CERTAIN LEGAL ASPECTS OF RECOGNIZING THE PEOPLE'S REPUBLIC OF CHINA

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By Hungdah Chiu

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Certain Legal Aspects of Recognizing the People’s Republic of China

by Hungdah Chiu*

In this work the author assumes normalization as an established national policy of the United States, and analyzes practical considerations and legal problems relating to the implementation of the American normalization policy with the People’s Republic of China. In particular, the author addresses questions relating to the current status of the 1972 Shanghai Communiqué, the legal aspects of a treaty termination with the Republic of China, the problem of frozen assets, the international legal status of Taiwan, and the international status of the Republic of China as affected by the recognition of the People’s Republic of China.

I. INTRODUCTION

The small number of published studies on legal aspects of normalization of relations with the People’s Republic of China (PRC) deal primarily with the United States domestic legal problems concerning normalization. These works focus on the means for working out a legal framework in which to maintain existing United States cultural, economic, trade and other relations with the Republic of China (ROC) in Taiwan after normalization. This article does not deal with such problems, but rather concentrates on five issues of United States constitutional law and public international law, namely:

1. The Shanghai Communiqué, which is the basis of United States-PRC relations. Its legal status will be examined as well as the related question of whether the document commits the United States to accept the PRC’s three conditions for normalizing relations.

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* Professor of Law, University of Maryland School of Law. The author would like to thank Phyllis Dobin Maurer of Swift & Swift, Washington, D.C. for her research assistance with this article. The views expressed herein are entirely the author’s.


(1)
2. Domestic and international legal aspects of terminating treaties with the ROC, especially the Mutual Defense Treaty, concluded in 1954, and the security problems of Taiwan in the post-normalization period.

3. The constitutional problem of using frozen PRC assets in the United States to satisfy the claims of United States nationals against the PRC.

4. The international legal status of Taiwan.

5. The impact of recognizing the PRC on the international status of the ROC.

II. THE SHANGHAI COMMUNIQUÉ, ITS LEGAL STATUS, AND THE PRC'S THREE CONDITIONS FOR ESTABLISHING DIPLOMATIC RELATIONS

On February 27, 1972, when President Nixon concluded his visit to the PRC, a joint communiqué was issued at Shanghai in which both countries, while still disagreeing on many issues, stated that “progress toward the normalization of relations between China and the United States is in the interests of all countries.” Subsequently, some China specialists in the United States argued for the speedy normalization of relations with the PRC under the latter’s three “conditions,” namely the removal of all United States military personnel and installations from Taiwan, the severance of the United States diplomatic relations with the ROC, and the abrogation of the United States-ROC Mutual Defense Treaty of 1954.

Some specialists have even argued that in the Shanghai Communiqué the United States had already pledged to take these steps,

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7 For the entire text of the Shanghai Communiqué, see 66 DEPT STATE BULL. 435 (1972).


The three “conditions” were never explicitly articulated as such in any official statement from Peking, however, a general consensus emerged that the Shanghai Communiqué represented an understanding by both Peking and Washington that Peking sought compliance with these conditions as prerequisites for normalization. Since 1972, both parties consistently referred to them, although the United States never publicly embraced the requirements of de-recognition of the ROC and abrogation of the Mutual Defense Treaty of 1954 until President Carter’s normalization announcement of December 15, 1978.
although the validity of such an interpretation of the Communiqué appears to be questionable.

So far as relations between the ROC and the United States are concerned, the Shanghai Communiqué was a document of both clarity and ambiguity. It was clear because the PRC and the United States both maintained that all United States forces should ultimately be withdrawn from Taiwan. It was ambiguous because the two sides did not agree on how the Taiwan question should be settled. The PRC insisted that the “liberation of Taiwan is China’s internal affair in which no other country has the right to interfere.” On the other hand, the United States “affirm[ed] its interest in a peaceful settlement of the Taiwan question by the Chinese themselves.” Both statements are silent as to the United States-ROC Mutual Defense Treaty and United States-ROC diplomatic relations.

President Nixon explained the United States position before he went to the PRC in the following terms: “In my address announcing my trip to Peking, and since then, I have emphasized that our new dialogue with the PRC would not be at the expense of friends . . . with the Republic of China, we shall maintain our friendship, our diplomatic ties, and our defense commitment.” This position was affirmed by Secretary of State Henry Kissinger at a press conference held on February 27, 1972, after the issuance of the Shanghai Communiqué. The pertinent colloquy is as follows:

*Question.* Why did not the United States government reaffirm its treaty commitment to Taiwan, as the President and you have done on numerous occasions?

*Dr. Kissinger.* Let me . . . state in response to this and any related question, and let me do it once and not repeat it. We stated our basic position with respect to this issue in the President’s world report in which we say that this treaty will be maintained. Nothing has changed in that position . . . the position of the world report stands and has been unaltered.*

After the issuance of the Shanghai Communiqué, the United States gave fifty to sixty assurances to the ROC government that the treaty commitment would be kept, justifying the conclusion that the United

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5 President Nixon’s Visit to the PRC, News Conference of Dr. Kissinger and Mr. Green, in Shanghai (Feb. 27, 1972), reprinted in 66 DEPT. STATE BULL. 428 (1972).
States made no commitment in the Shanghai Communiqué to terminate diplomatic relations and the Mutual Defense Treaty with Taiwan.

Some commentators have argued, however, that there was a tacit, implicit pledge in the Shanghai Communiqué or by President Nixon or Secretary of State Kissinger, to accept the three conditions. This raises two important questions: (1) Did the United States Government clearly explain this implication to the American people and American allies?; (2) Did the United States President or the Secretary of State have the constitutional authority to commit the United States to such a secret agreement? In other words, would such an agreement be binding? My view is that it would not be.⁶

In this connection, it is necessary to analyze the legal status of the Shanghai Communiqué in international law. Some commentators have assumed that it is a treaty or international agreement concluded between the United States and the PRC. This view is questionable. It is true that the PRC appears to regard this document as a treaty by including it in its official Treaty Series,⁷ but the United States has not yet treated this document as such. The Communiqué has not been included in the Department of State annual official publication, Treaties in Force, which includes all United States concluded treaties, agreements, exchange of notes, and others; nor is the Communiqué included in the Treaties and International Agreements Series (T.I.A.S.) of the United States.

At the international level, while international law does not prescribe a particular form for treaties or international agreements,⁸ it is also true that not every document issued jointly by two countries is

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⁶ In 1975, The United States Department of State publicly declared that any explicit commitment made by the President toward a foreign country has no legally binding force. The Department indicated that it does not keep records of exactly how many commitments are made by American Presidents or of their terms. See Baltimore Sun, July 3, 1975, at A2. If an explicit commitment made by a President alone is not legally binding, how can a secret declaration of intention or agreement made by a President have any political or legal meaning in the eyes of the American people?

⁷ 13 CHIH-HUA JEN-MIN KUNG-HO KUO T'AI-YUEH CHI 20-24 (1977) (collection of treaties of the People’s Republic of China). However, neither the United States nor the PRC has so far attempted to register the Communiqué with the United Nations Secretariat for publication in the United Nations Treaty Series.

necessarily an international agreement. In the renowned Lauterpacht-Oppenheim work it is said:

A mere general statement of policy and principles cannot be regarded as intended to give rise to a contractual obligation in the strict sense of the word. On the other hand, official statements in the form of Reports of Conferences signed by the Heads of States or Governments and embodying agreements reached therein may in proportion as these agreements incorporate definite rules of conduct, be regarded as legally binding upon the States in question.9

If we apply the principles stated above, it is clear that only those parts of the Communiqué where there was agreement between the United States and the PRC are legally binding in international law. Those agreed parts, however, did not include the obligation for the United States to terminate the Mutual Defense Treaty or to sever diplomatic relations with the PRC.10

III. THE PROBLEM OF TERMINATING TREATIES WITH THE ROC AND THE SECURITY OF TAIWAN IN THE POST-NORMALIZATION PERIOD

One of the PRC's three conditions for normalization was that the United States abrogate the 1954 Mutual Defense Treaty with the ROC. Under international law, there were three possible ways for the United States to terminate the treaty. The first is by invoking article X of the treaty, which provides that, "Neither Party may terminate it one year after notice has been given to the other Party." While it is legal for the United States to invoke article X, this method of termination entails severe political problems. During the one year notice period, the President would be subjected to extraordinary political pressures to revoke the notice of termination, as ROC supporters in the United States would mobilize all their efforts toward reversing the decision. Such an extended period of political turmoil could seriously impede the whole of United States foreign policy decision-making and would doubtless have unforeseeable adverse implications in other spheres of political and diplomatic action. There also is a constitutional problem as to

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10 For a similar view, see Edwards, Legal Aspects of Normalization of U.S.-PRC Relations, 2 Contemp. China 42 (1978). Also, nothing in President Nixon's memoirs indicates that he ever committed the United States to sever diplomatic relations or to terminate the Mutual Defense Treaty with the ROC. See R. Nixon, The Memoirs of Richard Nixon 559-71 (1978), for an account of the process in negotiating the Shanghai Communiqué.
whether the President can terminate any treaty in this way without the advice and consent of the Senate, or the participation of the Congress.

Secondly, if Taiwan declared itself a new, sovereign and independent state, the Mutual Defense Treaty would automatically lapse because of the demise of the international personality of the ROC. The international law principle on this point seems quite clear, as stated in Lauterpacht-Oppenheim's treatise, "[t]reaties of alliance . . . or of any other political nature fall to the ground with the extinction of the State which concludes them."\(^\text{11}\) Under such circumstances, there would be less public resistance to the President's allowing the Defense Treaty to lapse. A Gallup Poll conducted August 5 to 15, 1977, a few days before Secretary of State Vance's trip to the PRC, indicated that fifty-eight percent of Americans felt that the United States should not cancel the Mutual Defense Treaty with the ROC.\(^\text{12}\) However, in the same year, an opinion poll conducted by the Foreign Policy Association indicated that if Taiwan became an independent new state, sixty-three percent polled would favor allowing the Mutual Defense Treaty to lapse, while only eighteen percent would oppose.\(^\text{13}\)

A third method of terminating the 1954 Mutual Defense Treaty would be to consider that the treaty lapsed automatically upon recognition of the PRC as the sole legal government of China. This method reportedly received favorable consideration from the present Administration. The theoretical basis of this approach is that since the ROC and the PRC have each claimed to be the sole legal government of China, the United States must choose between the two. By recognizing the PRC as the only legal government of China, the United States would necessarily de-recognize the ROC and deny that it has any international legal personality, including the capacity to maintain existing treaties.

This theory would make sense only if the United States Government had in fact and in law treated the ROC government as the only legal government in China since 1949. But this was not the case. In the 1954 Mutual Defense Treaty, it was clearly provided in article VI that "the terms 'territorial' and 'territories' shall mean in respect of the Republic of China, Taiwan and the Pescadores," thus limiting United States recognition of the ROC government to the area under the

\(^{11}\) 1 L. OPFENHEIM, supra note 9, at 159.

\(^{12}\) See Gallup Poll: Americans Favor Official Ties with Taipei by 6 to 1, News From China, Sept. 2, 1977, at 77-78.

