

COMMENTS

BLOCKED ASSETS AND PRIVATE CLAIMS: THE INITIAL BARRIERS TO TRADE NEGOTIATIONS BETWEEN THE UNITED STATES AND CHINA

The joint communique¹ issued in Shanghai at the conclusion of the Peking Summit expressed a desire for the normalization of relations between the United States and China.² To effect that proposed goal specific discussions centered on an expansion of bilateral trade:

Both sides view bilateral trade as another area from which mutual benefits can be derived, and agree that economic relations based on equality and mutual benefit are in the interest of the peoples of the two countries. They agree to facilitate the progressive development of trade between their two countries.³

Although President Nixon has implemented a series of measures⁴ since 1969 designed to relax barriers to the expansion of trade between the United States and China, there remains one crucial obstacle that must be surmounted before any serious bilateral trade agreement can be effected. That obstacle involves the settlement of claims by U.S. nationals against the Chinese government arising out of its expropriations of property since October 1, 1949, when the Communist regime on the mainland was declared. It appears highly unlikely that China would be willing to establish direct trade with the United States if its vessels and aircraft were subjected to the risks of being levied against for satisfaction of these claims.

An interrelated and inseparable aspect of the claims settlement problem involves Chinese assets located in this country which have been "blocked" by the Secretary of the Treasury pursuant to the Foreign Assets Control Regulations.⁵ Dr. Kissinger has indicated recently that the claims settlement and blocked assets issues must be resolved in order to clear the way for substantive talks relating to future trade agreements.⁶ This comment will focus briefly on the character of these issues and the problems they present.

¹For the complete text of the communique see 66 DEP'T STATE BULL. 435 (1972).

²For a discussion of the Peking Summit in this regard see Green, *U.S.-China Relations: Progress Toward Normalization*, 68 DEP'T STATE BULL. 306 (1973).

³66 DEP'T STATE BULL. 438 (1972).

⁴For a discussion of these measures relating to various technical aspects of trade, travel, monetary, and transport restrictions see Starr, *Developing Trade with China*, 13 VA. J. INT'L L. 13, 23-25 (1972). See also Note, *Recent Changes in United States Trade Regulations Affecting the People's Republic of China: A Market Decontrolled*, 13 VA. J. INT'L L. 78 (1972).

⁵31 C.F.R. § 500 (1972). The Foreign Assets Control Regulations were promulgated pursuant to the Trading with the Enemy Act of 1917, 50 U.S.C. App. § 5(b) (1970) and Exec. Order No. 9193, 3 C.F.R. 1174-77 (1938-43 Comp.), 50 U.S.C. App. § 6 (1970), amending Exec. Order No. 9095, 3 C.F.R. 1121 (1938-43 Comp.), 50 U.S.C. App. § 6 (1970).

⁶Following a United States-China communique issued simultaneously at Washington and Peking on February 22, 1973, Dr. Kissinger held a news conference in which he stated:

With respect to outstanding issues that have been discussed in other channels, it was

There are presently some \$250 millions in claims held by U.S. nationals against China,⁷ which claims have been validated by the Foreign Claims Settlement Commission pursuant to its authority under the China Claims Act of 1966.⁸ That Act authorized the Commission to determine the amount and validity of claims held by U.S. nationals against the Chinese government.⁹ The Commission's decisions are based on applicable substantive law to include international law.¹⁰ The Act does not, however, provide for payment of awards granted by the Commission.¹¹ Instead, the Commission is to provide a "presettlement adjudication"¹² of claims which are then certified to the Secretary of State "to be useful in future negotiations of claims settlement agreements when normal diplomatic relations are resumed between the governments concerned."¹³ This "presettlement adjudication" does not represent a judgment that can be executed upon in the federal courts,¹⁴ and until final settlement

agreed that the linked issue of United States private claims against the People's Republic of China and P.R.C. blocked assets in the United States would be negotiated on a global basis in the immediate future. Discussions will begin on this subject between Secretary of State Rogers and the Chinese Foreign Minister next week when both are attending the International Conference on Viet-Nam in Paris, and we expect these negotiations to be concluded rapidly and in a comprehensive way, and we are certain that both sides are approaching them in a constructive spirit and in an attitude consistent with our intention to accelerate the improvement of our relations.

