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Treaties and Nationalization: The People's Republic of China Experience

By Jay S. Laifman*

Member of the Class of 1988

[N]o question is of greater importance to an investor than the possibility of nationalization. For if his venture is likely to be nationalized, it matters little what incentives he is offered.


I. INTRODUCTION

The People's Republic of China (PRC) and the United States of America are currently negotiating a new investment protection treaty.1 The existing trade-related treaties between the PRC and the United States do not adequately address nationalization.2 This Note examines the risk of nationalization in the PRC today and suggests an approach for the new treaty that balances the differences between the United States and the PRC3 and increases the likelihood of compensation in the event of nationalization.

Part I presents the current political climate of investment in, and the risk of nationalization by the PRC. Part II examines the inadequacies of the PRC's new investment laws when it is applied to nationalization. Part III presents the use of treaties as a solution to both the problems with the PRC's new laws and the theoretical differences be-

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2. Throughout this Note, the definition of nationalization will be the taking possession of assets and rights of foreigners by the government. Governments nationalize property in a particular class in order to advance social reforms and to place the means of production under state control. Governments also expropriate property. The taking in expropriation is usually directed toward individuals. Nonetheless, this definition will include both nationalization and expropriation because both involve similar issues regarding compensation.

3. See notes infra 117-48 and accompanying text.
between the countries. This section also examines existing treaties to identify possible problems, and concludes by suggesting a new approach to a nationalization treaty between the PRC and the United States.

A. The PRC Today

In 1977, Deng Xiaoping, the current leader of the PRC, set forth policies to modernize the PRC in industry, agriculture, science, and defense. He emphasized that the PRC needed outside help to develop its economy and technology. Deng Xiaoping believed that access to the West's scientific and technical knowledge was necessary for his nation's development.

Prior to Deng Xiaoping, the PRC practiced self-reliance and refused to allow foreign investment within its boundaries. In 1949, when the PRC became a new nation, Mao Tse-tung and the PRC viewed the United States as imperialist and, thus, an enemy of the PRC.

However, Deng Xiaoping felt that advanced technology and equipment would help to develop the PRC's economy and technology, and could be imported without compromising the PRC's policy of self-reliance. Thus, the PRC began encouraging outside investment in order to foster growth. This outside investment is not protected from the risk of nationalization.

B. The Investor

Today, the United States is the biggest investor in the PRC, with over $10 billion invested. Many investors, however, still hesitate to in-

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6. Id.
8. Mao Tse-tung was the first leader of the PRC. A. Gregor, supra note 5, at 21-23.
9. Id. at 55-56. China's anti-imperialist policy stems from past oppression by imperialist nations. Chinese leaders today still view imperialism as the key evil and view many U.S. policies as imperialist. It has been suggested that the recent rapprochement with the U.S. is a temporary measure to gain technology and pacify the USSR. Once these goals have been met, the strongly anti-imperialist Chinese may again turn on the U.S. Id. at 82-84.
11. Id. at 8; A. Gregor, supra note 5, at 82.
12. Tao Tai Hsia & Hahn, supra note 10, at 5.
14. Id.
vest in the PRC because of the nation's volatile political situation. The risk of nationalization, which can result from such instability, has often been a key factor influencing an investor's decision not to invest. Unfortunately, no legal guarantees against nationalization exist.

A nation has full sovereignty over its property. The United Nations has resolved that a "[v]iolation of the rights of peoples and nations to sovereignty over their natural wealth and resources is contrary to the spirit and principles of the Charter of the United Nations and hinders the development of international co-operation and the maintenance of peace." Further, since the United States itself has stated that the power of eminent domain "cannot be fettered by treaty," investors cannot expect the PRC to limit its sovereignty over its property or to sign a treaty that guarantees the PRC will not nationalize. The investor must, therefore, look for certain guarantees in the event of nationalization. American investors want assurances that the PRC will reimburse money and time invested in a foreign country in case of nationalization. C. The Risk of Nationalization in the PRC

The PRC has nationalized American property in the past. Current PRC leaders claim that the PRC will not nationalize in the future.

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19. Id. at 15-16. The U.S. has the ability to put pressure on the PRC to inhibit expropriations. The Hickenlooper Amendment to the Foreign Assistance Act requires that, in the event of expropriation of a U.S. investor's property, all aid to the expropriating country is to cease until restitution is made. 22 U.S.C. § 2370(c)(1) (1982). However, recently the U.S. has become reluctant to apply the law. G. INGRAM, supra note 16, at 338.
20. I. DELUPIS, supra note 17, at 133.
21. See infra notes 23-43 and accompanying text.
22. Liu Yiu-chu Freely Discusses the Joint Venture Law, cited in Tao Tai Hsia & Hahn, supra note 10, at 12-13 ("I think that we have forcefully propagandized our policy of not nationalizing. . . ."); Shen Xiaoming, cited in Tao Tai Hsia & Hahn, supra note 10, at 12-13 ("The foreign investor then need not worry that his capital will be nationalized without compensation. . . ."); Ren Jianxin, Some Legal Aspects of Our Import of Technology and Utilization of Foreign Investment, 1 CHINA L. REP. 85, 96 (1981) ("Some leaders of the Chinese government have answered definitely that pursuant to the joint venture law, assets of a foreign participant will not be expropriated.").
This section examines the strength of these claims in light of past occurrences.

1. Past Occurrences of Nationalization in China

In 1949, when the PRC was established, Mao Tse-tung pursued China's unification and supported a variation of Marxism to lead the Chinese people down a road of advancement. This plan required the Government to control the means of production throughout the country. During the following years, the PRC nationalized many industries. The Government created a "state sector" in the economy by nationalizing financial institutions, railroads, and shipping companies. The PRC also took systematic steps to "confiscate" American consular properties in the PRC.

