While the claimants in the China Claims Program asserted private claims it is clear that their pre-1949 activities in China followed a long history of foreign domination of the Chinese economy.\(^9\)

2. "Inadequacy" of Funds

On the assumption that any lump sum agreement would involve only those Chinese assets presently blocked in the U.S.\(^9\) several problems arise.

a. Comparative Claims Programs Settlements

There is no doubt that many U.S. claimants against the Chinese assets would raise objections to a settlement at 15 to 20 percent value and demand an additional payment from the P.R.C. Past settlement agreements with

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94. Redick, supra note 90 at 739.
95. §§ 185-190 (1965).
97. Executive power to block foreign assets arises from amendments to section 5(b) of the Trading With the Enemy Act. See note 3 supra. The primary blocking provisions of the Foreign Assets Control Regulations is 31 C.F.R. § 500.201 (1974). "Blocking" is, for the most part, a functionally descriptive term. Under § 500.201 all transactions covered by this section are prohibited. Descriptively, what happens is that as a result of the prohibitions the assets are in effect blocked.
Yugoslavia, Rumania, Bulgaria and Poland have been for varying percentages of face value of the adjudicated awards by the FCSC. These figures are set out in Table I.

<table>
<thead>
<tr>
<th>COUNTRY</th>
<th>Completion DATE</th>
<th>APPROXIMATE % OF AWARD PAID</th>
</tr>
</thead>
<tbody>
<tr>
<td>Yugoslavia</td>
<td>12/31/54</td>
<td>91%</td>
</tr>
<tr>
<td>Yugoslavia</td>
<td>7/15/69</td>
<td>36.1%</td>
</tr>
</tbody>
</table>


99. The United States accepted a lump sum of 24,526,370 dollars as the final settlement of total claims against Rumania which, with interest, amounted to 85 million dollars. The fund was made up of the blocked assets plus an additional 215 million dollars payable in five installments between July 1, 1960 and July 1, 1964. The 498 claims that were certified received approximately a 219 percent return of which 26 percent came from blocked assets and 2.9 percent 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).

100. The U.S.-Bulgarian Agreement of 1963 was a lump sum of 3,543,398 dollars. There were 391 claims of which only 217 were certified by the FCSC in the amount of 6,571,825 dollars of which 4,684,187 dollars was principal and 1,887,638 dollars was interest. Of the 3,543,398 dollars agreement, 3,143,398 dollars was composed of blocked assets in the U.S. with an additional $400,000 payment by the Bulgarian government. This total represented a 53.9 percent return of the total figure. Claims Settlement Agreement, July 2, 1963, United States-Bulgaria, 14 U.S.T. 969, T.I.A.S. No. 5387; see Lillich, The United States-Bulgarian Claims Agreement of 1963, 58 AM. J. INT'L L. 686 (1964) [hereinafter cited as Lillich].

101. Claims Settlement Agreement, July 16, 1960, United States-Poland, 11 U.S.T. 1953, T.I.A.S. No. 4545. The agreement consisted of 40 million dollars to be paid over a 20 year period beginning January 1961. The number of awards certified totalled 5,022 while 5,147 claims were denied. The approved awards were in the amount of 100,737,581 dollars. The approximate percent of awards paid was an estimated 36 percent. FCSC 1972 Report, supra note 88, at 34-35, reprinted in 55 AM. J. INT'L L. 540 (1961); see also Note, The American-Polish Claims Agreement of 1960, 55 AM. J. INT'L L. 452 (1961).

<table>
<thead>
<tr>
<th>Country</th>
<th>Date</th>
<th>Amount/Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Poland</td>
<td>3/31/66</td>
<td>36% (Estimated)</td>
</tr>
<tr>
<td>Bulgaria</td>
<td>8/9/59</td>
<td>$1,000 plus 69.710%</td>
</tr>
<tr>
<td>Title III</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Bulgaria</td>
<td>12/24/71</td>
<td>$1,000 plus 69.719%</td>
</tr>
<tr>
<td>(second)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Hungary</td>
<td>8/9/59</td>
<td>$1,000 plus 1.5%</td>
</tr>
<tr>
<td>Rumania</td>
<td>8/9/59</td>
<td>$1,000 plus 37.841475%</td>
</tr>
<tr>
<td>(second)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Rumania</td>
<td>12/24/71</td>
<td>$1,000 plus 37.841474%</td>
</tr>
<tr>
<td>Title IV</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Czechoslovakia</td>
<td>9/15/62</td>
<td>$1,000 plus 5.303841%</td>
</tr>
</tbody>
</table>