\(^{13}\) See Foreign Policy Association, Outreacher (June 1977).
latter’s effective control. In a joint communique issued by the late President Chiang K’ai-shek and the late Secretary of State John Foster Dulles on October 23, 1958, it was further provided that the “United States recognizes that the Republic of China is the authentic spokesman for Free China.”14 This made it clear that the United States did not consider the ROC as representing mainland China under PRC control. It appears that the latest statement by a high official touching upon this problem was made in 1961. In response to a question asked by a representative of the British Broadcasting Corporation on March 3, 1961, then Secretary of State Rusk said, “the Chinese Nationalist leadership from the mainland, not just Government officials but their professors, their scholars, their scientists, their artists that came over to Taiwan, were to us and are much more genuine representatives of the China that we have known.” After saying this, Dean Rusk immediately qualified his remarks by saying, “I’m talking in this context about the great cultural heritage of China,”15 thus excluding its implication for recognizing the ROC as representing all of China.

Actually, since the mid-1950’s the United States in fact, and to a certain extent, in law, treated the two Chinese governments as having separate personalities in international affairs. This was evidenced by United States sponsorship of a dual representation proposal at the United Nations in 1971,16 the maintenance of official relations with the PRC on a de facto ambassadorial level (a liaison office having diplomatic immunities),17 the restriction of treaties concluded between the United States and the ROC before 1949 to apply only to Taiwan,18 the conclusion of many treaties or agreements with the ROC to apply to Taiwan only, and numerous other examples. Under such circumstances, for the United States to terminate the Mutual Defense Treaty with the ROC by recognizing the PRC as the only legal government of China would be inconsistent not only with the political reality of East Asia, but also with recognized principles of public international law. The ROC possesses the four essential elements of statehood under international law, namely: (1) a defined territory; (2) a permanent population; (3) a government; and (4) the capacity to enter into inter-

18 See note 21 infra.
national relations. None of these elements has changed since the conclusion of the Mutual Defense Treaty in 1954. To say that a country can evade its treaty obligations by declaring nonrecognition of the other contracting party would be contrary to a fundamental principle of international law, *pacta sunt servanda*. Moreover, international practice also will not support such a view, as Dr. Bot pointed out:

A non-recognized state can be a party to international agreements provided that its de facto authorities carry on, even if only as agents, the external relations and can avail themselves of the resources of the territory and control the population if necessary, for the purpose of observing treaty obligations assumed.¹⁹

The constitutional aspect of terminating the United States-ROC Mutual Defense Treaty and other treaties concluded with the advice and consent of the Senate also should be noted. In an elaborate study of this problem, Senator Goldwater concluded that the executive cannot terminate the defense treaty with the ROC without the participation of the Senate or the Congress, either by way of one year notice or de-recognition.²⁰

Moreover, it should be noted that terminating the Mutual Defense Treaty by de-recognizing the ROC also would result in terminating all other United States treaties with the ROC. This would include the 1946 Treaty of Friendship, Commerce and Navigation with the ROC, ratified with the advice and consent of the Senate,²¹ which is the very basis of United States-ROC economic and trade relations. Since most provisions of this treaty, like other treaties of establishment, are self-executing, and since most provisions significantly affect the right of United States nationals and corporations in Taiwan, it is only logical that the termination of this treaty should require the participation of the Senate or the Congress.

In this connection, it is interesting to note a memorandum

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²⁰ According to Senator Goldwater, the constitutional power to terminate treaties lies not with the executive alone, but with the legislature and executive acting in concert. See remarks of Senator Goldwater, 124 CONG. REC. S11,716 (daily ed. July 25, 1978); 124 CONG. REC. S14,427 (daily ed. Sept. 8, 1977); N.Y. Times, Dec. 24, 1978, at A2, col. 3; id., at A9, col. 1.
²¹ 63 Stat. 1299; T.I.A.S. No. 1871; 25 U.N.T.S. 69. The Department of State considers the provisions of this treaty presently superceded with respect to areas of China not under the control of the National Government of the ROC. U.S. DEPT OF STATE, TREATIES IN FORCE 52 (1973). However, subsequent issues of the volume omit this note; it is not clear whether the treaty is now applicable to mainland China.
The United States Constitution is silent with respect to the power to terminate treaties . . . .

Although it is conceded that it is an executive function to communicate with foreign states on such matters . . . it has been questioned whether this function can be exercised for the purpose of terminating a treaty without the sanction of either or both of the Houses of the Congress. . . .

In connection with the termination or denunciation of a particular treaty by the United States, e.g., one year notice of termination, matters of policy or special circumstances may make it appear to be advisable or necessary to obtain the concurrence or support of the Congress or the Senate, either before or after taking the action for termination or denunciation . . . .

In view of the above discussion, it appears that whether the executive can unilaterally terminate the Mutual Defense Treaty or any other ratified treaty with the ROC without the participation of the Congress or the Senate, is at least an open question. At a minimum, it seems unlikely that a treaty, ratified by a two-thirds vote of the Senate, could lawfully be abrogated simply by executive order. This is especially so given the current political climate, in which the Congress appears anxious to retain and employ fully foreign policy powers.

In September 1978, the Congress attached an amendment to the International Security Assistance Act of 1978 concerning the Mutual Defense Treaty with the ROC. The text is as follows:

(a) The Congress finds that—
(1) the continued security and stability of East Asia is a matter of major strategic interest to the United States;
(2) the United States and the Republic of China have for a period of twenty-four years been linked together by the Mutual Defense Treaty of 1954;
(3) the Republic of China has during that twenty-four-year period faithfully and continually carried out its duties and obligations under that treaty; and
(4) it is the responsibility of the Senate to give its advice and consent to treaties entered into by the United States.
(b) It is the sense of the Congress that there should be prior consulta-

tion between the Congress and the executive branch on any proposed policy changes affecting the continuation in force of the Mutual Defense Treaty of 1954.\textsuperscript{23}

President Carter, however, ignoring the "sense" of the Congress and giving congressional leaders only a few hours advance notice, dramatically announced on December 15, 1978, that he would establish diplomatic relations with the PRC on January 1, 1979.\textsuperscript{24} A separate statement announced that the United States would terminate diplomatic relations with the ROC on that date and notify the ROC that the Mutual Defense Treaty would be terminated on January 1, 1980, in accordance with article X of the treaty.\textsuperscript{25} The President's unilateral decision without any prior consultations with the Senate apparently provoked many senators to challenge his move. Inside the Senate, it was reported that some senators proposed a resolution to require Senate approval for termination of a treaty.\textsuperscript{26} Outside the Senate, six senators and eight congressmen, headed by Senator Goldwater, filed a suit on December 22, 1978, in the United States District Court for the District of Columbia challenging the constitutionality of President Carter's unilateral decision to terminate the United States-ROC Mutual Defense Treaty.\textsuperscript{27}

A question closely related to the termination of the Mutual Defense Treaty is the security of Taiwan after the termination of the treaty on January 1, 1980. It had been the position of previous administrations that the PRC should pledge not to use force against Taiwan in exchange for United States termination of the Mutual Defense Treaty with the ROC. In connection with its recognition on January 1, 1979, the PRC neither explicitly nor implicitly pledged to refrain from using


\textsuperscript{26} \textit{See} Weaver, \textit{Treaty Termination May Spur Senators}, N.Y. Times, Dec. 18, 1978, at A13, col. 5.

force against Taiwan. Assistant Secretary of State for East Asian and Pacific Affairs Holbroke acknowledged that the United States negotiators had made no attempt to request Peking to do so.28 The United States also refrained from making a separate statement to commit United States assistance to Taiwan against outside attack.

In President Carter's statement accompanying the announcement of the joint communiqué establishing diplomatic relations between the PRC and the United States, he merely made the following statement concerning Taiwan: "The United States is confident that the people of Taiwan face a peaceful and prosperous future. The United States continues to have an interest in the peaceful resolution of the Taiwan issue and expect that the Taiwan issue will be settled peacefully by the Chinese themselves."29 The PRC immediately responded in a separate statement issued on the same day, by saying that the decision as to how to bring Taiwan back under its control for purposes of "unifying the country" was the PRC's "internal affair," implying that force could be used.

On the United States arms sales to Taiwan in the post-normalization period, the United States and the PRC only reached an agreement to disagree. PRC Premier Hua Kuo-feng said at a press conference held on December 16, 1978:

During the negotiations the United States side mentioned that after normalization it would continue to sell a limited amount of arms to Taiwan for defensive purposes. We made it clear that we absolutely would not agree to this. In all discussions the Chinese side repeatedly made clear its position on this question. We held that after the normalization, continued sales of arms to Taiwan by the United States would not conform to the principles of the normalization, would be detrimental to the peaceful liberation of Taiwan, and would exercise an unfavourable influence on the peace and stability of the Asia-Pacific region. So our two sides had difference on this point. Nevertheless, we reached an agreement on the joint communiqué.30

Later, it was disclosed that the United States agreed to sell only "limited" defensive weapons to Taiwan after normalization and to sell no arms to Taiwan in 1979.31 Many members of Congress severely criticized this agreement because there was no credible security

31 N.Y. Times, Jan. 13, 1979, at S.
assurance for Taiwan. After prolonged discussion in Congress and negotiation between congressional leaders and the Carter Administration, the latter reluctantly agreed to include the following policy statement on Taiwan's security in the Taiwan Relations Act of 1979, passed by the House (March 26, 1979) and the Senate (March 29, 1979):

(b) It is the policy of the United States—
(1) to preserve and promote extensive, close, and friendly commercial, cultural, and other relations between the people of the United States and the people on Taiwan, as well as the people on the China mainland and all other peoples of the Western Pacific area;
(2) to declare that peace and stability in the area are in the political, security, and economic interests of the United States, and are matters of international concern;
(3) to make clear that the United States decision to establish diplomatic relations with the People's Republic of China rests upon the expectation that the future of Taiwan will be determined by peaceful means;
(4) to consider any effort to determine the future of Taiwan by other than peaceful means, including by boycotts or embargoes, a threat to the peace and security of the Western Pacific area and of grave concern to the United States;
(5) to provide Taiwan with arms of a defensive character; and
(6) to maintain the capacity of the United States to resist any resort to force or other forms of coercion that would jeopardize the security, or the social or economic system of the people on Taiwan.32

IV. THE PROBLEM OF UNITED STATES NATIONALS' CLAIMS AGAINST THE PRC

At present, there are 384 United States claims worth approximately $196.8 million, without interest, against the PRC which have been validated by the Foreign Claims Settlement Commission.33 On the other hand, it has been reported that about $80 million in PRC assets in this country were “frozen” during the Korean War. It has been suggested that these 384 claims could be settled along the lines suggested by the model of the 1933 Litvinov Assignment34 between the United

States and the Soviet Union, under which the Soviet Union agreed to settle certain claims by the assignment to the United States of assets due to the Soviet Union as the successor of prior governments of Russia. However, whether the Chinese claims could be settled and ultimately effectuated within the framework of the United States Constitution is a question which has not yet been adequately studied in the voluminous literature on the normalization problem.

