

FOREIGN CLAIMS SETTLEMENT COMMISSION
OF THE UNITED STATES
WASHINGTON, D.C. 20579

IN THE MATTER OF THE CLAIM OF

BEN L. POND

Under the International Claims Settlement
Act of 1949, as amended

Claim No. CN-2-055

Decision No. CN-2-074

Counsel for Claimant:

David O. Bowden, Esquire
Benson, Stien & Braunstein

FINAL DECISION

This claim against the People's Republic of China (hereinafter "PRC"), under the China Claims Agreement of 1979 and Section 4 of Title I of the International Claims Settlement Act of 1949, is based on a loss resulting from the nationalization, confiscation, or other taking of property in China.

A Proposed Decision was issued on October 8, 1980 denying this claim for lack of sufficient evidence to establish that the property claimed was nationalized or otherwise taken by the PRC between November 6, 1966 and May 11, 1979. The claimant filed objection thereto and requested an Oral Hearing before the Commission. An Oral Hearing on this claim was held on January 22, 1981, at which claimant and counsel of record appeared.

Claimant objected to the Proposed Decision on the ground that the evidence submitted is sufficient to establish a taking of the property within the requisite period of time. Claimant has submitted additional evidence in support of his claim consisting of an additional letter from his nephew, Cheng Chao, dated December 5, 1977; a letter dated November 4, 1980 from nephew Cheng Chiu alias Te Hsuing; and originals with certified translations of two certificates of ownership purportedly to the Tai Huo Lu Compound, upon which a portion of this claim is based.

In the letter, dated December 5, 1977, nephew Cheng Chao indicates that he has been advised that, "that your shop in San-pai-fang would be demolished very soon." He further indicates that he has submitted the claimant's application for building a shop in the San-pai-fang district, that it does not appear as though such application would be approved at this time, and that the claimant is advised to accept the compensation offered, after requesting a slight increase, for his San-pai-fang building. This letter is consistent with the letter of June 26, 1978, from Nephew Ch'eng Chao, in which he indicates that the area including the claimant's building had become municipally owned and that he had been directed by a government official to bring "documentary proof, to the Building and Property Control Bureau to collect JMP \$2032.80 for the demolition of the San P'ai Fang building, at a calculated rate of JMP \$5.50 per square meter of condemned building property area, for an area of 369.6 square meters. Nephew Ch'eng Chao further indicates that he was advised by the government official, and he purportedly quotes that official, as follows:

"First, accept the payment in order to resolve matters concerning the wrecking. . . .Second, request a piece of land for your own building construction. Construction costs are about JMP \$150 per square [sic] meter, extremely expensive. If you do not wish to come collect compensation money, I can deposit it in a state bank as a special account."

Nephew Ch'eng Chao concluded his letter by requesting guidance from the claimant regarding the acceptance of the offer of compensation. In a letter, dated November 4, 1980, nephew Cheng Chiu alias Te Hsiung indicates as follows:

2. The building on Ching-I Road (i.e. the San Pei Fang Store Building) was entrusted to my management. It was rented to Hung-ta-li Watches for the last 34 years. I collected the rent. When the government sought to widen Ching-I Road, the buildings on both sides of the road had to be razed and replaced by six-story buildings. The tenant moved out on May 16, 1978. By the end of June the building was completely razed.

I spent a great deal of time during the past few years looking for the deeds to the properties. Although I searched in trunks and boxes I found only two deeds to the Tai Huo Lu Compound. We lost many books and documents because of frequent moving. The deed to the San Pei Fang Store Building is still missing; perhaps it got lost during moving and confusion. I am sending you the two deeds to Tai Huo Lu Compound. When I find the deed for San Pei Fang I shall send it to you.

Private citizens are now permitted to buy the newly constructed brick buildings at a price ranging from P \$150 to 300 per square meter according to location and construction material.

As discussed in the Proposed Decision claimant submitted six statements from persons who asserted that, of their own personal knowledge, up to 1946 claimant was the owner of a commercial building in the San Pei Fang district of Kunming. In an affidavit dated January 15, 1980 Lucille Change Lee asserts that:

. . .my parents rented from Mr. Pond half of the store-front of the commercial building at San Pei Fang for a gift shop. We also rented from Mr. Pond the second story of the commercial building as our living quarters. The other half of the store-front was used to operate a hardware store owned by Mr. Pond. The third story of the building was used as living quarters by Mr. Pond's nephew, who managed the hardware store.