In addition to this, claims programs in other countries seldom result in 100 percent returns to certified claimants.\(^{103}\)

b. **Legality of a Less Than Full Settlement**

It should be further noted at this point that there is little possibility of any successful litigation by claimants against the United States government for negotiating a less than full settlement. There exists no legal requirement that the U.S. compensate its nationals for differences between the amount of adjudicated claims and the actual amounts received from the lump-sum distribution.\(^{104}\) The absolute nature of the lack of United States liability for a less than full settlement is brought into question by the holding of the Court of Claims in Seery v. United States.\(^{105}\) After discussing the problems inherent in the prejudication of claims before funds have become available Lillich comments upon the legality of a less than full settlement:

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104. "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," A. Neilson, AMERICAN-TURKISH CLAIMS SETTLEMENT, OPINIONS AND REPORTS 4-5 (1937).

This general statement, though, needs some qualification in view of Seery v. United States, where the Court of Claims held that the part of an executive agreement which withdrew Mrs. Seery's statutory right of action against the United States was unconstitutional, since it took her property without due process of law. Seery suggests that the Department of State, when negotiating a lump sum settlement after a domestic claims program, is under some compunction to seek terms exactly like those of the statute authorizing pre-adjudication (as interpreted by the Foreign Claims Settlement Commission). For if an eligible claimant who had received an award under the statute was excluded from the terms of a subsequent settlement, he could well argue that he had been deprived of a vested right under a statute within the doctrine of the above case. On the other hand, if the Commission in such a situation decided to make a further payment to the claimant, other awardees could argue with some justification that this action constituted a breach of the settlement agreement and an unlawful depletion of the additional funds received thereunder. Thus the Department of State negotiators were faced with the thorny problems of ascertaining the Commission's gloss on Title III, under which the Bulgarian claims were adjudicated, and then securing Bulgaria's consent to an agreement whose terms faithfully mirrored the gloss.\textsuperscript{106}

This must be tempered with the statutory language referring to claimants:

\begin{center}
\textit{Nothing in this title shall be construed as the assumption of any liability by the United States for the payment or satisfaction, in whole or in part, of any claim on behalf of any national of the United States against any foreign government.}\textsuperscript{107}
\end{center}

3. Mitigating Aspects of the "Inadequate" Fund Distribution

Accepting these two assumptions as facing the reality of the present situation, \textit{i.e.}, Chinese recalcitrance to making additional funds available and the legality of a less than full settlement, would it, nevertheless, be possible to achieve a fair distribution of the assets blocked in the U.S.? While approximately a 15 to 30 percent of recovery is possible as a simple proportion of blocked assets over claims this does not reveal the true situation at hand. The breakdown of the 197 million dollars of certified claims is revealing. Table II reveals that 9 corporate claimants represent 116 million of the total dollar claims.

\begin{table}
\begin{tabular}{|c|c|}
\hline
Claimant Type & Claims Amount (Million) \\
\hline
Corporate & 116 \\
\hline
\end{tabular}
\end{table}

\textsuperscript{106} Lillich, \textit{supra} note 100, at 690-91.
Corporations and individuals have been allowed to write off their losses in the course of Chinese nationalization of their assets. Certainly they would have such amounts set-off against any awards. Bayar comments on this factor:


1. Classification of Assets by Type of Assets

<table>
<thead>
<tr>
<th>Amounts (dollars)</th>
<th>Percent of Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bank Deposits</td>
<td>$53.2 million</td>
</tr>
<tr>
<td>U.S. &amp; Securities</td>
<td>$15.5 million</td>
</tr>
<tr>
<td>Notes, Drafts, Debts</td>
<td>$ 5.9 million</td>
</tr>
<tr>
<td>All Other Types</td>
<td>$ 1.9 million</td>
</tr>
</tbody>
</table>