PRC nationalization also took the form of failure to pay financial obligations incurred by a former Chinese government. In 1911, imperialist China issued bonds for the development of its railroad. The Republic of China (ROC) stopped making interest payments on the bonds in 1939 when Japan invaded China. The ROC Government fled mainland China in 1949 and never paid interest again. Revenues from the railroads on mainland China secured the bonds. Thus, an action against the ROC, now in Taiwan, would "have been useless without a source of mainland funds to levy against." Mao Tse-tung and the PRC denied responsibility to repay the bonds. The PRC also denounced treaties and loans made by the ROC because it felt the treaties and loans "disgrace[d] the country and stripp[ed] away its right[s]."

24. Id. at 38.
26. A. GREGOR, supra note 5, at 38.
27. 22 DEP'T. OF STATE BULL. 551 (1950), quoted in J. HSIUNG, LAW AND POLICY IN CHINA'S FOREIGN RELATIONS: A STUDY OF ATTITUDES AND PRACTICE (1972). It is unlikely that the PRC will nationalize foreigners' properties to the extent of these 1949 nationalizations. However, as discussed below, variations of it are still possible.
30. Id.
31. Id.
32. Id. at 91.
33. Id.
34. Statement by the Central Committee of the Chinese Communist Party on Agreements and Negotiations Between Kuomintang and Foreign Governments, Feb. 1, 1947, reprinted in 2
United States Foreign Claims Settlement Commission held that the PRC would not be liable for the bonds since they were ROC obligations.  

Another occurrence of nationalization involved the PRC's freezing of American assets in 1950. This action was in response to the United States' freezing of Chinese assets because of the PRC's intervention in the Korean War. Although the United States was ready to release the frozen assets it held, the PRC was not. The PRC refused to pay compensation in any form. Investors claimed a loss of $196.9 million. In 1979, the United States and the PRC finally exchanged restitution for the nationalization when they signed the Settlement of Claims Treaty. The treaty extinguished all United States citizens' claims against China and the remaining Chinese claims against the United States. The settlement of claims provided only $80.5 million in restitution.

In summary, nationalization by the PRC has taken several forms: outright nationalization of various sectors of industry, denial of the ousted government's financial obligations, and frozen assets. These acts have harmed American investors in China. Compensation to Americans for their losses has been either delayed or nonexistent. The PRC has a clear history of nationalization.

2. The Possibility of Nationalization by the PRC in the Future

With consideration of the past nationalization by the PRC, this next section addresses three situations that could result in nationalization in the future: re-adjustment of investment, overthrow of the Government, and retreat from the current open door policy.
a. Re-Adjustment

The PRC, like other socialist countries, controls all of the country's industry. Even though more decisions are now made at the local level, the PRC is still a controlled economy in which the central government sets the pricing structure. The entire economy remains highly bureaucratized. Under this bureaucratized system, the PRC does not discover many inefficiencies until much money has been invested in an industry. These inefficiencies force the PRC to withdraw investment from one industry and reallocate the money in another industry.

The PRC currently encourages joint foreign investments in technology and oil-related industries. As it has in the past, the PRC could decide that it has overinvested in these industries. The PRC might then reduce investments in one industry and reallocate them elsewhere. This reallocation is a particular risk for oil investments in which there has been tremendous investment but little success. Without sufficient state support, the investor might be unable to continue. Although no outright taking occurs, deliberate actions by the host country that make continuing the investment fruitless is also a form of nationalization. This form is known as "creeping expropriation."

44. A. GREGOR, supra note 5, at 166-67.
45. For example, some business managers are now allowed to invest 10% of their profits in bonuses, new technology, and growth. Id. at 167.
46. Id. at 171.
47. Id. at 158-59.
48. Id. at 157-58.
50. See generally G. INGRAM, supra note 16. Nations have refrained from nationalization because their citizens lack the knowledge to use foreign technology. If a nation, however, understands the technology employed by the foreigners, there is less risk of losing the technological advances. Id. at 356. The PRC requires foreign investors to share their technology and to train Chinese workers rather than simply sell the advanced equipment. Ren Jianxin, supra note 22, at 93. Therefore, the current government or any new leadership would know that the technology could be used without the foreigners, and the risk of losing the technology would not be inhibiting.
51. The PRC classifies such investments as "joint development ventures." Chang & Pow, Trade and Investment Law and Practice in the PRC, 3 CHINA L. REP. 5, 44-45 (1985) (as opposed to "joint ventures," which deal in only manufacturing ventures).
52. The foreigners must pay the cost of the exploration until they find oil. Chang & Pow, supra note 51, at 45. Two point four billion dollars have already been invested in exploration equipment. Id. Since little oil has been found, the investors have much to lose if the Government decides it no longer wants foreigners to extract Chinese oil. Armacost, The People's Republic of China: Economic Reform, Modernization and the Law, 3 CHINA L. REP. 153, 154 (1986).
b. The Overthrow of the PRC Government

In the past, nationalization has been a tool of power for governments. Most occurrences of nationalization, unaccompanied by compensation, have immediately followed the overthrow of or drastic changes in governments. The leaders of the new government blamed the overthrown government for yielding to the pressures of foreigners. Thus, the new leaders used the foreigners as scapegoats to display control over the situation. In nationalizing the property, the new government committed a highly publicized act, which led the public to believe that the new government was crusading for their interests.