The alleged PRC assets in this country consist primarily of bank deposits or properties owned by Chinese nationals who resided on the mainland or by private corporations which were located there. Except for PRC liaison office building and the PRC's United Nations mission building, both of which are immune from United States jurisdiction under Public Law 93-22 and the International Organization Immunities Act, there are no PRC government assets in this country. In this connection, one must also take into consideration the particular situation of China—the ROC government continues to exist in Taiwan and continues legally to own all the government assets acquired in the name of China before the ROC's removal to Taiwan in 1949. Even after United States de-recognition of the ROC and recognition of the PRC on January 1, 1979, the situation remains the same as it is explicitly provided for in the Taiwan Relations Act of 1979, that "recognition of the People's Republic of China shall not affect in any way the ownership of or other rights or interests in properties, tangible and intangible, and other things of value, owned or held on or prior to December 31, 1978, or thereafter acquired or earned by the governing authorities in Taiwan." Hence, the Chinese situation is not similar to the Russian case, because at the time of the Litvinov Assignment the Soviet government was the sole de facto government of the State of Russia.

In order to transfer the alleged PRC assets in the United States, it would be necessary for the PRC to confiscate all its nationals' bank deposits or properties located in the United States and for the United States to recognize the extraterritorial effect of the PRC's confiscatory decree. In United States v. Pink, the Supreme Court held that the

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Soviet nationalization decrees were intended to embrace property in the United States and that United States recognition of the Soviet government validated all acts of the recognized government from the commencement of its existence. The Court also held that the public policy of New York denying effect to confiscatory decrees was overriden by the international compact involved, viz., the Litvinov Assignment. If the principle of that case remains valid today, it has been suggested that the claims against the PRC could certainly be settled along the lines of the Litvinov Assignment.40

However, the Pink case has been severely criticized. The main objection to the case is that aliens' private property in this country is under the protection of the Fifth Amendment, but the Pink case appears to suggest that the President can resort to an executive agreement, without the participation of the Congress, to confiscate aliens' private property in the United States.41

Because of the questionable ruling of the Pink case and indeed, because of the doubts as to its applicability, one can hardly assume that its ruling would be applied to the Chinese claims situation. In any case, to get a better basis for using bank deposits or properties located in the United States owned by residents in mainland China, it appears that the President should enlist the support of the Congress in handling the matter. A problem with referring the matter to the Congress, however, is created by the Gravel Amendment to the Trade Reform Act of 1974.42

The Gravel Amendment effectively blocked a United States-Czechoslovakia lump sum agreement of July 5, 1974, which sought to settle the claims of United States nationals arising from Czechoslovakia's post-war nationalization program. The amount of the compensation payable by Czechoslovakia under the agreement was roughly twenty percent of the United States nationals' claim against Czechoslovakia. Congress considered the amount of compensation unsatisfactory and, under the authority of the Gravel Amendment, directed the President to renegotiate the issue. As a result, Congress did not grant most favored nation status to Czechoslovakia.43

40 See, e.g., Redick, supra note 33, at 740.
43 See Lillich, The Gravel Amendment to the Trade Reform Act of 1974: Co-
While the Gravel Amendment legally affects only the Czechoslovakia claim settlement and its most favored nation status, it has ramifications as a precedent for the China claims situation. The only way to achieve a claim settlement with the PRC without requiring actual cash payment by the latter to the United States is to provide an approximately forty percent return to United States claimants (frozen PRC assets of about $80 million in the United States compared with about $200 million in United States nationals' claims against the PRC). Congress might find the compensation inadequate and refuse to approve such a claim settlement agreement.

One way to bypass the Congress is to use a Litvinov-type executive agreement to settle the United States nationals' claim against the PRC. This approach, however, might provoke Congress to take retaliatory actions in other legislation relating to United States-PRC relations, such as granting of most favored nation treatment to the PRC. Many Senators and Representatives already have expressed their displeasure at the President's unilateral action to terminate diplomatic relations and the Mutual Defense Treaty with the ROC. It would be very unwise for the President to take additional unilateral action on the claims settlement problem.

Finally, it is not clear whether the PRC has so far issued a decree to confiscate or nationalize all its nationals' properties abroad. If no such decree has been issued, it is unlikely that the PRC would take measures now in order to satisfy claims of United States nationals. Recently, the PRC has reversed its previous policy of hostility toward overseas Chinese, and the new Chinese Constitution of 1978 explicitly provides in article 54 that, "[t]he state protects the just rights and interests of overseas Chinese and their relatives." Under such circumstances, Congress will have to be cautious about a large lump sum payment. If the payment is made, it will most likely be on a pro rata basis.

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44 The only cash compensation agreement signed by the PRC was with Canada for certain ship loans. See Exchange of Notes Between the Government of Canada and the Government of the People's Republic of China Settling and Terminating the Loans Contracted by the Ming Sung Industrial Co., Ltd., from the Canadian Banks on Oct. 30, 1946, done June 4, 1973, reprinted in 15 INTL LEGAL MATERIALS 870 (1974).


46 PEKING REV., Mar. 11, 1979, at 14 (emphasis added).
cumstances, if the PRC decided to nationalize the properties located in this country but owned by its nationals, many of whom have friends and relatives abroad, in order to satisfy the American claimants, its action would seriously undermine its present policy of wooing overseas Chinese.

In view of the above stated difficulties in settling the Chinese claims, the final settlement was quite an ingenious one and did take into consideration the problems discussed above. According to the agreement initialed between the United States and the PRC on March 1, 1979, and signed on May 11, 1979, the PRC agreed to pay a total of eighty-one million dollars for settlement of all United States nationals' claims against it by October 1, 1984. The first installment of thirty million dollars will be paid on October 1, 1979. In return for this payment, the United States will unblock the frozen Chinese assets here, estimated at about eighty million dollars.\(^47\) However, the PRC or its nationals will probably collect only a small part of the unblocked assets since banks in other countries have already laid claim to some of the accounts.\(^48\) On the other hand, a substantial amount of claims against the PRC (about thirty percent) involve religious and nonprofit organizations, such as missionary societies; they seemed to agree to invest most of the proceeds of the claim settlement in furthering educational or other similar activities in China. With respect to corporate claims (about sixty percent), companies may have to forego receipt of the funds in exchange for the right to do business in China.\(^49\)

V. THE INTERNATIONAL LEGAL STATUS OF TAIWAN

One of the crucial legal problems closely related to the United States recognition of the PRC is the international legal status of Taiwan. If recognition of the PRC would result in an implied or explicit recognition of the PRC's claim to the island, then it would not be legally possible for the United States to aid Taiwan, such as by providing arms, to resist a PRC takeover of the island in the future. Therefore, it is essential to evaluate the international legal status of the island and the PRC's claim to it.

Although Chinese settlement in Taiwan can be traced back to the sixth century, the Chinese did not set up an administration there until

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\(^{49}\) Id.
1661, when Cheng Ch'eng-kung (Koxinga), a general of the defunct Ming dynasty (1368-1644) captured the island from the Dutch and set up a government. General Cheng and later his son, Cheng Ching used Taiwan as a base to restore the Ming dynasty. In 1683, Cheng's grandson surrendered Taiwan to the Ch'ing Empire (1644-1911), which then administered the island as a part of the mainland's Fukien Province. Taiwan was made a separate province in 1886. Nine years later, in 1895, after China's defeat in the First Sino-Japanese War (1894-95), the island was ceded through the Treaty of Shimonoseki to Japan.

On December 9, 1941, the ROC government, then on the mainland, issued a formal declaration of war against Japan, and declared "that all treaties, conventions, agreements, and contracts regarding relations between China and Japan are and remain null and void." At the Cairo Conference in November 1943, President Chiang Kai-shek, President Franklin D. Roosevelt, and Prime Minister Winston Churchill signed a joint communiqué on November 26, stating, in part, that "all the territories Japan has stolen from the Chinese, such as Manchuria, Formosa (Taiwan), and the Pescadores (Penghu), shall be returned to the Republic of China." On July 26, 1945, the heads of government of the United States, the Republic of China, and the United Kingdom declared in the Potsdam Proclamation that "the terms of the Cairo Declaration shall be carried out." Japan signed the Instrument of Surrender, thereby accepting the provisions of the Potsdam Proclamation, on September 2, 1945. On October 25, the ROC took over Taiwan from the Japanese, and soon restored it to its status as a province of the ROC. On December 8, 1949, the (Nationalist) government established its provisional capital in Taipei.

Despite the fact that the ROC began to exercise jurisdiction over Taiwan from October 25, 1945, the question of sovereignty was not technically resolved until the early 1950's. In international law and practice, a transfer of territories between states occurs through a treaty or by a unilateral renunciation of territorial sovereignty by the

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50 1 Heirslet's China Treaties 362 (1908).
51 Reprinted in China and the Question of Taiwan: Documents and Analysis 204 (H. Chiu ed. 1973).
52 3 DEPT STATE BULL. 393 (1943).
54 For the text of the Instrument of Surrender, see 59 Stat. 1734.
transferor and the establishment of *de facto* control by the transferee over the territory concerned. So far as Taiwan is concerned, this was not done until the San Francisco peace treaty with Japan, signed on September 8, 1951.\(^{65}\) The Japanese peace treaty provides in article 2 that "Japan renounces all rights, title and claim to Formosa and the Pescadores." Because the victorious powers could not agree on which government of China—the PRC or the ROC—should be invited to participate in the peace conference, it was decided not to invite either of them. On the other hand, Japan signed a bilateral peace treaty with the ROC on April 28, 1952,\(^{66}\) wherein article 2 provides: "It is recognized that under Article 2 of the Treaty of Peace with Japan signed at the City of San Francisco in the United States of America on September 8, 1951, Japan has renounced all rights, title and claim to Taiwan (Formosa) and Penghu (the Pescadores)."

Since neither the San Francisco peace treaty nor the Japan-ROC peace treaty explicitly provides for the return of Taiwan to China, the question of the legal status of Taiwan has become a complex and controversial issue. The position, as stated by the late Secretary of State John Foster Dulles, at a press conference held on December 1, 1954, is "that technical sovereignty over Formosa and the Pescadores has never been settled," and that "the future title is not determined by the Japanese peace treaty (signed at San Francisco), nor is it determined by the peace treaty which was concluded between the Republic of China and Japan."\(^{57}\) Some Western scholars have argued, however, that the ROC could in fact acquire lawful territorial sovereignty over Taiwan. For instance, Professor D. P. O'Connell of Australia, a well-known authority on international law, wrote that after the Japanese renunciation of the island, it was "doubtful . . . whether there is any international law doctrine opposed to the conclusion that China [could] appropriate the terra derelicta (the abandoned land) of Formosa by converting the belligerent occupation into definite sovereignty."\(^{56}\) Professor O'Connell refers vaguely to China without specifying whether he means the ROC or the PRC but, because the PRC has no physical control over Taiwan, it cannot be argued that

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\(^{66}\) 4 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 564 (1970).

Peking could acquire sovereignty over Taiwan through the theory suggested by Professor O'Connell.