2. Classification of Assets by Type of Owner

<table>
<thead>
<tr>
<th>Amounts (dollars)</th>
<th>Percent of Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>People’s Republic of China</td>
<td>$20.2 million</td>
</tr>
<tr>
<td>Assets Held through Third Country Banks</td>
<td>$23.6 million</td>
</tr>
<tr>
<td>Individuals</td>
<td>$15.2 million</td>
</tr>
<tr>
<td>Corporations, Partnerships, Unincorporated Associations</td>
<td>$14.6 million</td>
</tr>
<tr>
<td>Others</td>
<td>$ 2.9 million</td>
</tr>
</tbody>
</table>


109. I.R.C. § 165(a) (formerly Int. Rev. Code of 1939, § 23(f)). This section provides that, in computing taxable income under section 63, any loss actually sustained during the taxable year and not made good by insurance or some other form of compensation shall be allowed as a deduction. See Treas. Reg. ¶ 1.165-1(a), (b), (c), (d) for the nature of loss allowable, the amount deductible, and the year of deduction. On the matter of losses deductible, see Alvarez v. United States, 431 F.2d 1261 (5th Cir. 1970), cert. denied, 401 U.S. 913 (1971). The court held that a Cuban resident alien could not claim a loss under 26 U.S.C. §165(c) where he had owned rental property while resident of Cuba that was taken by state and indemnification given in form of monthly installments without interest, and monthly installments were terminated when alien failed to return
Aside from the equitable consideration of avoiding double compensation for claimants, it need merely be pointed out that the blocked assets along could satisfy all validated claims except those of corporations and individuals which exceed $500,000.110

Another point that has received little attention is that settling the claims problem in the form of an agreement with the P.R.C. that does not require additional funds from the P.R.C. does not eliminate the possibility of additional funds if its attitude should change in the future. As the FCSC stated in reference to the insufficiency of funds for the first Hungarian Claims Program:

Accordingly, payment to claimants were made on a pro rata basis with the understanding that additional amounts would be payable if additional funds should become available under the terms of a future claims agreement with Hungary . . . .

Public Law 93-460 limits payments on new awards in the Second Program to the extent of the percentage paid on previous awards, and then permits the balance of the fund to be distributed proportionately among all awardees in both programs.111

Finally, some of the completed settlements discussed,112 were administered to Cuba since no profit could have resulted from ownership of right of indemnification, and the loss sustained did not meet profit motive test to qualify it as trade or business loss; there is no loss where there is reasonable prospect of recovery and taxpayer fails to file claim for loss against foreign government (Cuba) for property confiscated by that foreign government. Vila v. United States, 301 F. Supp. 1004 (S.D. Fla. 1969) (taxpayer whose sugar plantation was confiscated otherwise expropriated, seized or taken by Government of Cuba on December 15, 1961, was entitled to loss under 26 U.S.C. §165(c)(1) as loss from his trade or business); for when the loss is deductible see Schweitzer v. Commissioner, 376 F.2d 30 (3d Cir. 1967), cert. denied, 389 U.S. 971 (1967); (where taxpayers' Hungarian property was confiscated in 1949 and 1952 and they received payment on property from Foreign Claims Settlement Commission in 1959, they could not deduct losses in latter year, since Tax Court had found, as fact on sufficient evidence, that they had no reasonable prospect of recovery for these losses at some future date). See also Selby v. Commissioner 33 T.C.M. 461 (1974) where taxpayers' loss of real estate in Shanghai occurred when the People's Republic of China came to power in 1949. Although taxpayer was never formally advised of the seizure, he was "de facto deprived of any power or control" over the property "from that point forward." It made no difference that the amount of his loss wasn't fixed by the Foreign Claims Settlement Commission until '70. It's the year of the event of the loss which determines and that year was '49, since there remained after the seizure no realistic prospect of recovery or reimbursement.

For the "reasonable probability" argument see Major v. Commissioner, 28 T.C.M. 386 (1969) holding that loss deduction for real and personal property confiscated in Hungary was allowable in year of nationalization, and not in later year in which taxpayer argued that "reasonable probability" of recovery terminated.

112. See notes 99-103 supra and accompanying text.
on a flat $1000 dollar plus percentage basis. This procedure would be particularly applicable to the China Claims situation with few large claimants whose losses have been somewhat offset by tax breaks and many smaller claimants.