In the PRC, the overthrow of the government involved a change to socialism. Socialist ideology mandates that neither foreigners nor citizens can own property. The 1949 actions by the PRC exemplify nationalization following an overthrow of a government.

c. Retreat from the Open Door Policy

The future of the PRC's present government and policies is unsure. Since the Opium Wars, when foreigners manipulated and abused China, the Chinese have been very sensitive to foreigners. Sensitivity to foreign encroachment led to a closed door policy, which lasted for over seventy years. The doors have been open only because Deng Xiaoping felt that gains from the West could be obtained without the abuse of the past. The PRC is still known for its tendency to embrace the past, and cries of cultural contamination have been noted by observers of United States-Sino political affairs. In the past, the involvement of foreigners in a host country provoked the citizens to seek isolation. Nonetheless, many Chinese argue that the new trend is irreversible because the current government is more stable than past Chinese

55. Id. at 10, 357.
56. Id. at 3.
57. Id.
59. See supra notes 23-27 and accompanying text.
60. Tao Tai Hsia & Hahn, supra note 10, at 6-9. See also S. SCHRAM, MAO TSE-TUNG 23-24 (1966) (humiliation and awareness of it).
61. Tao Tai Hsia & Hahn, supra note 10, at 6-9.
62. Id.
63. See supra notes 4-12 and accompanying text.
64. See Tao Tai Hsia & Hahn, supra note 10, at 6.
65. Armacost, supra note 52, at 155.
governments, and that drastic change or overthrow is unlikely.\textsuperscript{67}

The current open door policy does not have to be completely eliminated for investors to be harmed. The future of Deng Xiaoping's new policies\textsuperscript{68} depends partially upon whether his supporters remain in power. Currently, Deng Xiaoping's policies are under attack by those who want to return to isolation.\textsuperscript{69} If the isolationists' influence upon the Government results in less outside investment, effects similar to reallocation\textsuperscript{70} could result. In both situations, no direct taking occurs, yet the investor loses his expected return on the investment.

Wholly foreign-owned enterprises (WFOEs)\textsuperscript{71} and joint ventures (JVs)\textsuperscript{72} are potential targets of nationalization. With the WFOE, the PRC has widened the trade door more than ever before. Any restriction of trade policy might first affect the WFOEs. Total foreign ownership remains controversial in China because of China's history of abuse by foreigners.\textsuperscript{73} The WFOE investors provide one hundred percent of the funds and management.\textsuperscript{74} Thus, they have more freedom than JV investors, who must share management decisions with Chinese partners.\textsuperscript{75} The PRC, due to pressure by isolationists or abuses by foreigners,\textsuperscript{76} might decide to discontinue WFOEs in favor of JVs, over which they have greater control. Nationalization could occur, without a complete reversal of policy, in the form of the American investors' inability to continue independent operation of their investments.

\begin{itemize}
\item \textsuperscript{68} See Gittings, Deng Xiaoping, reprinted in CHINA: YESTERDAY AND TODAY 453 (M. Coye ed. 1984).
\item \textsuperscript{69} Tao Tai Hsia & Hahn, supra note 10, at 10.
\item \textsuperscript{70} See supra notes 44-53 and accompanying text.
\item \textsuperscript{73} Sin, Slow Growth for Foreign Wholly Owned Ventures, S. China Morning Post, May 1, 1987, reprinted in FBIS DAILY REP., May 1, 1987, at K9-10.
\item \textsuperscript{74} WFOE Law art. 2.
\item \textsuperscript{75} JV Law art. 6.
\item \textsuperscript{76} The operation of the investment can be a major factor that increases the risk of nationalization. G. Ingram, supra note 16, at 4-6, 352-58. Even small mistakes and abuses caused by other foreigners can create problems for an investor. \textit{Id}. In the PRC investment atmosphere, this can be critical because of the PRC's sensitivity to foreign encroachment. Tao Tai Hsia & Hahn, supra note 10, at 6.
\end{itemize}
III. INADEQUATE PROTECTION FROM PRC LAW

A. General Problems With PRC Law

When nationalization occurs, the investor should first turn to the host country’s own legal system for compensation. This gives the country an opportunity to make reparations without making the issue international.

The PRC's legal system, however, does not provide for reparation. Before foreigners began investing in the PRC, no need for private investment laws existed.\footnote{Lubman & Salper, supra note 28, at 262.} When the PRC decided to encourage investors, it developed the first investment laws.\footnote{Id.} Inadequacies permeate the new laws because of the Chinese lawmakers’ lack of experience and desire to preserve flexibility.\footnote{Tao Tai Hsia & Hahn, supra note 10, at 6-7.} These new laws have been criticized for being incomplete and for not including adequate tax, corporate, and other commercial laws.\footnote{Id.} Laws promulgated to clarify murky legal areas are not always readily accessible,\footnote{See Horsley, supra note 1, at 175-76; Marra, supra note 53, at 174.} nor uniformly applied.\footnote{Lubman & Salper, supra note 28, at 265-66.} The PRC, however, continues to improve its legal system.\footnote{Since 1981, The PRC has enacted over 100 laws relating to business in the PRC. Han Xu, supra note 13, at 160.} Enforcement of the laws will reduce the likelihood of nationalization of investments in PRC. However, once nationalization does occur, the existing laws offer little guidance to effectuate compensation.

B. PRC Written Law Applicable to Nationalization

Currently, only two written laws deal with nationalization and the investor: the Joint Venture Law\footnote{See supra note 72.} and the Wholly Foreign-Owned Enterprise Law.\footnote{See supra note 71.} These laws provide some hope and guidance for the investor.