[T]here is already a reasonable amount of trade, much larger than any projection had foreseen two years ago. The initial step in a further expansion has to be the discussion of the two issues . . . [of] blocked assets and private claims. When these two issues are resolved, which we can expect to be fairly soon, then further steps can be taken. 68 DEP'T STATE BULL. 313, 315, 316 (1973).

⁷68 DEP'T STATE BULL. 317 (1973). As of July 6, 1972, the Foreign Claims Settlement Commission had rendered 576 final decisions, including 384 awards and 192 denials, for a total amount of nearly \$197 millions. See FOREIGN CLAIMS SETTLEMENT COMM'N ANN. REP. 1, 18, 24-25 (1971) and addendum prepared by Susan M. Jacoby, Office of Assets Control, Treasury Department.

⁸22 U.S.C. §§ 1643-1643k (1970).

⁹The China Claims Act of 1966, 22 U.S.C. § 1643b (1970), amending the International Claims Settlement Act of 1949, 22 U.S.C. § 1643 (1964), provides that the Commission shall determine: losses resulting from the nationalization, expropriation, intervention, or other taking of, or special measures directed against, property including any rights or interests therein owned wholly or partially, directly or indirectly at the time by nationals of the United States.

The term "property" is defined in 22 U.S.C. § 1643a(3) as

any property, right, or interest including any leasehold interest, and debts owed by the . . . Chinese Communist regime or by enterprises which have been nationalized, expropriated, intervened, or taken by the . . . Chinese Communist regime and debts which are a charge on property which has been nationalized, expropriated, intervened, or taken by the . . . Chinese Communist regime.

¹⁰22 U.S.C. § 1643b (1970).

¹¹22 U.S.C. § 1643 (1970).

¹²FOREIGN CLAIMS SETTLEMENT COMM'N ANN. REP. 18 (1971).

¹³FOREIGN CLAIMS SETTLEMENT COMM'N ANN. REP. 5 (1971).

¹⁴22 U.S.C. § 1643 (1970).

between the United States and China is reached claimants may resort to the courts. Litigation, however, would be a futile exercise because there are currently no Chinese assets available in this country upon which execution can be obtained. All such assets have been blocked by the Secretary of the Treasury pursuant to the Foreign Assets Control Regulations, making them unavailable for use not only by the Chinese government and its nationals, but also unavailable to U.S. claimants unless a transfer license is obtained from the Secretary of the Treasury.¹⁵

The blocking of foreign assets located in this country reflects several policy considerations which have recurred throughout the history of the United States.¹⁶ The purposes of the Trading with the Enemy Act of 1917,¹⁷ under which the Regulations were promulgated,¹⁸ were to codify the common law unlawfulness of trading with the enemy and to update legislation in this area to be more reflective of "the needs and conditions of the present day."¹⁹ New problems which the Act attempted to surmount included the necessity of impounding funds due to the modern commercial practice of "transfer credits and money by letter,"²⁰ the necessity of defining the enemy with particularity, and the necessity of the United States Government having the use of the funds temporarily, rather than acting as the enemy's debtor or agent.²¹ The funds would "be paid back to the enemy or otherwise disposed of at the end of the war as Congress shall direct."²²

The Act has been continued in effect, being amended on several occasions to meet new problems.²³ For example, the 1933 amendment extended the

¹⁵*Id.*

¹⁶*See, e.g.,* Miller v. United States, 78 U.S. (11 Wall.) 268, 305-06 (1870), where federal marshalls confiscated Northern railroad stocks that belonged to one Samuel Miller, charged with being a confederate officer, judge, and member of the Confederate Congress. The Supreme Court upheld the constitutional authority of Congress to provide for such confiscation and said:

The confiscation is not because of crime, but because of the relation of the property to the opposing belligerent, a relation in which it has been brought in consequence of its ownership. It is immaterial to it whether the owner be an alien or a friend, or even a citizen or subject of the power that attempts to appropriate the property. . . . The whole doctrine of confiscation is built upon the foundation that it is an instrument of coercion, which, by depriving an enemy of property within the reach of his power, whether within his territory or without it, impairs his ability to resist the confiscating government, while at the same time it furnishes to that government means for carrying on the war.