Similarly, Arthur H. Dean, now Honorary President of the American Society of International Law, also has argued:

Since Japan renounced all right, title and claim to Formosa and the Pescadores . . . Nationalist China may have already acquired legal title to Formosa and the Pescadores by occupation or possibly by subjugation . . . . Until the coming into force of the Japanese peace treaty on April 28, 1952, there was a formal obstacle to Nationalist China's acquiring legal title to Formosa by occupation, in that technical sovereignty over Formosa and the Pescadores remained in Japan. There were, accordingly, not terrae nullius capable of being acquired by occupation. However, when Japan renounced all right, title and claim to Formosa and the Pescadores, this obstacle was removed.\(^{59}\)

This interpretation of the legal status of Taiwan is confirmed by several Japanese court decisions. For instance, in *Japan v. Lai Chin Jung*, decided by the Tokyo High Court on December 15, 1956, it was stated that "Formosa and the Pescadores came to belong to the Republic of China, at any rate on August 5, 1952, when the [peace] treaty between Japan and the Republic of China came into force."\(^{60}\)

Now let us turn to the PRC's claim to Taiwan. While the legal arguments summarized above would support the ROC's claim to Taiwan, the same arguments would not support the PRC's claim to Taiwan, for several reasons. In the first place, the PRC has denied the validity of both of the Japanese peace treaties mentioned above. On August 15, 1951, before the San Francisco treaty was signed, Premier Chou En-lai denounced the proposed treaty as "illegal, and therefore null and void."\(^{61}\) On May 5, 1952, after the treaty entered into force, Chou again repudiated it as "completely illegal."\(^{62}\) Peking can hardly claim any benefit from a document which it considers to be illegal and void. Moreover, after Japan's renunciation of its claim to Taiwan, the

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\(^{61}\) H. Chiu, *supra* note 8, at 244-45.

PRC could not acquire title over the island through the international law principle of occupation, because it had no physical control over the island. Nor could the PRC claim title over Taiwan because it considered the ROC government to be an illegal group or even bandits. Clearly, a government can no more claim benefits through a regime which it does not recognize as legal than it can through a document which it has declared illegal and void.

Some PRC writers have argued that because Taiwan was originally Chinese territory, a peace treaty is not necessary to transfer title back to China, especially since the Treaty of Shimonoseki ceding Taiwan to Japan was abrogated as a result of the outbreak of the Second Sino-Japanese War in 1937. International practice, however, does not support the PRC position. The provinces of Alsace and Lorraine, for example, were originally French territory, but were ceded to Germany in 1871. Subsequently, they were returned to France through the Treaty of Versailles signed between the Allied and Associated Powers (including France) and Germany on June 28, 1919. In other words, French sovereignty over its former territory did not automatically revert after World War I, but required the formal treaty mechanism. There does not appear to be any precedent or principle of international law supporting the PRC position that on October 25, 1945, Taiwan was restored to China de jure and de facto.

If this reasoning is correct, then the PRC’s claim must be primarily based on the theory of historical irredentism. PRC writers and officials have frequently argued that Taiwan is historically Chinese; and that during the Japanese occupation (1895-1945), the people of Taiwan longed for reunification with China. But while this is an undoubted historical fact, it can hardly support the PRC’s claim to Taiwan today. In the first place, during the period of Japanese occupation, China was run by a government which permitted a free enterprise economy, and the society was relatively free. If the people of Taiwan had known at the time that mainland China would become the totalitarian, highly regimented society it is today, it is unlikely that they would have longed so fervently for reunification. The fact that very few people from Taiwan participated in the Communist movement in China during the

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Japanese occupation period seems to support this point. And today, it seems abundantly clear that the vast majority of the people on Taiwan do not want to be united with the PRC.

Second, Mao Tse-tung himself did not include Taiwan among China's "lost territories" to be regained from Japan. In an interview at Yenan on July 16, 1936, Mao said that "[i]f the Koreans wish to break away from the chains of Japanese imperialism, we will extend them our enthusiastic help in their struggle for independence. The same thing applies for Formosa."\(^{65}\)

Third, the doctrine of self-determination is now an accepted principle of international law, and one that has not been opposed by the PRC. This principle would certainly overrule any historical claim of the PRC toward Taiwan, since the great majority of the people of Taiwan now clearly oppose unification with the PRC. Thus, historical claim alone will not justify a country's claim to a piece of territory.

In the 1972 Shanghai Communiqué, the United States declared that "[i]t acknowledges that all Chinese on either side of the Taiwan Strait maintain there is but one China and Taiwan is a part of China. The United States government does not challenge that position."\(^{66}\) Some people have argued that the United States thus accepted the PRC's claim to Taiwan in the Shanghai Communiqué. But this is certainly not true. The phrase "does not challenge" is not equivalent to a recognition of the PRC claim. This interpretation also was confirmed by a high official of the United States Government. Soon after the issuance of the Shanghai Communiqué, Assistant Secretary of State for East Asian and Pacific Affairs, Marshall Green, denied that it represented any change in the position held by the United States since 1950, namely, that the status of Taiwan was as yet undetermined.\(^{67}\) Moreover, it was disclosed recently that at the time of negotiating the Shanghai Communiqué, then Secretary of State Kissinger wanted to accept the PRC's position on Taiwan by stating in the Communiqué that the United States "accepts" rather than "does not challenge" the belief of "all Chinese in one China." But he was rebuffed in that attempt, possibly by President Nixon.\(^{68}\)

In the Washington-Peking Joint Communiqué on the Establishment of Diplomatic Relations issued on December 15, 1978, the

\(^{67}\) Mainichi Daily News, Mar. 29, 1972, at 5.
United States “acknowledges the Chinese position that there is but one China and Taiwan is part of China.” However, the PRC translated the word “acknowledges” into “Cheng-jen” in the Chinese version of the Communiqué, which retranslated into English means “recognizes.”

The United States did not, apparently due to the ignorance of the translators, challenge the accuracy of the Chinese version of the Communiqué. Therefore, the Chinese side could then rely on their version of the Communiqué to claim that the United States had already “recognized” their territorial claim to Taiwan. Furthermore, in a separate statement issued on the same day, Peking insisted that the problem of bringing Taiwan back under its control for “unifying the Country” was China’s “internal affair,” as mentioned above. Again, there was no United States challenge to the Chinese statement.

In view of the above analysis, if the United States does not make its position on the legal status of Taiwan\textsuperscript{68} clear, it will be in a poor legal position to challenge the PRC’s interference in United States relations, commercial, cultural, defensive or otherwise, with Taiwan.

A question closely related to the legal status of Taiwan is the ROC’s claim to the mainland of China. If the ROC continues to make an unconditional claim to sovereignty over the mainland now controlled by the PRC, then, despite the special legal status of Taiwan, there will be no reason to question the PRC for making a similarly unconditional claim to sovereignty over Taiwan. Since its removal to Taiwan,

\textsuperscript{68} For a reprint of the American text, see 11 CASE W. RES. J. INTL. L. 227 (1979). For the Chinese text, see Jen-min jih pao (People’s Daily), Dec. 17, 1978, at 1.

\textsuperscript{69} Deputy Assistant Secretary of State for East Asian and Pacific Affairs Roger Sullivan told the Taiwan press on December 27, 1978, that in the Joint Communiqué of December 15, 1978, the United States did not recognize the People’s Republic of China’s sovereign claim to Taiwan. Chung-yen jih-pao (Central Daily News), Dec. 28, 1978, at 1. However, at that point no public statement on the status of Taiwan had been made by a high level American official to the American press. Several Senators also raised this issue. For instance, Senator Glenn, Chairman of the Foreign Relations Subcommittee on East Asian and Pacific Affairs, said on January 24, 1979, that when the agreements on normalization were jointly announced, President Carter indicated that the United States “acknowledges” Peking’s claim to Taiwan. In addition, Glenn pointed out that the Chinese government’s parallel statement did not use the word “acknowledge,” and was phrased instead to say that the United States “recognizes” China’s claim to Taiwan. Senator Glenn has criticized the Administration for its failure to protest the Chinese use of words. He also warned that he will make this issue and the security of Taiwan his principal focus of interest in any upcoming congressional hearings regarding the Administration’s plans for establishing United States relations with Taiwan on a nongovernmental basis. See Goshko, Glenn Says China Pledge on Taiwan is Essential, Wash. Post, Jan. 25, 1979, at 1, col. 5.
however, the ROC has gradually imposed important limitations on its claim to the mainland. In the first place, treaties which were formerly applicable to all of China were explicitly revised to limit their application to Taiwan. For instance, the 1946 Treaty of Friendship, Commerce, and Navigation between the United States and the Republic of China has not been applicable to mainland China since the early 1950's. Similarly, new treaties or agreements concluded since 1950 have all been limited in their application to the Taiwan area. For example, the 1954 Mutual Defense Treaty with the United States provides in article VI that, “[f]or the purposes of Articles II and V, the terms ‘territorial’ and ‘territories’ shall mean in respect of the Republic of China, Taiwan and the Pescadores.”

Further, in an exchange of notes accompanying the 1954 Mutual Defense Treaty, the ROC pledged not to use force against the mainland without the consent of the United States. And in a joint communiqué issued by President Chiang Kai-shek and United States Secretary of State John Foster Dulles on October 23, 1958, the ROC made a more general pledge not to use force against the mainland. It states:

The government of the Republic of China considers that the restoration of freedom to its people on the mainland is its sacred mission. It believes that the foundation of this mission resides in the minds and the hearts of the Chinese people, and that the principal means of successfully achieving its mission is the implementation of Dr. Sun Yat-sen’s three peoples’ principles (nationalism, democracy, and social well-being), and not the use of force.  

This pledge of the nonuse of force to achieve unification was confirmed recently by a statement of the ROC Foreign Minister, Shen Chang-huan, on July 1, 1977, in which he said:

It has been the consistent position of the government of the Republic of China to carry out its responsibility of delivering our 800 million compatriots from Communist tyranny by political means, while the Chinese Communists have never given up their design to “liberate” Taiwan by force. The “peaceful settlement” theme being harped on by the Chinese Communists is but an attempt on their part to impose their tyrannical rule on the 16 million Chinese on Taiwan.  

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71 U.S. DEPT OF STATE, TREATIES IN FORCE 52 (1973).
77 AMERICAN FOREIGN POLICY, CURRENT DOCUMENTS, 1958, at 1185 (1962).
The foregoing analysis seems to establish that the ROC has, in fact, suspended its claim to the Chinese mainland by renouncing the use of force to achieve unification. The PRC, however, still insists on its right to use force to "liberate" Taiwan—a territory to which it does not have a clear legal title. An attempt to vindicate a claim to territory by the use of force is prohibited both by international law and by the Charter of the United Nations.

VI. THE IMPACT OF UNITED STATES RECOGNITION OF THE PRC ON THE INTERNATIONAL STATUS OF THE ROC

There is no doubt that United States recognition of the PRC will have important legal, economic and political impact on the international status of the ROC. However, whether United States recognition of the PRC will have a significant adverse effect on the ROC will depend on:

1. Whether the United States continues to recognize the ROC as a state within the territory under its control.
2. The pattern of United States-ROC relations in the post-recognition period.

It could be possible for the United States to recognize the PRC, while continuing to maintain diplomatic or official (liaison office having official legal status) relations, including existing treaty relations, with the ROC. This would have minimum adverse impact on the ROC. On the other hand, if United States recognition of the PRC results in de-recognition of the ROC as a state in the international community, there will be serious detriment to the ROC.

First, United States termination of diplomatic relations and refusal to maintain official relations with the ROC could cause the remaining twenty-one states which have continued to recognize the ROC to follow suit, thus fundamentally weakening the ROC's international status by making it a non-state.