In an unsworn statement, dated February 22, 1980, Wang Qi Xing states that: "I know Ben L. Pond was the sole owner of the two properties at the time he left China in 1946 and Ben L. Pond's nephew, Cheng Chao, was asked to look after the two properties."

On the basis of these statements, affidavits, and letters the Commission finds that the claimant owned a three story commercial building, consisting of 369.6 square meters of floor space, known as the San Pei Fang Building located on Cheng-I Road in Kunming and that this building was taken in by the PRC on May 17, 1978 for the public purpose of widening Cheng-I Road. The Commission further finds that claimant was offered and is deemed to have received compensation from the PRC for this taking in the amount of JMP \$2032.80.

Claimant contends that the offered compensation does not constitute just compensation as required under international law. Therefore, claimant contends that, although the taking was for a public purpose, it is compensable in this program due to the lack of just compensation. Claimant asserts that the loss sustained was in the total amount of \$37,425.00, based upon "the local government's quotation of the cost of the construction being 150 yuan per square meter of floor space at the time the building was

expropriated. . .On the basis of 1 yuan = .54 US \$, the San Pei Fang building consisting of 369.64 square meters at US \$81 per square meter was worth \$29,940.00 and the land, valued at 25% of the building, was worth \$7,485.00, for a total value of \$37,425.00."

The Commission is not persuaded by the claimant's contention that the value as of the date of loss should be based upon the asserted new construction cost. The Commission notes that newly constructed buildings were allegedly being sold for the claimed \$150 Yuan per square meter of floor space. The Commission concludes that taking into account depreciation for existing buildings the fair and reasonable value of the property would not exceed 50% of the alleged new construction cost. Therefore using a factor of \$40.50 US per square meters of floor space the Commission finds the value of the building to be \$14,970.42. The Commission deems reasonable the suggested use of 25% of the building value to determine the land value and finds the value of the land to be \$3,742.60 for a total property value of \$18,713.02. In order to determine the quantum of the loss sustained by the claimant the amount of compensation deemed to have been paid by the PRC to the claimant as a result of this taking must be deducted from this valuation. At the conversion rate used by the claimant the compensation of 2032.80 JPY (yuan) is equal to \$1,097.71 which when deducted from the determined value of the property results in a loss sustained by the claimant in the amount of \$17,615.31.

The Commission notes that during the first China Claims Program there were no awards for loss of property in the City of Kunming; however, a review of the evaluations of commercial properties in Canton taken in 1955 with appropriate adjustments for the difference in size of properties and the difference of the size of the cities involved the Commission concludes that the above determined value for the property owned by the claimant is comparable to the values determined in the first China Claims Program. It should be further noted that the Commission in this second program is not governed by the findings of the Commission during the first China Claims Program; however, in the first

program the Commission had considerably more valuation information from which to make such determinations, so that comparisons with such evaluations are helpful in accessing the appropriateness of the evaluation in this claim.

With regard to the Tai Huo Lu Compound, the claimant has submitted the originals and certified translations of two certificates of ownership purportedly describing this property. These certificates of ownership, dated in the 33rd and 34th years of the Republic of China, describe two contiguous parcels of property, numbered 1937 A and 1937 B, on the East Road surrounding the city of Kunming consisting of 1.643 mou and 1.189 mou, respectively for a total of 2.832 mou or approximately a 1/2 acre of land. There is no evidence of record nor information on these certificates to relate them to the Tai Huo Lu Compound except that the location on the East road surrounding the city is the location of the claimed compound and the property claimed, approximately 1/3 of an acre, is similar to that described in the certificates of ownership.

Additionally, claimant has submitted a letter, dated November 4, 1980, from nephew Cheng Chiu alias Te Hsiung, with a certified translation thereof, which indicates as follows:

The razing of the Tai Huo Lu Compound happened many years ago. I drifted from place to place during the years 1970 to 1976; therefore I did not keep any records of past events. When I reported a date of razing (the Tai Huo Lu Compound) I made a momentary recollection. The sequence of the dates could have contain [sic] mistakes. Now I have conferred with members of my family and reached the following conclusions:

(1) The Tai Huo Lu Compound (located on the City Circumferential East Road, which section was later renamed Tai Huo Street) was razed to yield ground for the extension of Red Sun Square. The government notified us on January 18, 1969 to move out of our residence within one day (January 19). We complied and moved out within the limited time. Razing of all buildings in that area started towards the end of the month and was completed in about a month and a half.