1. The Joint Venture Law

On July 1, 1979, the Law of the People's Republic of China on Joint Ventures Using Chinese and Foreign Investment (Joint Venture Law) was adopted.\footnote{See supra note 72.} The Joint Venture Law represents a dramatic step as the
first PRC law officially providing for foreign investment on Chinese soil.\textsuperscript{87} The Joint Venture Law is mostly a statement of the PRC's intent and policies.\textsuperscript{88} It has only fifteen articles, which outline a general legal framework for joint ventures. Ren Jianxin, Director of the Legal Affairs Department of the China Council for the Promotion of International Trade, has reduced the numerous regulations governing joint ventures into a few key points.\textsuperscript{89} First, the PRC requires an investment to benefit China's development.\textsuperscript{90} This requirement prevents investors from ignoring the PRC's needs. In the past, host countries have criticized foreign investors for pursuing their own profits.\textsuperscript{91} Second, the PRC requires that investments augment foreign exchange.\textsuperscript{92} By restricting imports, the PRC will increase foreign currency reserves and thus maintain a positive trade balance before allowing more imports. This requirement should reduce the likelihood that the investment will result in decapitalization of the local economy, which has been a factor in past nationalization.\textsuperscript{93} Third, the PRC requires an investment to conform to environmental protection standards.\textsuperscript{94} This requirement should result in less destruction of the landscape.\textsuperscript{95} These requirements do not increase the likelihood of compensation once nationalization occurs. If they are enforced and followed, however, they should reduce the likelihood of nationalization by eliminating factors that have turned countries against foreigners.

In the past, countries eager to encourage foreign investment have found foreign investment to be detrimental to the host country due to the lack of control over the foreigner's activities.\textsuperscript{96} The PRC requires a highly subjective case-by-case inquiry into each investment's qualities and defects,\textsuperscript{97} including the factors outlined above. This inquiry should help prevent some abusive investments.

Investments such as coal mining,\textsuperscript{98} however, seem directly counter to the environmental protection requirements. One particular invest-

\begin{itemize}
\item \textsuperscript{87} Chang & Pow, supra note 51, at 9-10.
\item \textsuperscript{88} Ren Jianxin, supra note 22, at 93.
\item \textsuperscript{89} Id.
\item \textsuperscript{90} Id.
\item \textsuperscript{91} G. INGRAM, supra note 16, at 8, 355.
\item \textsuperscript{92} Ren Jianxin, supra note 22, at 93.
\item \textsuperscript{93} G. INGRAM, supra note 16, at 8.
\item \textsuperscript{94} Ren Jianxin, supra note 22, at 93.
\item \textsuperscript{95} Natural resource extraction investments have been subject to nationalization more often than investments in manufacturing. See generally G. INGRAM, supra note 16, at 5.
\item \textsuperscript{96} G. INGRAM, supra note 16, at 10-11.
\item \textsuperscript{97} Tao Tai Hsia & Hahn, supra note 10, at 6.
\item \textsuperscript{98} Similar investments have been nationalized in Peru, G. INGRAM, supra note 16, at 19-104, and Chile, id.
\end{itemize}
ment in the PRC has resulted in the world’s largest open-pit coal mine\textsuperscript{99} and thus potentially irreparable harm to the landscape. This suggests that abusive investments are still possible.

Like other PRC laws, the new Joint Venture Law has many problems. Problems with the Joint Venture Law have included vagueness, nonuniform interpretation, and requirements that upset PRC citizens.\textsuperscript{100} The Joint Venture Law only vaguely addresses nationalization. Article 2 states, “The Chinese Government protects, by the legislation in force, the resources invested by a foreign participant in a joint venture and the profits due him pursuant to the agreements, contracts and articles of association authorized by the Chinese Government as well as his other lawful rights and interests.”\textsuperscript{101}

The Joint Venture Law leaves unclear the nature and extent of compensation to be paid to foreigners whose investments are nationalized. Even PRC officials disagree upon the meaning of this section. One official has said “appropriate” compensation is the standard,\textsuperscript{102} while another said “reasonable” compensation is the standard.\textsuperscript{103} In either case, it is unclear what either word actually means with regard to how much of the nationalized investment the investor will be able to recover. Such a standard is not helpful. More concrete terms are needed.

Another problem is that requirements stated in supplemental regulations may upset many PRC citizens. In the Provisions on Labor Management in Joint Ventures Using Chinese and Foreign Investment, articles 8 and 11 are potentially problematic for PRC citizens. These articles require foreign companies to pay higher wages than state-run companies.\textsuperscript{104} In the past, foreign companies created a new elite by treating their employees better than the host government. The citizens who did not benefit envied the citizens who did and resented the foreigners for creating the imbalance.\textsuperscript{105} Currently in the PRC, certain radicals condemn these bonuses, or higher wages.\textsuperscript{106} Consequently, the Joint Venture Law itself imposes a standard that could result in future problems for the investor.

\textsuperscript{99} Han Xu, supra note 13, at 161.
\textsuperscript{100} See infra notes 104-06 and accompanying text.
\textsuperscript{101} See supra note 72.
\textsuperscript{102} Tao Tai Hsia & Hahn, supra note 10, at 12.
\textsuperscript{103} Ren Jianxin, supra note 22, at 96.
\textsuperscript{105} Cf. G. INGRAM, supra note 16, at 10-12.
\textsuperscript{106} Tao Tai Hsia & Haun, China's Joint Venture Law: Part II, 1 CHINA L. REP. 61, 82 (1981).
2. The Wholly Foreign-Owned Enterprises Law

The most recent PRC law developed for foreign investments is the Law on Wholly Foreign-Owned Enterprises (WFOE Law), which was promulgated on April 12, 1986. By following the Law's extensive regulations, a foreigner can invest in the PRC without forming a partnership with a Chinese citizen. Previously, wholly foreign-owned enterprises were limited to a few selected zones and cities. Otherwise, a foreign investor could only operate as a partner with a Chinese national.