¹⁷*See* note 5 *supra*.

¹⁸*Id.*

¹⁹Hearings on H.R. 4960 Before a Subcomm. of the House Comm. on Interstate and Foreign Commerce, 65th Cong., 1st Sess. 130-31 (1917).

²⁰*Id.*

²¹*Id.*

²²*Id.*

²³Trading with the Enemy Act § 5, ch. 106, § 5, 40 Stat. 415 (1917), *as amended*, ch. 176, § 5, 40 Stat. 966 (1918), *as amended*, ch. 1, § 2, 48 Stat. 1 (1933), *as amended*, ch. 185, § 1, 54 Stat. 179 (1940), ch. 593, § 301, 55 Stat. 839 (1941).

President's power to time of war or national emergency,²⁴ and the 1941 amendment made foreign fund control subject to the President and his appointed agencies.²⁵ In effect, the original World War I Trading with the Enemy Act became a flexible tool "as an act of permanent legislation which could be applied in the event that the United States was again involved in war."²⁶

President Truman used this flexibility on December 16, 1950, in response to the Chinese threat in North Korea, to issue the Proclamation of National Emergency²⁷ under which the Secretary of the Treasury issued the Foreign Assets Control Regulations²⁸ and placed China on the schedule as a designated foreign country.²⁹ Both the national emergency and the Regulations continue in effect today.

The administration of the Regulations and their judicial application³⁰ represent a rigid adherence to a four point policy with respect to China. The United

²⁴48 Stat. 1 (1933), 50 U.S.C. App. § 5 (1970).

²⁵55 Stat. 839 (1941), 50 U.S.C. App. § 5 (1970).

²⁶M. DOMKE, *TRADING WITH THE ENEMY IN WORLD WAR II* 2 (1943).

²⁷Proclamation No. 2914, 15 Fed. Reg. 9029, 50 U.S.C. App. 12266 (1970).

²⁸31 C.F.R. § 500 (1972).

²⁹31 C.F.R. § 500.201(d) (1972).

³⁰For an illustration of the extent to which the Secretary of the Treasury is willing to go in order to keep Chinese assets within the Department's control see *Cheng Yih-Chun v. Federal Reserve Bank of New York*, 442 F.2d 460 (2d Cir. 1971). The decedent died in Shanghai survived by his wife and five children, all residents of Shanghai with the exception of his son, the plaintiff, a resident of Hong Kong. The decedent had assets of \$62,000 deposited with the Irving Trust Company of New York which was appointed administrator and which subsequently transferred the funds to the Treasury of New York pursuant to an order of the New York County Surrogate Court.

On April 27, 1950, the Shanghai heirs and plaintiff executed a "Power of Attorney" before the British Vice-Consul, Shanghai, which purported to give the plaintiff the right to represent the interests of the Shanghai heirs in the New York estate. Later that year, however, on December 17, the Secretary of the Treasury issued the Foreign Assets Control Regulations.

In 1959 the plaintiff was permitted to withdraw his one-sixth distributive interest in the New York estate, but the remaining five-sixths interest owned by the Shanghai heirs was frozen under the Regulations. In 1963 the plaintiff exchanged letters with the Shanghai heirs whereby they purported to release all their interest in the New York estate in exchange for his release of the Shanghai estate. The Treasury Department, however, denied him a license for the New York funds, characterizing the attempted mutual release as a prohibited transfer of funds by designated nationals after the Regulations proscribing such transfers had become effective.