* * * * *

I spent a great deal of time during the past few years looking for the deeds to the properties. Although I searched in trunks and boxes I found only two deeds to the Tai Huo Lu Compound. . . I am sending you the two deeds to Tai Huo Lu Compound. . . .

The information in this letter is consistent with the information regarding the subject property contained in a letter dated July 10, 1973 from the same nephew, a certified translation of which was previously submitted, which indicates as follows:

During the latter part of January, 1969, because of the expansion of the Great Hall, all the buildings in the Labor Cultural Palace area (including the T'ai Ho Lu compound) were razed. At that time, my family was residing at No. 79, T'ai Ho Street, and as the government gave us notice to move out within one day, we were temporarily transferred to No. 6, P'ing Cheng Street (originally a kindergarten for children of the personnel of government organizations.

Also previously submitted was a letter from the same nephew, dated September 5, 1975, which creates some confusion about the date that the subject property was confiscated when he says: "it has already been eight years since T'ai Ho Lu compound buildings were razed. . ." That statement would indicate a seizure in 1967, instead of 1969 as indicated by the other letters. It is conceivable that claimant's nephew just misstated the number of years in this latter letter. In the latter letter he also states that compensation had been paid by the PRC for all other properties, except the subject property, that were "needed to enlarge the city Great Hall square area."

As discussed in the Proposed Decision claimant submitted six statements from persons who asserted that, of their own personal knowledge, up to 1946 claimant was the owner of the Tai Huo Lu compound in Kunming. In a affidavit dated February 13, 1980 Lung Chang King states: "My knowledge of Mr. Pond's ownership of these properties is based upon the facts that I had visited personally many times, during my residence at Kunming from 1935 to 1949, the properties, namely, the Tai Huo Lu Compound on Tai Huo Street. . . ."

On the basis of the statements, affidavits, letters, and ownership certificates which have been submitted, the Commission finds that the claimant was the owner of a parcel of property in Kunming located on the city circumferential East Road, known as the Tai Huo Lu Compound, and that this parcel of property was

taken by the PRC on January 19, 1969 for the public purpose of expanding a public square area. The Commission further finds that no compensation has been paid claimant for the loss of his property.

In regard to valuation of the loss sustained claimant has submitted a calculation using a valuation of 1/2 of the new construction cost for 1978 as discussed above regarding the San Pei Fang property. Using the area of 1400 square meters of floor space in the compound, as indicated in the letter dated September 5, 1975, claimant calculates the value of the building as \$56,000.00 based on a construction cost of \$40.00 US per square meter of floor space. The claimant calculates the land value as being equal to 25% of the building value or \$14,000.00 for a total of \$70,000.00 for the value of the subject property. As indicated above with regard to the San Pei Fang property the appropriate valuation is the value on the date of the loss not replacement cost. The Commission concludes that taking into account depreciation for existing buildings the fair and reasonable value of existing residential property in 1978 in Kunming would not have exceeded one third of the new construction cost of commercial buildings. On that basis and accepting the asserted reduction of the 1978 value by 1/2 for calculation of value in 1969, the Commission concludes that a \$13.50 US per square meter of floor space is appropriate for valuing the subject property. Using this factor and the claimant's method for calculation, the Commission concludes that the claimant sustained a loss in the amount of \$23,625.00. The Commission notes that this value is comparable to the valuations of similar properties in the first China Claims Program with appropriate adjustments for a later date of taking.

The Commission finds that claimant was a national of the United States on the dates of taking having been naturalized on October 14, 1952. The Commission has concluded that, in granting awards on claims under section 4 of Title I of the International Claims Settlement Act of 1949, as amended, for the nationalization

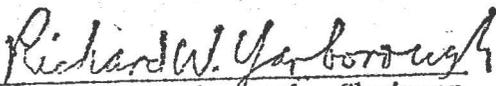
or other taking of property, interest shall be allowed at the rate of 6% per annum from the date of loss to the date of settlement. (See Claim of John Hedio Proach, Claim No. PO-3197; FCSC Dec and Ann 549 (1968)).