Article 5 of the WFOE Law specifically addresses nationalization: "The State will not nationalize or carry out expropriation of wholly foreign-owned enterprises; in special circumstances, in accordance with the needs of the common social interest, the State may in accordance with legal procedures carry out expropriation, and give commensurate compensation."

The first sentence of the article is quite a bold statement. It clearly states that the PRC will not nationalize. However, the rest of the article mitigates its strength. The PRC will nationalize in special circumstances. The article does not suggest what these special circumstances are. Rather, it states only that they will be "in accord with the needs of the common social interest." Social interest is intrinsically involved with almost everything a nation does. Likewise, most past nationalization has been connected with the interests of society. Therefore, article 5 neither forbids nationalization, nor makes it any less likely than nationalizations in the past.

Article 5 refers to legal procedures that are to be followed in the event of nationalization expropriation. Such procedures could be helpful for both the investor and the PRC. The foreigner could insure that his investment was not improperly taken. The PRC could legitimize its actions by following the procedures. However, the article does not provide procedures, nor does it specify where to find them.

Article 5 requires "commensurate payment" for enterprises that are

107. See supra note 71.
108. WFOE Law art. 2.
110. Id. This article only covers wholly foreign-owned enterprises. Therefore, it affects neither investments created under the Joint Venture Law, nor investments created under the Joint Development Law.
111. Id.
112. I. DELUPIS, supra note 17, at 76-78.
113. WFOE Law art. 5.
nationalized. This term does not provide an adequate standard for determining compensation. It is unclear whether the standard to be applied to determine a commensurate payment should be the value of the property to the PRC, the foreigner, or another foreigner. Nor does the article specify how or by whom the valuation should be made.

Thus, the new WFOE Law attempts to give the foreigner assurances regarding nationalization. However, the wide exception and vague procedures and standards drastically diminish the impact of the statement against nationalization.

C. The Application of International Law

When no PRC law covers a topic, Chinese leaders claim that international law applies. However, due to the difficulty in ascertaining the applicable Chinese law on a particular subject, investors cannot be sure whether international law applies or whether they are simply unsuccessful in discovering the applicable law. Further, the PRC could create a law or change one of their policies to avoid the application of international law. Such tactics have been used before in other countries for the sole purpose of limiting the rights of foreign investors after an illegal act has occurred. This assertion by Chinese leaders, therefore, does not help determine what law is applicable in any given situation.

IV. TREATIES AS A REMEDY

Since the PRC laws do not provide all the answers for the investor, a treaty between the United States and the PRC could fill some gaps. For example, a treaty could resolve some uncertainty by developing a standard for compensation or defining the nature of property.

A. The Lack of an Agreement on a Standard for Compensation

One of the problems facing the investor is the lack of agreement on an international standard for compensation. The United States and other Western nations hold one theory, while other nations seem to have their own different theories. Because there is no agreement on the rationale behind the duty of the nationalizing nation to compensate, many nations

114. Id.
116. For a list of governments that have changed internal policies to the detriment of the investor, see I. DELUPIS, supra note 17, at 27-29.
believe they have no such duty.\textsuperscript{117}

The United States believes in prompt, adequate, and effective payment.\textsuperscript{118} In other words, the payment should be within a reasonable period of time without delay,\textsuperscript{119} equivalent to the value of the property taken,\textsuperscript{120} and in a currency the foreigner can utilize.\textsuperscript{121} Although the standard is vague, the Western European countries also support this view on restitution.\textsuperscript{122} Together, the United States and the Western European countries have attempted to make this view an international standard through United Nations agreement.\textsuperscript{123} However, developing countries have not accepted these standards.\textsuperscript{124}

Socialist and developing countries have at times recognized a duty to compensate, but not according to the Western "prompt, adequate, and effective" standard.\textsuperscript{125} Their limited recognition is a result of the diplomatic need to remain on good terms with the international community.\textsuperscript{126}

Li Hao-p’ei, one of the few PRC commentators on the subject of nationalization, rejects the Western notion of prompt, adequate, and effective relief.\textsuperscript{127} He states that the Western theory "is obviously based upon the sanctity and inviolability of private property advocated by the bourgeoisie."\textsuperscript{128} Rather, he advances the notion supported by other socialist countries that no obligation to pay any compensation by the nationalizing country exists:

To require the nationalizing state to make compensation to owners of foreign nationality may frustrate the exercise of the sovereign right of state to carry out economic and social reform. . . . [T]he nationalizing state only has an obligation not to discriminate. . . . [I]f it does not compensate nationals . . . then [there is] no obligation to


\textsuperscript{118} \textit{RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES} § 187 (1965).

\textsuperscript{119} \textit{Id.} § 189.

\textsuperscript{120} \textit{Id.} § 188.

\textsuperscript{121} \textit{Id.} § 190.

\textsuperscript{122} R. Ribeiro, \textit{supra} note 58, at 90-91.

\textsuperscript{123} \textit{Id.} at 83-84.

\textsuperscript{124} Note, \textit{supra} note 117, at 167.

\textsuperscript{125} R. Ribeiro, \textit{supra} note 58, at 115.

\textsuperscript{126} \textit{Id.} at 115.

\textsuperscript{127} Li Hao-p’ei, \textit{Nationalization & International Law}, reprinted in \textit{1 PEOPLE’S CHINA AND INTERNATIONAL LAW: A DOCUMENTARY STUDY}, \textit{supra} note 34, at 718-29.

\textsuperscript{128} \textit{Id.} at 720.
foreigners.129

The United States and the PRC, therefore, do not agree upon a standard for compensation.