C. Summary

It has been observed that: 1) executive power to conclude an agreement exists;\textsuperscript{113} 2) there is little current likelihood for additional funds to be made available by the P.R.C. to supplement funds currently blocked; 3) previous U.S. settlements and foreign settlements have usually been for less than full value; 4) a less than full agreement would not necessarily subject the U.S. government to liability for the difference and; 5) the circumstances relating to the China claimants are favorable in terms of a fair distribution. Quite simply, there is no compelling reason for the U.S. to persist in its demands for the P.R.C. to offer additional funds when its balance of payments and foreign trade situation is not one capable of accommodating such demands. Further, while the blocked assets are declining in value the adjudicated awards are increasing at 6 percent interest.

The positive features of ending the blocked assets-Chinese Claims problem in the form of an international assignment have been pointed at by other authors. One comments:

A feasible model for a United States-Chinese agreement for the settlement of these claims can be found in the "Litvinov Assignment" of 1933, under which the United States and the Soviet Union agreed to settle certain claims by the assignment to the United States of assets due the Soviet Government as the successor of prior governments of Russia. If the P.R.C. assigned to the United States its interests in the assets blocked and frozen at the outset of the Korean Emergency, substantial funds would be made available to compensate the China claimants, at least for 15 to 20 percent of their adjudicated losses. As under the War Claims Distribution of 1962 (but unlike the Litvinov Assignment), claimants with smaller individual claims should be fully compensated. In the China Claims Program, claimants with certified awards of less than $100,000 account for only 10 percent of the total certified amount.

As pointed out by one scholar, the use of a lump sum settlement avoids the express admission by the nationalizing country of the validity of any particular claim. Such a settlement would confirm the general liability of China to compensate U.S. nationals who lost property when relations between the United States and the P.R.C.

\textsuperscript{113} See note 68 supra.
deteriorated in 1950. If the blocked Chinese assets were utilized, there also would be minimal impact on the foreign trade and internal development plans of the Chinese. 114

While another suggests that:

[t]his feature would provide not only for rapid implementation of the claims and assets agreement, but would also avoid the spectacle of the Senate’s refusal to ratify a lump-sum agreement or other settlement treaty with China the compensatory terms of which it found unsatisfactory. The implications of the Litvinov Assignment respecting property rights and domestic law have already been “extensively litigated”; it is well established that such an assignment from China to the United States would validate China’s title to all the blocked assets and assign such title to the U.S. Government. The assets would then be vested, liquidated and distributed according to the congressional mandate. Since this transaction would be intimately connected with the conduct of foreign affairs, its recognition of China’s title to the blocked assets would be binding on the courts.115

As will be discussed, it is important that any type of international assignment agreement be incidental to recognition of the P.R.C. Regime as with the Litvinov Assignment.

IV. LUMP SUM AGREEMENT AND RECOGNITION

The negotiation of a lump sum settlement is a complex matter involving the interrelatedness of the recognition problem and the P.R.C.’s desire for trade concessions from the U.S. Charles Redick states that “it is too early to determine” that the claims settlement agreement will be settled in conjunction with the resolution of the issues of recognition and trade concession:

With China Claims Program completed and its record certified to the Secretary of State, claimants now must look to the U.S. Government for action which will bring them compensation for their losses. In considering the result of the completed program, it is not inappropriate to ask just what the response of the P.R.C. to it will be. Recent events indicate that the claims settlement may be part and parcel of a more comprehensive accord between the United States and the P.R.C., but it is still too early to determine whether this will be so.116

It is extremely unlikely, however, that an agreement could be reached in the absence of a solution to the recognition problem for several reasons. Charles Bayer, author of perhaps the most authoritative article on the Chinese Claims problem states that in the absence of recognition:

114. Redick, supra note 90, at 740.
115. Note 110 supra, at 1002-03.
116. Redick, supra note 90, at 738.
unblocking the Chinese assets removes the prohibition on unlicensed legal proceedings to establish claims against them. While a claims settlement with China would serve to prevent any U.S. claimant from seeking compensation from a source other than the settlement fund, it would not bar the claims from foreign creditors and claimants. The crucial point in this regard is that the major foreign claimant will be Nationalist China. As of now, only $916 million in adverse claims against the blocked assets have been registered by Nationalist Chinese interests, but the registered claims represent only those claims in existence in 1950 and acted upon to some extent. It is most likely that Nationalist Chinese banks and emigre corporations each will lay claim to the previously blocked assets of their mainland counterparts, which amount to some $57.1 million. Persons with relatives in China, claiming that assets sent there are likely to be confiscated, might seek to gain custody of the assets of their relatives, to be held for their benefit.\(^{117}\)

A claims settlement accompanied by recognition of the P.R.C. would prevent the National Chinese Government and its agencies, now prohibited from asserting claims against the frozen assets, from doing so when they became unfrozen, as stated in *Guaranty Trust Company v. United States*\(^ {118}\) and *Russian Socialist Federated Soviet Republic v. Cibrario*.\(^ {119}\) However, this would not be the case for a corporation or bank which is not an embodiment of the government, as both *United States v. Insurance Cos.*\(^ {120}\) and *Sokoloff v. National City Bank of New York*\(^ {121}\) have held.