By maintaining only unofficial relations with Taiwan in the post-recognition period, the United States would at least be tacitly recognizing the PRC's territorial claim to Taiwan. Thus, if the PRC later chose to interfere with the United States trade, government loan or guarantee, or arms sales relations with the ROC, the United States would be in poor position to resist the PRC's interference. The China Airlines dispute between Japan and Taiwan of 1973 and 1974 is a vivid example. In that case, the PRC forced Japan to provoke the ROC in ter-
minate the air service between Taipai and Tokyo by making insulting remarks against the ROC flag.\textsuperscript{14}

The Carter Administration and certain commentators have argued that after Japanese recognition of the PRC on the latter's terms, the volume of trade between Japan and Taiwan continued to grow. Therefore, in their view, recognition of the PRC at the expense of the ROC should not have a significant adverse effect on United States trade and economic relations with the ROC. This view is questionable for several reasons.

It is true that the volume of Japan-Taiwan trade has continued to grow since 1972; nevertheless, Taiwan's rate of growth of trade has been losing ground to the PRC since 1972. In a study on the Japanese formula for normalizing relations with the PRC, Dr. James W. Morley, Professor and Chairman of the Department of Government at Columbia University, correctly pointed out that, taking China area trade (PRC, ROC and Hong Kong) as a whole, the PRC's share of the Japan-China area trade has grown significantly since 1972. He said:

In contrast to the PRC share of Japan's exports to these markets which has risen from 23\% to 41\% in the period from 1972 to 1975, Taiwan has followed the reverse course, dropping from 42\% to 33\% and Hong Kong likewise, from 35\% to 25\%. Similarly, over the same period, the PRC share of Japan's imports from these Chinese sources rose from 48\% to 59\% while Taiwan's fell from 41\% to 31\% and Hong Kong's from 11\% to 10\%.\textsuperscript{15}

Professor Morley also explained the reasons for such limited growth of Japan-Taiwan trade relations since 1972:

Since normalization, neither the Japanese Export-Import Bank nor the Economic Cooperation Fund has extended any aid to Taiwan. Very little Japanese money, even private, has gone into the 10-large construction projects on which the ROC counts for economic growth—projects, for example, for road and railroad building, harbor construction, power generation, and heavy and petro-chemical industrial production. Japanese private entrepreneurs appear to be limiting their investments in Taiwan to those in which their capital can be recouped in a short, 2-3 year space of time.\textsuperscript{16}

In addition to the reasons given by Professor Morley, businessmen


\textsuperscript{15} Id. at 132.

\textsuperscript{16} Id. at 131.
in Taiwan indicate that Japanese legal obstacles have increased the difficulty of doing business with Japan. Among these are delays in obtaining visas (from five days to several weeks), treatment of ROC nationals in Japan as stateless persons, and the lack of government-to-government relations which have made bilateral trade agreements impossible.

Furthermore, in an era of highly competitive international trade and in view of the rise of protectionism in many industrial states, trade relations must be governed by government-to-government agreements and can hardly be satisfactorily handled by unofficial contracts or agreements. The ROC's trade difficulties with the European Economic Community (EEC) are an example. Recently, the EEC planned to cut Taiwan's textile quotas by twenty-five percent, equivalent to a loss of $200 million. But Taiwan delegates, whether from private enterprises or from the ROC government, cannot negotiate directly with the EEC's Textile Commission because the EEC does not recognize the ROC as a state in the international community. The situation is vividly described in a recent study:

[T]he lack of government-to-government ties with the EEC nations is a major handicap for the Republic of China . . . . Authorities from both South Korea and Hong Kong are able to engage in direct negotiations with the EEC Textile Commission, and thus are able to secure more favorable—or at least less unfavorable—terms than those that the EEC unilaterally determines for Taiwan.

Furthermore, the two governments are allowed to issue export licenses themselves or through textile associations, and can in their way ensure that the quota is completely used. Taiwan, on the other hand, must rely on the import licenses issued by most of the EEC countries (excepting West Germany and Italy).

The result is that the quota assigned to Taiwan is not always completely utilized. Importers often decide not to use all their allowance for Taiwan, and their allotment cannot be transferred. . . .

Both Hong Kong and South Korea are also permitted to carryover up to 6 per cent of their quotas into the following year if they are not fully utilized, or carryforward (borrow) up to 5 percent of the following year's allotments if a certain category of quota is in strong demand. Neither privilege is currently enjoyed by Taiwan.17

The impact of United States recognition of the PRC and the refusal to maintain official relations with the ROC on nuclear development in Taiwan is an issue which cannot be ignored. Taiwan has the technical capability for building nuclear weapons and delivery systems. At present, the ROC is a contracting party to the 1963 Nuclear Test Ban Treaty† and the 1968 Treaty on the Non-Proliferation of Nuclear Weapons.‡ It also has concluded an agreement with the United States on cooperation concerning civil uses of atomic energy.§ United States refusal to recognize the ROC as a legal government of Taiwan would result in making the ROC a non-state and would give it a legal excuse to ignore its obligations under these treaties. Taiwan would therefore be legally free to manufacture nuclear weapons.

Although the United States would have no sound legal basis to prevent Taiwan from manufacturing nuclear weapons, it would continue to possess great economic and political leverage to force Taiwan into line. This is especially true since the United States would for a time remain Taiwan’s sole source of nuclear fuel. But a knowledgeable commentator has observed:

There are potential alternative sources of nuclear fuel and it is quite possible that, having facilitated Taiwan’s extraordinary success and then having, in effect, thrown Taiwan completely back on it own resources, the United States would prove unwilling to take military or severe economic action against a Taiwanese government which refused to allow continued inspection of its nuclear reactors and development. Such action would be morally questionable and politically dangerous, and would shock other United States allies. The legality of such actions would be dubious and the pressure from Taiwan’s political supporters and foreign investors would be intense.¶

In order to reduce the adverse effect of United States de-recognition of the ROC, the Taiwan Relations Act of 1979 specifically guarantees the legal status of Taiwan in the United States domestic law and in fact virtually treats it as a state:

(b) . . . .

(1) Whenever the laws of the United States refer or relate to foreign countries, nations, states, governments, or similar entities, such terms shall include and such laws shall apply with respect to Taiwan.

(3)(A) The absence of diplomatic relations and recognition with respect to Taiwan shall not abrogate, infringe, modify, deny, or otherwise affect in any way rights or obligations (including but not limited to those involving contracts, debts, or property interests of any kind) under the laws of the United States heretofore or hereafter acquired by or with respect to Taiwan.

(7) The capacity of Taiwan to sue and be sued in courts in the United States, in accordance with the laws of the United States, shall not be abrogated, infringed, modified, denied, or otherwise affected in any way by the absence of diplomatic relations or recognition.

(8) No requirement, whether expressed or implied, under the laws of the United States with respect to maintenance of diplomatic relations or recognition shall be applicable with respect to Taiwan.

(c) For all purposes, including actions in any court in the United States, the Congress approves the continuation in force of all treaties and other international agreements, including multilateral conventions, entered into by the United States and the governing authorities on Taiwan recognized by the United States as the Republic of China prior to January 1, 1979, and in force between them on December 31, 1978, unless and until terminated in accordance with law.

(d) Nothing in this Act may be construed as a basis for supporting the exclusion or expulsion of Taiwan from continued membership in any international financial institution or any other international organization.\(^{22}\)

VII. CONCLUDING OBSERVATIONS

Recent United States recognition of the PRC on the latter's terms has created many legal problems, domestic and international, regarding continued United States relations with Taiwan, particularly Taiwan's future security. President Carter's statement on "having an interest in the peaceful resolution of the Taiwan issue" and "expect[ing] that the Taiwan issue will be settled peacefully by the Chinese themselves," has no legal meaning at all. Such "interest" or

"expectation" cannot change the nature of the Taiwan problem, which
was referred to in the Chinese statement issued at the same time and
not challenged by the United States, as an internal Chinese affair.
Under such circumstances, any future United States relations with
Taiwan can exist only so long as Peking tolerates them. If Peking were
to interfere with such relations, the United States would be in a very
poor legal position to challenge such interference. Therefore, it is
essential that the United States make it clear to Peking that it does not
recognize Peking's claim to Taiwan and will tolerate no interference in
its relations with Taiwan, whether commercial, cultural, scientific,
technological, defensive, or otherwise.

Past experience from dealing with Peking teaches one to make
everything explicit and unmistakably clear. Also, one cannot trust the
so-called "goodwill" of Peking. In 1954, the PRC concluded an agree-
ment with India on trade and intercourse between India and Tibet and concurrently issued a joint communiqué on peaceful co-
existence. When Prime Minister Nehru raised the Sino-Indian bound-
ary question, Premier Chou En-lai assured Nehru that this would not
be an obstacle to friendly relations between the two countries. But
after the PRC consolidated its control in Tibet, it settled its bound-
ary question with India by resorting to the use of force. On September
10, 1955, the United States and PRC reached an Agreed Announce-
ment on Repatriation of Civilians, in which the PRC "recognize[d]
that Americans in the PRC who desire[d] to return to the United
States [were] entitled to do so." When the time came to implement
the agreement, the PRC insisted that only those Americans who were not
in Chinese prisons would be allowed to go home. It also demanded
that the United States provide a list of all Chinese in this country in
exchange for a comparable list to be provided by Peking of all
Americans in mainland China. At the time there were fewer than 100
Americans in China, while over 200,000 Chinese resided in the United
States. Most of these Chinese were overwhelmingly pro-Republic of

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83 Agreement on Trade and Intercourse Between Tibetan Region of China and
84 For the text of the communiqué, see 1 J. COHEN & H. CHIU, PEOPLES CHINA
85 The PRC established its control over Tibet by eliminating about five percent
of the population. See INTL COMMN OF JURISTS, THE QUESTION OF TIBET AND THE
RULE OF LAW (1959); INTL COMMN OF JURISTS, TIBET AND THE CHINESE PEOPLE'S
REPUBLIC (1960).
86 55 DEPT STATE BULL. 456 (1955).
China (Taiwan) and were almost universally opposed to the releasing of their names to the PRC, for fear that their relatives in mainland China would be subjected to communist pressure.\textsuperscript{87} There is no reason why this manipulation in implementing an agreement will not be repeated in the future if the United States does not make its position on future United States-Taiwan relations clear and unambiguous to the PRC.

In view of the foregoing analysis, it is understandable why the Congress has insisted that it should take certain credible measures to assure the security of Taiwan and the continuation of the close economic, cultural and other relations between the two countries so as to make United States policy toward Taiwan clear to the PRC. This was done by passing the Taiwan Relations Act of 1979 by an overwhelming majority of both the House and the Senate in late March 1979.

Since law cannot be totally divorced from political reality, it is essential that United States recognition of the PRC reflect the reality of the Chinese situation. Today, there are in fact two Chinese governments, each controlling a large territory and each governing effectively within the area of its respective control. In recognizing the PRC, the United States should not ignore the existence of the ROC on Taiwan and its seventeen million people—a country with a viable economy whose volume of trade makes it the sixteenth largest trading country in the community of nations and the eighth largest trading partner of the United States. There is no legal or moral ground on which the United States can reasonably ignore the ROC as a state in the international community. It is therefore not for the PRC to insist on United States de-recognition of and maintenance of only unofficial relations with the ROC as a condition for accepting United States recognition. The Soviet Union has not insisted on United States de-recognition of the three Baltic states (Estonia, Lithuania and Latvia) as a condition for continuing diplomatic relations with the United States. There is no reason why, in the Chinese case, the United States should act differently.