B. Theoretical Differences on the Nature of Property

Another problem facing an investor involves the differing views of the nature of property ownership held by Western and developing nations. Western nations believe ownership can only be effected through the power of the state by eminent domain.130 In addition, when a state exercises eminent domain, it owes the owner restitution.131 This Western view is a progression from the Roman view of absolute possession and control.132 On the other hand, the developing countries argue that land has a social function, and thus belongs to the state for the accomplishment of its social goals.133 The possessor of land and other property does not own it. Rather, she uses it for the social good. Therefore, if she loses possession, she does not lose property rights because the nation does not recognize those rights.134 These opposing views on property rights reveal the reason why Western and developing nations do not agree on compensation.

C. Treaties Used as a Solution to Theoretical Differences

Because of these differing views, there is no single international law for restitution, nor one law to satisfy all nations.135 When an investor deals with nations that do not accept Western views, the applicable law can only be the law of that individual nation.136

Commentators have suggested that the United States discard the "prompt, adequate, and effective" standard,137 especially since England and France, strong supporters of the standard, at times have been unable to comply.138 As far as a Western investor is concerned, however, the

129. Id. at 722.
131. Id.
133. Id. at 4-8.
134. Id. at 27, 122-25.
135. A. Lowenfeld, supra note 130, at 5-7.
137. Note, supra note 117, at 178.
138. R. Ribeiro, supra note 58, at 96-97 (because of the wide-scale nature of the nationalizations, the nations lacked sufficient capital).
result would be a denial of fair compensation. Few investors would be willing to take the risk of investment without some guarantee of compensation.

Treaties have been used to tailor agreements to meet the concerns of differing nations. Between two nations, treaties can address individual needs effectively. By focusing on an end result, the parties can avoid reference to state policies. In the area of nationalization, if the parties can agree when and how much compensation is due, and for what reasons, the reason each nation came to that conclusion is insignificant. For example, one party may view an agreement as a means to preserve property rights, while the other party perceives the treaty as a means to preserve beneficial trade relations.

In spite of such statements as Li Hao-p'ei's, the PRC has previously reached agreements with the United States regarding compensation. The PRC's rationale for compensation is coextensive with its rationale for rapprochement with the United States.

The PRC agreed to rapprochement with the United States for two reasons—fear of the Union of Soviet Socialist Republics (USSR), and need for technological advancement. By 1969, relations between the PRC and the USSR had deteriorated. The PRC feared the USSR was preparing to attack the PRC. Although the PRC still considered the United States an enemy, its immediate fears of the USSR and USSR collusion with the United States led to temporary rapprochement with the United States in 1979. The PRC hoped that friendly relations would prevent collusion between the USSR and the United States and invasion by the USSR.

Previous accommodations by the PRC have been temporary and unreliable. For example, the PRC and its opponents, the Nationalists, joined forces to fight the Japanese. Once the Japanese were defeated, the Nationalist Party became the PRC's enemy again. This suggests that this rapprochement with the United States could be equally unreliable.

139. See I. DELUPIS, supra note 17, at 133.
140. See supra text accompanying notes 119-29.
142. A. GREGOR, supra note 5, at 75-76.
143. Id. at 76.
144. The PRC considered the U.S. imperialist and consequently an adversary. Id. See supra notes 7-9 and accompanying text.
145. See generally A. GREGOR, supra note 5, at 79-89.
146. Id. at 82-84.
Another rationale for rapprochement was the PRC's need for technological advancement.\textsuperscript{147} Deng Xiaoping, as opposed to Mao Tse-tung, felt that the PRC needed the United States' technology for development.\textsuperscript{148} This need will remain whether or not the PRC finds other means to fight imperialism. In negotiating a treaty, therefore, the United States can use these needs as inducements for Chinese agreement on compensation. However, since the former rationale is more likely to end than the latter, the latter should be emphasized.

1. Specific Attempts at Treaties

Countries have used bilateral and multilateral treaties to address the issue of protection of investments from nationalization. There are basically two types of bilateral treaties: Friendship, Commerce, and Navigation Treaties (FCNs),\textsuperscript{149} and Bilateral Investment Treaties (BITs).\textsuperscript{150} BITs are relatively new and considered by the United States to be the prototype for future treaties and a replacement for the older FCN treaties.\textsuperscript{151} The FCN incorporated the "prompt, adequate, and effective" Western standards.\textsuperscript{152} However, in some nations, the treaties have been cited by the parties and then denied enforcement by the host nation.\textsuperscript{153} The BIT should be an improvement over the FCN, with its greater legal protection and clearer terms.\textsuperscript{154} Although it uses different adjectives for "prompt, adequate, and effective," it is really very similar. The United States has recently signed a BIT with Egypt.\textsuperscript{155} However, Egypt is already complaining that the treaty conflicts with the needs of a developing country and wants to change it.\textsuperscript{156}

Nations have also attempted multilateral treaties. To date, none have been successful.\textsuperscript{157} Like previous bilateral treaties, a middle ground

\begin{footnotes}
\footnotetext[147]{Id. at 82.}
\footnotetext[148]{See supra notes 4-6 and accompanying text.}
\footnotetext[149]{E. NWOGUGU, THE LEGAL PROBLEMS OF FOREIGN INVESTMENT IN DEVELOPING COUNTRIES 120-23 (1965).}
\footnotetext[150]{See, e.g., Treaty Concerning the Reciprocal Encouragement and Protection of Investments, Sept. 29, 1982, United States-Egypt, 21 I.L.M. 927 (1982).}
\footnotetext[151]{United States, Egypt Sign First Treaty on Bilateral Investments, 18 Int'l Trade Rep. (BNA) 17 (1982).}
\footnotetext[152]{E. NWOGUGU, supra note 149, at 120-23.}
\footnotetext[153]{I. DELUPIS, supra note 17, at 112. The PRC itself has denied treaties written by its former government, the ROC. See supra notes 28-32 and accompanying text.}
\footnotetext[155]{Treaty Concerning the Reciprocal Encouragement and Protection of Investments, supra note 150.}
\footnotetext[156]{Note, supra note 154, at 301.}
\footnotetext[157]{For examples, see E. NWOGUGU, supra note 149, at 136-59 (discussing the Draft Con-}
\end{footnotes}
has been difficult to find. Since multilateral treaties involve more views and opinions, solutions of disputes are nearly impossible.