A. Litvinov Assignment\(^ {122}\)

The Litvinov Assignment was an agreement between the U.S. and the Soviet Union by which the U.S. accepted an assignment of certain claims due to the Soviet Union on November 16, 1933 in connection with the recognition of the Soviet Union. The note of the Soviet Foreign Minister Maxim Litvinov which outlined the agreement provided that:

*The government of the Union of Soviet Socialist Republics will not take any steps to enforce any decisions of courts or initiate any new*

\(^{117}\) Note 110 supra, at 1000.

\(^{118}\) 304 U.S. 126, 137 (1938).

\(^{119}\) 235 N.Y. 255, 139 N.E. 259 (1923).

\(^{120}\) 89 U.S. (22 Wall.) 99 (1874).

\(^{121}\) 239 N.Y. 158, 145 N.E. 917 (1924).

\(^{122}\) It should be kept in mind that in the past, i.e., prior to Pub. L. No. 95-223, there was power under § 5(b) to vest property unilaterally during a national emergency. Vesting (pursuant to a specific congressional authorization) remains an alternative to the lump sum agreement. It should be noted that the Litvinov Assignment was not entirely satisfactory since it involved a great deal of litigation.
litigations for the amounts admitted to be due or that may be found to be due it, as the successor of prior Governments of Russia, or otherwise, from American nationals... and does hereby release and assign all such amounts to the Government of the United States...

If an agreement analogous to the Litvinov Assignment is present then it can be assumed that the problems of "two Chinas" relating to the status of Nationalist China vis-a-vis the U.S., Nationalist Chinese government vis-a-vis the Communist Regime, and all conflicting claims have been reconciled in such an agreement. As one scholar has noted referring to the consequences of one alternative:

If the People's Republic of China assigned to the U.S. its interests in the assets blocked and frozen at the outset of the Korean emergency, substantial funds would be made available to compensate the China claimants at least for 15 to 20 percent of their adjudicated losses. If an agreement analogous to the Litvinov Assignment is present then it can be assumed that the problems of "two Chinas" relating to the status of Nationalist China vis-a-vis the U.S., Nationalist Chinese government vis-a-vis the Communist Regime, and all conflicting claims have been reconciled in such an agreement. As one scholar has noted referring to the consequences of one alternative:

If the People's Republic of China assigned to the U.S. its interests in the assets blocked and frozen at the outset of the Korean emergency, substantial funds would be made available to compensate the China claimants at least for 15 to 20 percent of their adjudicated losses. Indeed, the New York Times hinted that such a claims agreement may be part of a more all-inclusive and comprehensive accord between the U.S. government and the People's Republic of China. One possible assumption implicit in such an agreement would be that the U.S. government's recognition of the Regime as the government of China would also include the recognition of the Nationalist Chinese government (Formosa and the Pescadores) as an independent state. Whatever the specific terms of such an agreement, they would undoubtedly clarify many of the problems that would arise with recognition in the absence of such an agreement as will be discussed below. In such a situation involving recognition and an incidental agreement with the Regime, the de facto or de jure nature of recognition becomes irrelevant to the terms of such a controlling and determinative agreement. The irrelevance of such a distinction owes to the holding expressed in the Tinoco Arbitration, internal application of decrees in Luther v. Sagor, and the conclusions of many authors as noted by Cochran who writes:

the difference if any, is becoming less clear... The existence of de facto recognition is becoming a moribund issue by not being raised as a possibility by the government.

124. Redick, supra note 90, at 740.
He goes on to discuss the importance of the State Department’s Digest as lending authority to this position.