The plaintiff then sought to retrieve the funds through the New York County Surrogate Court which found, as a matter of New York law, that the 1950 "Power of Attorney" was sufficient to vest the entire estate in him. Armed with this ruling, the plaintiff renewed his application for a license from the Treasury Department along with an additional request that he be allowed a remittance from the blocked estate of \$100 per month which was permissible under the Regulations. 31 C.F.R. § 500.521 (1972). Again, the plaintiff was denied a transfer license and his request for the monthly remittance was refused. He then brought suit in the District Court for the Southern District of New York asking the court either to declare the funds not subject to the Regulations, to compel the Secretary to issue a transfer license, or to declare the Regulations unconstitutional. Summary judgment was granted the defendant. The Second Circuit Court of Appeals, opinion by Judge Friendly, affirmed, holding that the denial of a transfer license was neither arbitrary, capricious, or unconstitutional.

States had pursued this policy for almost twenty years prior to implementation of the Nixon measures beginning in 1969. The four points of this earlier policy may be described briefly in the following terms:

1. Economic defense—American financial facilities and dollars would not be made available for the benefit of China.

2. Preservation/Marshalling—pursuant to either unilateral action or as a part of a bilateral settlement between the two countries, the Chinese assets frozen in the United States can be used to offset American assets frozen, destroyed, or nationalized in China.

3. Protection of Chinese nationals' interests—the assets of Chinese nationals, especially of those living outside China, would be immune from confiscation by the Chinese government as long as those assets were kept in this country.

4. Isolation—in an attempt to isolate the Chinese economy no commercial or financial transactions were permitted by American firms or American controlled foreign firms.³¹

It is clear that the thrust of these policy considerations has lost its vitality in the face of the present *rapprochement*. Nevertheless, some \$78 millions in Chinese assets remain blocked under the Regulations.³²

By permitting the recent advent of trade, on however limited a basis, the United States "overtly demonstrates its acceptance of the Peking Government even if it does not involve formal recognition."³³ Even without formal recognition, however, the United States could in one stroke remove any barriers to direct trade between the two countries by the settlement of all claims that U.S. nationals hold against China. The implemented policies of preservation of blocked assets and of administration of claims provide an option for settlement in a manner analogous to the Litvinov Assignment.³⁴ Under that assignment,

³¹Sommerfield, *Treasury Regulations Affecting Trade with the Sino-Soviet Bloc and Cuba*, 19 BUS. LAW. 861, 867 (1964).

³²68 DEP'T STATE BULL. 317 (1973).

³³67 DEP'T STATE BULL. 491 (1972).

³⁴The assignment was in the form of a letter, dated November 16, 1933, to the President of the United States from Maxim Litvinov, People's Commissar for Foreign Affairs:

Following our conversations I have the honor to inform you that the Government of the Union of Soviet Socialist Republics agrees that, preparatory to a final settlement of the claims and counter claims between the Governments of the Union of Soviet Socialist Republics and the United States of America and the claims of their nationals, the Government of the Union of Soviet Socialist Republics will not take any steps to enforce any decisions of courts or initiate any new 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, including corporations, companies, partnerships, or associations, and also the claim against the United States of the Volunteer Fleet, now in litigation in the United States Court of Claims, and will not object to such amounts being assigned and does hereby release and assign all such amounts to the Government of the United States, the Government of the Union of Soviet Socialist Republics to be duly notified in each case of any amount realized by the Government of the United States from such release and assignment.

as a condition precedent to recognition of the Soviet Union, claims due the Soviet Union were released and assigned to the United States in settlement of claims and counterclaims between the governments and nationals of each.³⁵ Settlement with China would involve allocating to each U.S. claimant, whose claim has been determined and validated by the Foreign Claims Settlement Commission, a pro rata share of the \$78 millions in the blocked assets fund. Each claimant would receive approximately \$.31 per dollar of his validated claim.