One problem with multilateral treaties has been the insistence by the Western nations on certain principles. Meanwhile, the developing nations fear the restrictions these treaties may place upon their freedom and development. Negotiators have been softening their insistence on classic nationalization requirements. However, others have felt that any of the multilateral treaties proposed so far would be worse than none at all. Many differing opinions would result in an agreement that would leave the investor open to a threat of nationalization without compensation. Nonetheless, as suggested below, some practical solutions may still exist.

V. CURRENT PRC TREATIES

The current investment treaties between the United States and the PRC are inadequate to meet the needs of the investor. The PRC has treaties with other countries that are only marginally better. Negotiations for a new treaty with the PRC should address the problems of these older treaties.

A. PRC-United States Treaties

Presently, the United States and the PRC have two treaties. They are the Trade Relations Treaty and the Investment Guaranties on the Protection of Foreign Property, the International Convention on Treatment of Foreigners, and the Havana Charter for an International Trade Organization).

158. Id. at 156.
159. These principles are as follows:

(1) Both capital-exporting and capital-importing states should be parties to any multilateral convention created. (2) Foreign private investment should not be discriminated against and is to be accorded fair treatment. (3) Expropriation or other dispossession of private property must be accompanied by the payment of fair, effective and adequate compensation. (4) States must respect their contractual undertakings made in connection with foreign investments. (5) There should be an impartial tribunal to settle all disputes arising from the convention.

Id. at 154.
160. Id. at 157.
161. See R. Ribeiro, supra note 58, at 94.
162. E. NWOGUGU, supra note 149, at 156.
163. See infra text accompanying notes 186-92.
164. See infra notes 171-75 and accompanying text.
Treaty.\textsuperscript{166}

The Trade Relations Treaty does not provide specific protection for the investor regarding compensation for expropriation. Article II provides the investor with "Most Favored Nation" treatment.\textsuperscript{167} Most Favored Nation treatment is treatment accorded within a nation that is as favorable as treatment the nation accords any third country's nationals, companies, products, vessels, or other objects in similar situations.\textsuperscript{168}

However, as this Note will argue, nationals of other countries do not receive adequate protection. Therefore, this treaty does not improve the situation for the American investor.

The Investment Guaranties Treaty also fails to provide adequate protection. Although the treaty recognizes the United States right to subrogation for purposes of investment insurance from the Overseas Private Investment Corporation (OPIC),\textsuperscript{169} it does not require the PRC to pay compensation.\textsuperscript{170} Nor does the treaty set any standards for relief, "prompt, adequate, and effective" or otherwise. Yet it is a step forward, since it shows the PRC does recognize some rights for investors.

\textbf{B. The PRC-France Treaty}

In the past few years, the PRC has signed treaties with France,\textsuperscript{171} Sweden,\textsuperscript{172} Romania,\textsuperscript{173} the Federal Republic of Germany,\textsuperscript{174} and Belgium,\textsuperscript{175} which are more extensive than the United States treaties. The Sino-France Treaty\textsuperscript{176} signed in 1984 is an example. Like the United States-PRC treaty, it contains a Most Favored Nation clause\textsuperscript{177} and

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\textsuperscript{167} Treaty on Trade Relations, art. II, supra note 165, 31 U.S.T. at 4653.
\textsuperscript{168} E. NWOGUGU, supra note 149, at 123.
\textsuperscript{169} Marra, supra note 53, at 170. OPIC is an agency of the U.S. Government that promotes American investment in developing countries by providing nationalization insurance to private investors. OPIC will only insure investment projects in nations that have signed a treaty recognizing OPIC's right to subrogation to the insureds' claims. \textit{Id.}
\textsuperscript{170} See \textit{id. at 170-74.}
\textsuperscript{174} \textit{See id.}
\textsuperscript{176} Reciprocal Encouragement and Protection of Investments, supra note 171, at 550.
\textsuperscript{177} \textit{Id.} at 553.
agrees to insurance subrogation. 178 There the similarities with the United States treaties end.

The French treaty specifically covers expropriation. 179 Although the standard of compensation is obviously influenced by Western thought, it has a few improvements. Compensation must be appropriate, made with no unjust delay, and fully transferable. 180 Although the term "appropriate" is virtually equivalent to the term "adequate," neither offers a method to actually determine an amount. 181 The term "no unjust delay" is synonymous with the term "prompt." Also, article 8 182 of the treaty describes a very structured time frame for review. 183 However, the article mentions no time frame for the prompt payment of an award. Delay can be crippling to the investor who is waiting for millions of dollars. A time schedule for payment and fines for late payment might facilitate a quicker response. 184

The term "fully transferable" is a significant improvement over the term "effective," which is too vague. The notion of effective compensation is that compensation should be in a currency the investor can use. That is, compensation in the form of a host country's currency can be relatively useless to an investor. Such compensation is worthless outside of the host country when financial institutions will not convert it. Likewise, it has limited value within the host country when the investor cannot use what the country has to offer. Arguably, "effective" implies that the compensation should be of value to the investor. The term "fully transferable" explicitly requires the host country to offer the investor something of value.

VI. SUGGESTED TREATY IMPROVEMENTS

A. A Change in the Focus of Negotiation

The above-mentioned treaties have attempted to create a standard of relief to investors in the event of nationalization. As discussed, the West endorses the "prompt, adequate, and effective" standard, or some slight variation of it. This standard is aimed at how the government should make payment once nationalization occurs, but it ignores the real issue.