According to one view, retroactivity\(^{129}\) is dependent upon de jure recognition\(^ {130}\) in validating actions of a government from the commencement of its existence. The co-existence of two governments also makes the nature of the recognition accorded to the Regime meaningful. Such a distinction is important in determining which of the governments, if either, may claim the extraterritorial assets in the U.S. According to D. P. O’Connell:

> The de jure government remains exclusively competent with respect to State activities both within the territory over which it has retained control, and in the world at large outside the national territory. Conversely, the de facto government is competent extraterritorially.\(^{131}\)

The effect of this distinction and the relationship with a third party to the proceedings, i.e., the “other” government, is dealt with in *Civil Air Transport, Inc. v. Central Air Transport Corp.*:

> retroactivity of recognition operates to validate acts of a de facto government which has subsequently become the new de jure government and not invalidate acts of the previous de jure government.\(^ {132}\)

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129. The most cogent discussion of the notion of retroactivity is by Fitzmaurice who states regarding retroactivity:

> The fact that (as is generally agreed) recognition, once given, operates retroactively to legitimize and give legal effect to the acts of the entity concerned, as from the date of its inception, is sometimes cited as a stumbling-block to both the main theories of recognition. It certainly is so to the constitutive theory, because how can there be dating back in respect of something that did not exist at that time, and to a period preceding what was only constituted by the recognition itself? But retroactivity is also said to be an objection to the declaratory view, because on the basis of that view, [an international person exists] and since the international person existed even previous to its recognition, no specific doctrine of retroactive ought to be necessary. The answer seems to be that on the declaratory view, it is not necessary. The entire doctrine of retroactivity in this context, is one which grew up with the original, constitutive, view of recognition, and was necessitated precisely because (though logically wholly at variance with it) the constitutive view required this practical adjustment. In short, retroactivity had to be postulated because the constitutive view never fitted the facts. On the declaratory view, the doctrine of retroactivity is not so much abolished as rendered superfluous. Strictly, the question does not arise, since on this view recognition does not create the international person.


B. Problem of Recognition Without a Lump Sum Agreement

With recognition in the absence of a lump sum agreement by the U.S. the P.R.C. would subject itself to counterclaims in bringing suit in U.S. courts to obtain control over confiscated assets. According to the Court's opinion in National City Bank of N.Y. v. Republic of China,135 counterclaims against the government of China (in this case the P.R.C.) would be valid to the extent of the government's claim. This is not contrary to the concept of sovereign immunity as expressed in the Schooner Exchange134 case because, in bringing suit in U.S. courts, the government submitted itself to the jurisdiction involved by such action and defenses by way of set-off and counterclaim are available against the original plaintiff in the case.135

Another aspect of the possible consequences of recognition of the Regime as the government of China by the U.S. is implied in Petrogradsky.136 In the opinion of the Court, the corporation was held to exist as a juridical entity and entitled to the surplus of funds after claims to the funds had been taken care of. This case was a situation involving a non-recognized government. The assertion of third party interests (in this case the defunct Imperial Russian government and board of directors) not a party to the litigation is not authoritative and does not justify refusing to hand over the assets in question. A freezing of the assets in question, similar to the sine die decision of the District Court in Wells Fargo Bank and Union Trust,137 might occur in the absence of recognition.

Even with recognition, in the absence of an executive agreement incidental to it, the type of recognition remains unknown to the Court, unless it was de jure. In this sense, either form of recognition would lend weight to the Regime's legal position with regard to the assets in question but would not necessarily be determinative and valid retroactively unless the recognition extended was de jure because of the peculiarities of the "two Chinas Problem." Most importantly, in the absence of recognition of the P.R.C. by the U.S., the Nationalist Government would have the capacity to litigate for those assets as soon as they were unblocked.

V. CONCLUSION

There is even greater incentive today to resolve the blocked Chinese assets and claims issues. As Sino-American relations continue to develop,138 these issues will remain an impediment. During an era of rapprochement when

133. Note 79 supra.
136. Note 72 supra.
137. Note 79 supra.
138. This development has been manifested in various executive agreements, statements, pronouncements and actions. An early sampling of these would include: U.S. Dep't of State,
global interdependence extends beyond ideological curtains, the shadow of the protection of foreign investment remains. It is particularly important since the resolution of the sovereign immunities problem that has been the source of extensive litigation and academic dispute since Banco National de Cuba v. Sabbatino. As the United States seeks to clarify the status of sovereigns in its courts, many pressing issues exist. One has been examined here.

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