The President³⁶ may face pressure on the part of organized claimants to hold

The Government of the Union of Soviet Socialist Republics further agrees, preparatory to the settlement referred to above not to make any claims with respect to:

(a) judgments rendered or that may be rendered by American courts in so far as they relate to property, or rights, or interests therein, in which the Union of Soviet Socialist Republics or its nationals may have had or may claim to have an interest; or,

(b) acts done or settlements made by or with the Government of the United States, or public officials in the United States, or its nationals, relating to property, credits, or obligations of any Government of Russia or nationals thereof.

Exchange of letters between Soviet Foreign Minister Litvinov and President Roosevelt, November 16, 1933, in Dep't of State, Eastern European Series, No. 1 (1933). President Roosevelt's acknowledgement letter concluded by saying:

I am glad to have these undertakings by your Government and I shall be pleased to notify your Government in each case of any amount realized by the Government of the United States from the release and assignment to it of amounts admitted to be due, or that may be found to be due, the Government of the Union of Soviet Socialist Republics, and of the amount that may be found to be due on the claim of the Russian Volunteer Fleet.

Id.

³⁵For cases upholding the constitutional validity of the Assignment see *United States v. Pink*, 315 U.S. 203 (1942); *Guaranty Trust Co. v. United States*, 304 U.S. 126 (1938); *United States v. Belmont*, 301 U.S. 324 (1937).

³⁶The President's authority to conclude settlement by executive action without the concurrence of Congress has been recognized by the Supreme Court in two cases involving the Litvinov Assignment. In *United States v. Belmont*, 301 U.S. 324, 330 (1937), the Court said:

The recognition, establishment of diplomatic relations, the assignment, and agreements with respect thereto, were all parts of one transaction, resulting in an international compact between the two governments. That the negotiations, acceptance of the assignment and agreements and understandings in respect thereof were within the competence of the President may not be doubted. Governmental power over internal affairs is distributed between the national government and the several states. Governmental power over external affairs is not distributed, but is vested exclusively in the national government. And in respect of what was done here, the Executive had authority to speak as the sole organ of that government. The assignment and the agreements in connection therewith did not, as in the case of treaties, as that term is used in the treaty making clause of the Constitution (Art. II, § 2), require the advice and consent of the Senate.

With respect to 5th Amendment property rights of U.S. and alien claimants, the Court in *United States v. Pink*, 315 U.S. 203, 228, 229, 230 (1942), pointed out that

[i]f the President had the power to determine the policy which was to govern the question of recognition, then the Fifth Amendment does not stand in the way of giving full force and effect to the Litvinov Assignment.

. . . Power to remove such obstacles to full recognition as settlement of claims of our

out for a more advantageous settlement in the hope that more Chinese assets will somehow turn up within United States jurisdiction as a result of the already increasing trade, or perhaps that the Chinese government will recognize the validity of the claims and contribute assets for their full satisfaction. It is unlikely, however, that any claim is presently being carried as an asset on a claimant's books, and any settlement would almost certainly be considered a windfall for claimants who until recently had no realistic expectation of receiving anything.

Such a settlement would benefit two governments and two peoples cautiously and deliberately trying to reverse policies of mutual antagonism. If the steadily flowing current of the past 23 years has not exactly been reversed, it has at least been diverted from what was previously considered the only course it would ever follow. The political implications of direct bilateral trade, established and conducted in a manner as among friends, would be enormous. Resolution of the blocked assets and claims settlement issues is merely the starting point.

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nationals . . . certainly is a modest implied power of the President. . . . No such obstacle can be placed in the way of rehabilitation of relations between this country and another nation, unless the historic conception of the powers and responsibilities of the President in the conduct of foreign affairs . . . is to be drastically revised. It was the judgment of the political department that full recognition of the Soviet Government required the settlement of all outstanding problems including the claims of our nationals. Recognition and the Litvinov Assignment were interdependent. We would usurp the executive function if we held that that decision was not final and conclusive in the courts.