Finally, the human rights aspect of United States recognition of the PRC should not be ignored. The ROC, with its seventeen million people rightfully demands a respectful place in the world community of nations and the right to maintain its present prosperous economy. If

\textsuperscript{87} H. CHIU, \textit{The People's Republic of China and the Law of Treaties} 82-84 (1972), and references cited.
United States recognition of the PRC would result in jeopardizing the welfare and aspirations of the ROC and its citizens, it would be contrary to the principles of international law, justice and respect for human rights and self-determination—all principles that this great democracy has cherished since its founding over two hundred years ago.

Supplement to Footnote 27 at Page 10

On October 17, 1979, United States District Court for the District Court of Columbia ordered "that plaintiffs' motion to alter or amend the judgement of June 6, 1979 be . . . granted" and declared that "President's notice of termination must receive the approval of two-thirds of the United States Senate or a majority of both houses of Congress for it to be effective under [U.S.] Constitution to terminate the Mutual Defense Treaty of 1954 [with the Republic of China]."
DOCUMENT 1

Joint Communique on the Establishment of Diplomatic Relations between the United States of America and the People’s Republic of China, January 1, 1979

(The communique was released on December 15, 1978, in Washington and Peking)

The United States of America and the People’s Republic of China have agreed to recognize each other and to establish diplomatic relations as of January 1, 1979.

The United States of America recognizes the Government of the People’s Republic of China as the sole legal Government of China. Within this context, the people of the United States will maintain cultural, commercial, and other unofficial relations with the people of Taiwan.

The United States of America and the People’s Republic of China reaffirm the principles agreed on by the two sides in the Shanghai Communique and emphasize once again that:

- Both wish to reduce the danger of international military conflict.
- Neither should seek hegemony in the Asia-Pacific region or in any other region of the world and each is opposed to efforts by any other country or group of countries to establish such hegemony.
- Neither is prepared to negotiate on behalf of any third party or to enter into agreements or understandings with the other directed at other states.
- The Government of the United States of America acknowledges* the Chinese position that there is but one China and Taiwan is part of China.
- Both believe that normalization of Sino-American relations is not only in the interest of the Chinese and American peoples but also contributes to the cause of peace in Asia and the world.

The United States of America and the People’s Republic of China will exchange Ambassadors and establish Embassies on March 1, 1979.

*The Chinese text translated the word “acknowledges” into Cheng jen, which, if retranslated into English, would mean “recognize.”

Public Law 96–8
96th Congress

An Act

To help maintain peace, security, and stability in the Western Pacific and to promote the foreign policy of the United States by authorizing the continuation of commercial, cultural, and other relations between the people of the United States and the people on Taiwan, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SECTION 1. This Act may be cited as the "Taiwan Relations Act".

FINDINGS AND DECLARATION OF POLICY

SEC. 2. (a) The President having terminated governmental relations between the United States and the governing authorities on Taiwan recognized by the United States as the Republic of China prior to January 1, 1979, the Congress finds that the enactment of this Act is necessary—

(1) to help maintain peace, security, and stability in the Western Pacific; and
(2) to promote the foreign policy of the United States by authorizing the continuation of commercial, cultural, and other relations between the people of the United States and the people on Taiwan.

(b) It is the policy of the United States—

(1) to preserve and promote extensive, close, and friendly commercial, cultural, and other relations between the people of the United States and the people on Taiwan, as well as the people on the China mainland and all other peoples of the Western Pacific area;
(2) to declare that peace and stability in the area are in the political, security, and economic interests of the United States, and are matters of international concern;
(3) to make clear that the United States decision to establish diplomatic relations with the People's Republic of China rests upon the expectation that the future of Taiwan will be determined by peaceful means;
(4) to consider any effort to determine the future of Taiwan by other than peaceful means, including by boycotts or embargoes, a threat to the peace and security of the Western Pacific area and of grave concern to the United States;
(5) to provide Taiwan with arms of a defensive character; and
(6) to maintain the capacity of the United States to resist any resort to force or other forms of coercion that would jeopardize the security, or the social or economic system, of the people on Taiwan.

(c) Nothing contained in this Act shall contravene the interest of the United States in human rights, especially with respect to the
human rights of all the approximately eighteen million inhabitants of Taiwan. The preservation and enhancement of the human rights of all the people on Taiwan are hereby reaffirmed as objectives of the United States.

IMPLEMENTATION OF UNITED STATES POLICY WITH REGARD TO TAIWAN

Sec. 3. (a) In furtherance of the policy set forth in section 2 of this Act, the United States will make available to Taiwan such defense articles and defense services in such quantity as may be necessary to enable Taiwan to maintain a sufficient self-defense capability.

(b) The President and the Congress shall determine the nature and quantity of such defense articles and services based solely upon their judgment of the needs of Taiwan, in accordance with procedures established by law. Such determination of Taiwan's defense needs shall include review by United States military authorities in connection with recommendations to the President and the Congress.

(c) The President is directed to inform the Congress promptly of any threat to the security or the social or economic system of the people on Taiwan and any danger to the interests of the United States arising therefrom. The President and the Congress shall determine, in accordance with constitutional processes, appropriate action by the United States in response to any such danger.

APPLICATION OF LAWS; INTERNATIONAL AGREEMENTS

Sec. 4. (a) The absence of diplomatic relations or recognition shall not affect the application of the laws of the United States with respect to Taiwan, and the laws of the United States shall apply with respect to Taiwan in the manner that the laws of the United States applied with respect to Taiwan prior to January 1, 1979.

(b) The application of subsection (a) of this section shall include, but shall not be limited to, the following:

1. Whenever the laws of the United States refer or relate to foreign countries, nations, states, governments, or similar entities, such terms shall include and such laws shall apply with respect to Taiwan.

2. Whenever authorized by or pursuant to the laws of the United States to conduct or carry out programs, transactions, or other relations with respect to foreign countries, nations, states, governments, or similar entities, the President or any agency of the United States Government is authorized to conduct and carry out, in accordance with section 6 of this Act, such programs, transactions, and other relations with respect to Taiwan (including, but not limited to, the performance of services for the United States through contracts with commercial entities on Taiwan), in accordance with the applicable laws of the United States.

(A) The absence of diplomatic relations and recognition with respect to Taiwan shall not abrogate, infringe, modify, deny, or otherwise affect in any way any rights or obligations (including but not limited to those involving contracts, debts, or property interests of any kind) under the laws of the United States heretofore or hereafter acquired by or with respect to Taiwan.

(B) For all purposes under the laws of the United States, including actions in any court in the United States, recognition of the People's Republic of China shall not affect in any way the ownership of or other rights or interests in properties, tangible
and intangible, and other things of value, owned or held on or prior to December 31, 1978, or thereafter acquired or earned by the governing authorities on Taiwan.

(4) Whenever the application of the laws of the United States depends upon the law that is or was applicable on Taiwan or compliance therewith, the law applied by the people on Taiwan shall be considered the applicable law for that purpose.

(5) Nothing in this Act, nor the facts of the President's action in extending diplomatic recognition to the People's Republic of China, the absence of diplomatic relations between the people on Taiwan and the United States, or the lack of recognition by the United States, and attendant circumstances thereto, shall be construed in any administrative or judicial proceeding as a basis for any United States Government agency, commission, or department to make a finding of fact or determination of law, under the Atomic Energy Act of 1954 and the Nuclear Non-Proliferation Act of 1978, to deny an export license application or to revoke an existing export license for nuclear exports to Taiwan.

(6) For purposes of the Immigration and Nationality Act, Taiwan may be treated in the manner specified in the first sentence of section 202(b) of that Act.

(7) The capacity of Taiwan to sue and be sued in courts in the United States, in accordance with the laws of the United States, shall not be abrogated, infringed, modified, denied, or otherwise affected in any way by the absence of diplomatic relations or recognition.

(8) No requirement, whether expressed or implied, under the laws of the United States with respect to maintenance of diplomatic relations or recognition shall be applicable with respect to Taiwan.

(c) For all purposes, including actions in any court in the United States, the Congress approves the continuation in force of all treaties and other international agreements, including multilateral conventions, entered into by the United States and the governing authorities on Taiwan recognized by the United States as the Republic of China prior to January 1, 1979, and in force between them on December 31, 1978, unless and until terminated in accordance with law.

(d) Nothing in this Act may be construed as a basis for supporting the exclusion or expulsion of Taiwan from continued membership in any international financial institution or any other international organization.

OVERSEAS PRIVATE INVESTMENT CORPORATION

Sect. 5. (a) During the three-year period beginning on the date of enactment of this Act, the $1,000 per capita income restriction in clause (2) of the second undesignated paragraph of section 231 of the Foreign Assistance Act of 1961 shall not restrict the activities of the Overseas Private Investment Corporation in determining whether to provide any insurance, reinsurance, loans, or guaranties with respect to investment projects on Taiwan.

(b) Except as provided in subsection (a) of this section, in issuing insurance, reinsurance, loans, or guaranties with respect to investment projects on Taiwan, the Overseas Private Insurance Corporation shall apply the same criteria as those applicable in other parts of the world.
Sec. 6. (a) Programs, transactions, and other relations conducted or carried out by the President or any agency of the United States Government with respect to Taiwan shall, in the manner and to the extent directed by the President, be conducted and carried out by or through—

(1) The American Institute in Taiwan, a nonprofit corporation incorporated under the laws of the District of Columbia, or
(2) such comparable successor nongovermental entity as the President may designate,

(hereafter in this Act referred to as the "Institute").

(b) Whenever the President or any agency of the United States Government is authorized or required by or pursuant to the laws of the United States to enter into, perform, enforce, or have in force an agreement or transaction relative to Taiwan, such agreement or transaction shall be entered into, performed, and enforced, in the manner and to the extent directed by the President, by or through the Institute.

(c) To the extent that any law, rule, regulation, or ordinance of the District of Columbia, or of any State or political subdivision thereof in which the Institute is incorporated or doing business, impedes or otherwise interferes with the performance of the functions of the Institute pursuant to this Act, such law, rule, regulation, or ordinance shall be deemed to be preempted by this Act.

SERVICES BY THE INSTITUTE TO UNITED STATES CITIZENS ON TAIWAN

Sec. 7. (a) The Institute may authorize any of its employees on Taiwan—

(1) to administer to or take from any person an oath, affirmation, affidavit, or deposition, and to perform any notarial act which any notary public is required or authorized by law to perform within the United States;
(2) To act as provisional conservator of the personal estates of deceased United States citizens; and
(3) to assist and protect the interests of United States persons by performing other acts such as are authorized to be performed outside the United States for consular purposes by such laws of the United States as the President may specify.

(b) Acts performed by authorized employees of the Institute under this section shall be valid, and of like force and effect within the United States, as if performed by any other person authorized under the laws of the United States to perform such acts.