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178. Id. at 555.
179. Art. 4, id. at 553-54.
180. Id.
181. The many arguments involving the valuation of nationalized property are beyond the scope of this Note.
182. Reciprocal Encouragement and Protection of Investments, supra note 171, at 556-57.
183. Id.
184. See Note, supra note 154, at 300.
More often then not, when a nation has nationalized property and is faced with one of these treaties, it denies that it owes anything. It does not even reach the stage of how compensation should be paid. The main issue is whether compensation should be paid. The "prompt, adequate, and effective" standard does not establish whether compensation should be paid. The problem is convincing the nation that it has a duty in the first place.

Current treaties do not explicitly distinguish between various degrees and forms of nationalization and accompanying duties to compensate. This implies that the treaties require payment for all nationalizations.

Treaty negotiators should focus on when compensation should be due, rather than how payment is to be made. By finding some cut-off point for when compensation is due and when it is not, negotiators will be able to agree upon explicit rules for how compensation is to be paid. By agreeing that at specific times the nation will owe money, negotiators will reduce the motivation to avoid the issue by setting a vague standard. That is, the nation will realize that a vague standard for how payment is to be made will not affect its obligation to pay in certain limited situations. As a result, the nation will find it in its best interests to focus on setting specific parameters to limit how much will owe. The times a nation will agree that compensation is appropriate might be limited. That is, it will stress "when" compensation is due rather than "how" to limit their obligation. This focus would provide a more concrete rule, and might lead to more compensation to the investor than the current treaties allow.

Nations have been reluctant to commit themselves to any agreements that provide for prompt, adequate, and effective compensation. By using vague standards, nations attempt to avoid future restrictions. By increasing security for the investor, however, these nations can increase the number of foreigners interested in investing. This situation is especially true in the PRC, where foreigners have been waiting for further assurances from the PRC Government regarding investment security.

185. I. DeluPis, supra note 17, at 110-13.
187. R. Ribeiro, supra note 58, at 92.
188. I. DeluPis, supra note 17, at 27; E. Nwogugu, supra note 149, at 9.
189. See Armacost, supra note 52, at 154.
Current treaties with the PRC show the PRC's recognition of some duty to compensate. The "prompt, adequate, and effective" standard used in the PRC's treaties with other countries\textsuperscript{190} indicates that the PRC recognizes that at some point it may owe money and will pay it. When the compensation will be paid needs to be articulated in precise terms.

B. Finding a Diplomatic Balance

Treaty negotiators need to address concerns already expressed by the PRC. The requirements for joint ventures under the Joint Venture Law reflect the immediate concern of the PRC: that investments should benefit the development of the PRC. Benefit in this context means improving management techniques and production technology, respecting the PRC culture, and protecting the environment.\textsuperscript{191} The PRC leaders might be interested in a treaty with conditional compensation. The possibility of losing the right to compensation would motivate foreign investors to respect the needs of the PRC. On the other hand, the power to cut off compensation could be abused by the PRC if the PRC had too much discretion in determining what has been beneficial. The PRC would be able to punish the investor freely without being restricted by the requirement to compensate, even when the wrongdoing does not merit the loss of compensation.

An alternative approach is to focus on what the PRC will do with the property once it is nationalized. If the PRC continues to operate the enterprise, it should owe compensation. If the PRC does not pay the foreigner for the value of the enterprise, the PRC is clearly unjustly enriched.\textsuperscript{192} If the PRC does not utilize the foreigner's investment, however, the theory of unjust enrichment does not apply since the PRC would not benefit by the investment of the foreigner. Likewise, the West's argument that there is a clear duty to compensate in this situation is not persuasive to the socialist Chinese. Therefore, there is no basis for compensation when the PRC does not directly gain from the investor's loss. This situation could be the dividing line for when compensation is due. That is, the PRC would be obliged to pay compensation only when unjustly enriched. Certainly, to the Westerner, many who deserve compensation will not receive it. However, the PRC as a socialist country does not recognize these property rights as the West does. Moreover, if

\textsuperscript{190} See \textit{supra} notes 171-75.
\textsuperscript{191} Ren Jianxin, \textit{supra} note 22, at 93.
\textsuperscript{192} For an unjust enrichment theory, see R. RIBEIRO, \textit{supra} note 58, at 127-32.
the PRC agrees to a specific obligation to compensate, it will be better than no obligation at all, or one that is too vague to enforce.

VII. CONCLUSION

Although noteworthy, the current PRC investment laws neither protect the foreigner from nationalization, nor insure that the investor will be compensated once nationalization occurs. The Joint Venture Law and the Wholly Foreign-Owned Enterprise Law address nationalization. However, both fail to be sufficiently specific and unambiguous to provide effective guidance in the event of nationalization.

The investment treaty currently being negotiated between the PRC and the United States should address the inadequacies of the PRC investment laws. Rather than insisting that compensation be paid in every circumstance, the United States should recognize the PRC's views on property rights and address them in the treaty. In order to balance the PRC's needs with the United States demands for compensation, the treaty should base the duty to compensate on the theory of unjust enrichment, requiring the PRC to pay compensation only when it continues to use and profit from the nationalized investment. By narrowing the scope of the duty, United States negotiators can provide a theory acceptable to the PRC. The result would be a treaty that is precise, unambiguous, and enforceable.

Doubts remain about the viability of the new policies and leadership in the People's Republic of China. However, there are also signs that the Government is stable and the economy is expanding. This emerging world power should be respected. Treaty negotiators must recognize its needs and concerns when developing a bilateral agreement.