TAX EXEMPT STATUS OF THE INSTITUTE

Sec. 8. (a) The Institute, its property, and its income are exempt from all taxation now or hereafter imposed by the United States (except to the extent that section 11(a)(3) of this Act requires the imposition of taxes imposed under chapter 21 of the Internal Revenue Code of 1954, relating to the Federal Insurance Contributions Act) or by any State or local taxing authority of the United States.

(b) For purposes of the Internal Revenue Code of 1954, the Institute shall be treated as an organization described in sections 170(b)(1)(A), 170(c), 2055(a), 2106(a)(2)(A), 2522(a), and 2522(b).
22 USC 3308.

Sec. 9. (a) Any agency of the United States Government is authorized to sell, loan, or lease property (including interests therein) to, and to perform administrative and technical support functions and services for the operations of, the Institute upon such terms and conditions as the President may direct. Reimbursements to agencies under this subsection shall be credited to the current applicable appropriation of the agency concerned.

(b) Any agency of the United States Government is authorized to acquire and accept services from the Institute upon such terms and conditions as the President may direct. Whenever the President determines it to be in furtherance of the purposes of this Act, the procurement of services by such agencies from the Institute may be effected without regard to such laws of the United States normally applicable to the acquisition of services by such agencies as the President may specify by Executive order.

(c) Any agency of the United States Government making funds available to the Institute in accordance with this Act shall make arrangements with the Institute for the Comptroller General of the United States to have access to the books and records of the Institute and the opportunity to audit the operations of the Institute.

22 USC 3309.

Sec. 10. (a) Whenever the President or any agency of the United States Government is authorized or required by or pursuant to the laws of the United States to render or provide to or to receive or accept from Taiwan, any performance, communication, assurance, undertaking, or other action, such action shall, in the manner and to the extent directed by the President, be rendered or provided to, or received or accepted from, an instrumentality established by Taiwan which the President determines has the necessary authority under the laws applied by the people on Taiwan to provide assurances and take other actions on behalf of Taiwan in accordance with this Act.

(b) The President is requested to extend to the instrumentality established by Taiwan the same number of offices and complement of personnel as were previously operated in the United States by the governing authorities on Taiwan recognized as the Republic of China prior to January 1, 1979.

(c) Upon the granting by Taiwan of comparable privileges and immunities with respect to the Institute and its appropriate personnel, the President is authorized to extend with respect to the Taiwan instrumentality and its appropriate personnel, such privileges and immunities (subject to appropriate conditions and obligations) as may be necessary for the effective performance of their functions.

22 USC 3310.

Sec. 11. (a)(1) Under such terms and conditions as the President may direct, any agency of the United States Government may separate from Government service for a specified period any officer or employee of that agency who accepts employment with the Institute.

(2) An officer or employee separated by an agency under paragraph (1) of this subsection for employment with the Institute shall be
entitled upon termination of such employment to reemployment or reinstatement with such agency (or a successor agency) in an appropriate position with the attendant rights, privileges, and benefits with the officer or employee would have had or acquired had he or she not been so separated, subject to such time period and other conditions as the President may prescribe.

(3) An officer or employee entitled to reemployment or reinstatement rights under paragraph (2) of this subsection shall, while continuously employed by the Institute with no break in continuity of service, continue to participate in any benefit program in which such officer or employee was participating prior to employment by the Institute, including programs for compensation for job-related death, injury, or illness; programs for health and life insurance; programs for annual, sick, and other statutory leave; and programs for retirement under any system established by the laws of the United States; except that employment with the Institute shall be the basis for participation in such programs only to the extent that employee deductions and employer contributions, as required, in payment for such participation for the period of employment with the Institute, are currently deposited in the program's or system's fund or depository. Death or retirement of any such officer or employee during approved service with the Institute and prior to reemployment or reinstatement shall be considered a death in or retirement from Government service for purposes of any employee or survivor benefits acquired by reason of service with an agency of the United States Government.

(4) Any officer or employee of an agency of the United States Government who entered into service with the Institute on approved leave of absence without pay prior to the enactment of this Act shall receive the benefits of this section for the period of such service.

(b) Any agency of the United States Government employing alien personnel on Taiwan may transfer such personnel, with accrued allowances, benefits, and rights, to the Institute without a break in service for purposes of retirement and other benefits, including continued participation in any system established by the laws of the United States for the retirement of employees in which the alien was participating prior to the transfer to the Institute, except that employment with the Institute shall be creditable for retirement purposes only to the extent that employee deductions and employer contributions, as required, in payment for such participation for the period of employment with the Institute, are currently deposited in the system's fund or depository.

(c) Employees of the Institute shall not be employees of the United States and, in representing the Institute, shall be exempt from section 207 of title 18, United States Code.

(d)(1) For purposes of sections 911 and 913 of the Internal Revenue Code of 1954, amounts paid by the Institute to its employees shall not be treated as earned income. Amounts received by employees of the Institute shall not be included in gross income, and shall be exempt from taxation, to the extent that they are equivalent to amounts received by civilian officers and employees of the Government of the United States as allowances and benefits which are exempt from taxation under section 912 of such Code.

(2) Except to the extent required by subsection (a)(3) of this section, service performed in the employ of the Institute shall not constitute employment for purposes of chapter 21 of such Code and title II of the Social Security Act.
REPORTING REQUIREMENT

Sec. 12. (a) The Secretary of State shall transmit to the Congress the text of any agreement to which the Institute is a party. However, any such agreement the immediate public disclosure of which would, in the opinion of the President, be prejudicial to the national security of the United States shall not be so transmitted to the Congress but shall be transmitted to the Committee on Foreign Relations of the Senate and the Committee on Foreign Affairs of the House of Representatives under an appropriate injunction of secrecy to be removed only upon due notice from the President.

(b) For purposes of subsection (a), the term "agreement" includes—

(1) any agreement entered into between the Institute and the governing authorities on Taiwan or the instrumentality established by Taiwan; and

(2) any agreement entered into between the Institute and an agency of the United States Government.

(c) Agreements and transactions made or to be made by or through the Institute shall be subject to the same congressional notification, review, and approval requirements and procedures as if such agreements and transactions were made by or through the agency of the United States Government on behalf of which the Institute is acting.

(d) During the two-year period beginning on the effective date of this Act, the Secretary of State shall transmit to the Speaker of the House of Representatives and the Committee on Foreign Relations of the Senate, every six months, a report describing and reviewing economic relations between the United States and Taiwan, noting any interference with normal commercial relations.

RULES AND REGULATIONS

Sec. 13. The President is authorized to prescribe such rules and regulations as he may deem appropriate to carry out the purposes of this Act. During the three-year period beginning on the effective date of this Act, such rules and regulations shall be transmitted promptly to the Speaker of the House of Representatives and to the Committee on Foreign Relations of the Senate. Such action shall not, however, relieve the Institute of the responsibilities placed upon it by this Act.

CONGRESSIONAL OVERSIGHT

Sec. 14. (a) The Committee on Foreign Affairs of the House of Representatives, the Committee on Foreign Relations of the Senate, and other appropriate committees of the Congress shall monitor—

(1) the implementation of the provisions of this Act;

(2) the operation and procedures of the Institute;

(3) the legal and technical aspects of the continuing relationship between the United States and Taiwan; and

(4) the implementation of the policies of the United States concerning security and cooperation in East Asia.

(b) Such committees shall report, as appropriate, to their respective Houses on the results of their monitoring.

DEFINITIONS

Sec. 15. For purposes of this Act—
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(1) the term "laws of the United States" includes any statute, rule, regulation, ordinance, order, or judicial rule of decision of the United States or any political subdivision thereof; and
(2) the term "Taiwan" includes, as the context may require, the islands of Taiwan and the Pescadores, the people on those islands, corporations and other entities and associations created or organized under the laws applied on those islands, and the governing authorities on Taiwan recognized by the United States as the Republic of China prior to January 1, 1979, and any successor governing authorities (including political subdivisions, agencies, and instrumentalities thereof).

AUTHORIZATION OF APPROPRIATIONS

Sec. 16. In addition to funds otherwise available to carry out the provisions of this Act, there are authorized to be appropriated to the Secretary of State for the fiscal year 1980 such funds as may be necessary to carry out such provisions. Such funds are authorized to remain available until expended.

SEVERABILITY OF PROVISIONS

Sec. 17. If any provision of this Act or the application thereof to any person or circumstance is held invalid, the remainder of the Act and the application of such provision to any other person or circumstance shall not be affected thereby.

EFFECTIVE DATE

Sec. 18. This Act shall be effective as of January 1, 1979.

Approved April 10, 1979.

LEGISLATIVE HISTORY:

HOUSE REPORTS: No. 96-26 (Comm. on Foreign Affairs) and No. 96-71 (Comm. of Conference).

SENATE REPORT No. 96-7 (Comm. on Foreign Relations).

CONGRESSIONAL RECORD, Vol. 125 (1979):

Mar. 8, 13, considered and passed House.
Mar. 7, 8, 12, 13, S. 245 considered and passed Senate.
Mar. 14, proceedings vitiated; H.R. 2479, amended, passed in lieu.
Mar. 28, House agreed to conference report.
Mar. 29, Senate agreed to conference report.

WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 15, No. 15:
Apr. 10, Presidential statement.
DOCUMENT 3

Presidential Executive Order 12143
of June 22, 1979

MAINTAINING UNOFFICIAL RELATIONS WITH
THE PEOPLE ON TAIWAN

In light of the recognition of the People's Republic of China by the
United States of America as the sole legal government of China,
and by the authority vested in me as President of the United
States of America, by the Taiwan Relations Act (Public Law 96-8,
93 Stat. 14, 22 U.S.C. 3301 et seq., hereinafter referred to as "the
Act"), and Section 301 of Title 3 of the United States Code, in
order to facilitate the maintenance of commercial, cultural and
other relations between the people of the United States and the
people on Taiwan without official representation or diplomatic
relations, it is hereby ordered as follows:

1-1. Delegation and Reservation of Functions.

1-101. Exclusive of the functions otherwise delegated, or
reserved to the President, by this Order, there are delegated to the
Secretary of State all functions conferred upon the President by
the Act. In carrying out these functions, the Secretary of State
shall consult with other departments and agencies as appropriate.

1-102. There are delegated to the Director of the Office of
Personnel Management the functions conferred upon the Presi-
dent by paragraphs (1) and (2) of Section 11(a) of the Act. These
functions shall be exercised in consultation with the Secretary of
State.

1-103. There are reserved to the President the functions
conferred upon the President by Section 3, Section 7(a)(3), and the
second sentence of Section 9(b), and the determination specified in
Section 10(a) of the Act.


1-201. Pursuant to Section 7(a) of the Act, I specify the following
provisions of law:

(a) Section 4082 of the Revised Statutes (22 U.S.C. 1172):

§ 1172. Solemnization of marriages

Marriages in presence of any consular officer of the
United States in a foreign country, between persons who
would be authorized to marry if residing in the District of Columbia, shall be valid to all intents and purposes, and shall have the same effect as if solemnized within the United States. And such consular officer shall, in all cases, give to the parties married before them a certificate of such marriage, and shall send another certificate thereof to the Department of State, there to be kept; such certificate shall specify the names of the parties, their ages, places of birth, and residence.

(b) Section 1707 of the Revised Statutes (22 U.S.C. 1173):

§ 1173. **Protests**

Consuls and vice consuls shall have the right, in the ports or places to which they are severally appointed, of receiving the protests or declarations which captains, masters, crews, passengers, or merchants, who are citizens of the United States, may respectively choose to make there; and also such as any foreigner may choose to make before them relative to the personal interest of any citizen of the United States.

(c) Section 1708 of the Revised Statutes (22 U.S.C. 1174):

§ 1174. **Lists and returns of seamen and vessels, etc.**

Every consular officer shall keep a detailed list of all seamen and mariners shipped and discharged by him, specifying their names and the names of the vessels on which they are shipped and from which they are discharged, and the payments, if any, made on account of each so discharged; also of the number of the vessels arrived and departed, the amounts of their registered tonnage, and the number of their seamen and mariners, and of those who are protected, and whether citizens of the United States or not, and as nearly as possible the nature and value of their cargoes, and where produced, and shall make returns of the same, with their accounts and other returns, to the Secretary of Commerce.
§ 1175. Estates of decedents generally; General Accounting Office as conservator

It shall be the duty of a consular officer, or, if no consular officer is present, a diplomatic officer, under such procedural regulations as the Secretary of State may prescribe—

First. To take possession and to dispose of the personal estate left by any citizen of the United States, except a seaman who is a member of the crew of an American vessel, who shall die within or is domiciled at time of death within his jurisdiction: Provided, That such procedure is authorized by treaty provisions or permitted by the laws or authorities of the country wherein the death occurs, or the decedent is domiciled, or that such privilege is accorded by established usage: Provided further, That the decedent shall leave in the country where the death occurred or where he was domiciled, no legal representative, partner in trade, or trustee by him appointed to take care of his personal estate. A consular officer or, in his absence, a diplomatic officer shall act as the provisional conservator of the personal property within his jurisdiction of a deceased citizen of the United States but, unless authorized by treaty provisions, local law, or usage, he shall not act as administrator of such personal property. He shall render assistance in guarding, collecting, and transmitting the property to the United States to be disposed of according to the law of the decedent's domicile.

Second. After having taken possession of the personal property, as provisional conservator, to inventory and carefully appraise the effects, article by article, with the assistance of two competent persons who, together with such officer, shall sign the inventory and annex thereto an appropriate certificate as to the accuracy of the appraised value of each article.

Third. To collect the debts due to the decedent in his jurisdiction and pay from the estate the obligations owed there by the decedent.

Fourth. To sell at auction, after reasonable public notice, unless the amount involved does not justify such expenditure, such part of the estate as shall be of a perishable nature, and after reasonable public notice and
notice to next of kin if they can be ascertained by reasonable diligence such further part, if any, as shall be necessary for the payment of the decedent's debts incurred in such country, and funeral expenses, and expenses incident to the disposition of the estate. If, at the expiration of one year from the date of death (or for such additional period as may be required for final settlement of the estate), no claimant shall appear, the residue of the estate, with the exception of investments of bonds, shares of stocks, notes of indebtedness, jewelry or heirlooms, or other articles having a sentimental value, shall be sold.

Fifth. To transmit to the General Accounting Office the proceeds of the sale (and any unsold effects, such as investments of bonds, shares of stocks, notes of indebtedness, jewelry or heirlooms, or other articles having a sentimental value), there to be held in trust for the legal claimant. If, however, at any time prior to such transmission, the decedent's legal representative should appear and demand the proceeds and effects in the officer's hands, he shall deliver them to such representative after having collected the prescribed fee therefor.

The Comptroller General of the United States, or such member of the General Accounting Office as he may duly empower to act as his representative for the purpose, shall act as conservator of such parts of these estates as may be received by the General Accounting Office or are in its possession, and may, when deemed to be in the interest of the estate, sell such effects, including bonds, shares of stock, notes of indebtedness, jewelry, or other articles, which have heretofore or may hereafter be so received, and pay the expenses of such sale out of the proceeds: Provided, That application for such effects shall not have been made by the legal claimant within six years after their receipt. The Comptroller General is authorized, for and in behalf of the estate of the deceased, to receive any balances due to such estates, to draw therefor on banks, safe deposits, trust or loan companies; or other like institutions, to endorse all checks, bills of exchange, promissory notes, and other evidences of indebtedness due to such estates, and take such other action as may be deemed necessary for the conservation of such estates. The net proceeds of such sales, together with such other moneys as may be collected by him, shall be deposited into the Treasury to a fund in trust for the legal claimant and reported to the Secretary of State.
If no claim to the effects the proceeds of which have been so deposited shall have been received from a legal claimant of the deceased within six years from the date of the receipt of the effects by the General Accounting Office, the funds so deposited, with any remaining unsold effects, less transmittal charges, shall be transmitted by that office to the proper officer of the State or Territory of the last domicile in the United States of the deceased citizen, if known, or, if not, such funds shall be covered into the general fund of the Treasury as miscellaneous receipts on account of proceeds of deceased citizens, and any such remaining unsold effects shall be disposed of by the General Accounting Office in such manner as, in the judgment of the Comptroller General, is deemed appropriate, or they may be destroyed if considered no longer possessed of any value: Provided, That when the estate shall be valued in excess of $500, and no claim therefor has been presented to the General Accounting Office by a legal claimant within the period specified in this paragraph or the legal claimant is unknown, before disposition of the estate as provided herein, notice shall be given by publishing once a week for four consecutive weeks in a newspaper published in the county of the last known domicile of the deceased, in the United States, the expense thereof to be deducted from the proceeds of such estate, and any lawful claim received as the result of such advertisement shall be adjusted and settled as provided for herein.

(e) Section 1710 of the Revised Statutes, as amended (22 U.S.C. 1176):

§ 1176. Notification of death of decedent; transmission of inventory of effects

For the information of the representative of the deceased, the consular officer, or, if no consular officer is present, a diplomatic officer, in the settlement of his estate shall immediately notify his death in one of the gazettes published in the consular district, and also to the Secretary of State, that the same may be notified in the State to which the deceased belonged; and he shall, as soon as may be, transmit to the Secretary of State an inventory of the effects of the deceased taken as before directed.
(f) Section 1711 of the Revised Statutes, as amended (22 U.S.C. 1177):

§ 1177. Following testamentary directions; assistance to testamentary appointee

When a citizen of the United States dies in a foreign country and leaves, by any lawful testamentary disposition, special directions for the custody and management, by the consular officer, or in his absence a diplomatic officer, within whose jurisdiction the death occurred, of the personal property in the foreign country which he possessed at the time of death, such officer shall, so far as the laws of the foreign country permit, strictly observe such directions if not contrary to the laws of the United States. If such citizen has named, by any lawful testamentary disposition, any other person than a consular officer or diplomatic officer to take charge of and manage such property, it shall be the duty of the officer, whenever required by the person so named, to give his official aid in whatever way may be practicable to facilitate the proceedings of such person in the lawful execution of his trust, and, so far as the laws of the country or treaty provisions permit, to protect the property of the deceased from any interference by the authorities of the country where such citizen died. To this end it shall be the duty of the consular officer, or if no consular officer is present a diplomatic officer, to safeguard the decedent's property by placing thereon his official seal and to break and remove such seal only upon the request of the person designated by the deceased to take charge of and manage his property.

(g) Section 1718 of the Revised Statutes (22 U.S.C. 1185); and

§ 1185. Retention of papers of American vessels until payment of demands and wages

All consular officers are authorized and required to retain in their possession all the papers of vessels of the United States, which shall be deposited with them as directed by law, till payment shall be made of all demands and wages on account of such vessels.
(h) Section 7 of the Act of April 5, 1906 (22 U.S.C. 1195).

§ 1195. Notarial acts, oaths, affirmations, affidavits, and depositions; fees

Every consular officer of the United States is required, whenever application is made to him therefor, within the limits of his consulate, to administer to or take from any person any oath, affirmation, affidavit, or deposition, and to perform any other notarial act which any notary public is required or authorized by law to do within the United States; and for every such notarial act performed he shall charge in each instance the appropriate fee prescribed by the President under section 1201 of this title.

1–202. Pursuant to Section 9(b) of the Act, and in furtherance of the purposes of the Act, the procurement of services may be effected without regard to the following provisions of law and limitations of authority:

(a) Section 3648 of the Revised Statutes, as amended (31 U.S.C. 529);

(b) Section 9 of the Act of June 30, 1906 (31 U.S.C. 627), and Section 3679 and 3732 of the Revised Statutes (31 U.S.C. 665; 41 U.S.C. 11), to the extent necessary to permit the indemnification of contractors against unusually hazardous risks, as defined in Institute contracts, consistent, to the extent practicable, with regulations prescribed by the Department of Defense pursuant to the provisions of the Act of August 28, 1958 (50 U.S.C. 1431 et seq.), and Executive Order No. 10789 of November 14, 1958, as amended;

(c) Section 3709 of the Revised Statutes and Section 302 of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 5, 252);

(d) Section 3710 of the Revised Statutes (41 U.S.C. 8);

(e) Section 2 of Title III of the Act of March 3, 1933 (41 U.S.C. 10a);

(f) Section 3735 of the Revised Statutes (41 U.S.C. 13);

(g) Section 304(b) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 254(b)), so as to permit the payment of fees in excess of the prescribed fee limitations, but
nothing herein shall be construed as authorizing the use of the cost-plus-a-percentage-of-cost system of contracting;

(h) Section 305 of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 255);

(i) Sections 2 through 16 of the Contract Disputes Act of 1978 (41 U.S.C. 601–613);

(j) Sections 2304, 2305 and 2306(a) through (f) of Title 10 of the United States Code, but nothing herein shall be construed as authorizing the use of the cost-plus-a-percentage-of-cost system of contracting; and


1-203. (a) With respect to cost-type contracts with the American Institute in Taiwan under which no fee is charged or paid, amendments and modifications of such contracts may be made with or without consideration and may be utilized to accomplish the same things as any original contract could have accomplished, irrespective of the time or circumstances of the making, or the form of the contract amended or modified, or of the amending or modifying contract and irrespective of rights which may have accrued under the contract or the amendments or modifications thereof.

(b) With respect to contracts heretofore or hereafter made under the Act, other than those described in subsection (a) of this Section, amendments and modifications of such contracts may be made with or without consideration and may be utilized to accomplish the same things as any original contract could have accomplished, irrespective of the time or circumstances of the making, or the form of the contract amended or modified, or of the amending or modifying contract, and irrespective of rights which may have accrued under the contract or the amendments or modifications thereof, if the Secretary of State determines in each case that such action is necessary to protect the foreign policy interests of the United States.

1-204. Pursuant to Section 10(a) of the Act, the Coordination Council for North American Affairs is determined to be the unofficial instrumentality established by the people on Taiwan having the necessary authority under the laws applied by the people on Taiwan to provide assurances and take other actions on behalf of Taiwan in accordance with the Act.

1–301. This Order supersedes my memorandum of December 30, 1978 for all departments and agencies entitled “Relations With the People on Taiwan” (44 FR 1075). Agreements and arrangements referred to in paragraph (B) of that memorandum shall continue in force and shall be performed in accordance with the Act and this Order.

**JIMMY CARTER**

THE WHITE HOUSE,
*June 22, 1979*

*Federal Registrar,* Vol. 44, No. 124

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