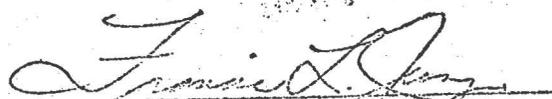
A W A R D

An award is hereby made to claimant, BEN L. POND, in the total principal amount of Forty-One Thousand Two Hundred Forty Dollars and Thirty-One Cents (\$41,240.31), with interest thereon at 6% per annum on \$23,625.00 thereof from January 19, 1969 to May 11, 1979, the date of the China Claims Agreement, in the sum of Fourteen Thousand Six Hundred Fourteen Dollars and Forty-Two Cents (\$14,614.42), and on \$17,615.31 thereof from May 17, 1978 to May 11, 1979, the date of the China Claims agreement, in the sum of One Thousand Thirty-Five Dollars and Seventy-Eight Cents (\$1,035.78).

Dated at Washington, D.C.
and entered as the Final
Decision of the Commission.

APR 22 1981


Richard W. Yarborough, Chairman


Francis L. Jung, Commissioner


Ralph W. Emerson, Commissioner

This is a true and correct copy of the decision of the Commission which was entered as the final decision on APR 22 1981


Executive Director

FOREIGN CLAIMS SETTLEMENT COMMISSION
OF THE UNITED STATES
WASHINGTON, D.C. 20579

IN THE MATTER OF THE CLAIM OF

BEN L. POND

Under the International Claims Settlement
Act of 1949, as amended

Claim No. CN-2-055

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Counsel for Claimant:

Benson, Stien & Braunstein
By: David O. Bowden

PROPOSED DECISION

This claim against the Government of the People's Republic of China, under the China Claims Agreement of 1979 and Section 4 of Title I of the International Claims Settlement Act of 1949, is based upon the loss of two parcels of real property in Kunming, Yunnan Province, China. Claimant states that he has been a national of the United States since his naturalization on October 14, 1952. The claimant asserts that his losses occurred in January 1969 and in 1978.

Under Section 4 of Title I of the International Claims Settlement Act of 1949, as amended, the Commission is given jurisdiction to receive, examine, adjudicate, and render final decisions with respect to claims of nationals of the United States included within the terms of any claims agreement concluded on and after March 10, 1954, between the Government of the United States and a foreign government (exclusive of governments against which the United States declared the existence of a state of war during World War II), arising out of the nationalization or other taking of property [22 U.S.C.A. Sec. 1623(a)]. In this section the Commission is directed to decide claims in accordance with provisions of the applicable claims agreement and the principles of international law.

On May 11, 1979, an agreement was concluded between the Governments of the United States of America and the People's Republic of China (hereinafter referred to as the PRC) settling claims of nationals of the United States against the PRC arising from the nationalization, expropriation, intervention, or other taking of, or special measures directed against, property of nationals of the United States on or

after October 1, 1949, and prior to the date on which the agreement was concluded.

Under the provisions of Title V of the International Claims Settlement Act of 1949 [78 Stat. 1110 (1964), 22 U.S.C. Sec. 1643-1643k (1964), as amended by Public Law 89-780, approved November 6, 1966, 80 Stat. 1365 (1966)], the Commission was given jurisdiction over claims of nationals of the United States against the Chinese Communist regime (the PRC) arising since October 1, 1949, for losses resulting from the nationalization, expropriation, intervention, or other taking of, or special measures directed against, property of nationals of the United States. In that program, the Commission considered claims that arose between October 1, 1949 and November 6, 1966, the date on which the program was authorized. That program was completed on July 6, 1972 pursuant to a statutory mandate in the enabling legislation.

On June 1, 1979, the Commission published notice in the Federal Register announcing that a new China Claims Program would be initiated under which it would consider claims by nationals of the United States against the PRC for losses that arose between November 6, 1966 and May 11, 1979. August 31, 1979 was established as the deadline for filing such claims.

The period during which losses must have occurred for favorable action to be taken on claims in the second China Claims Program was established because the Congress of the United States had previously made provisions under Title V of the Act, supra, for the filing and adjudication of claims by nationals of the United States for property losses in China that arose between October 1, 1949 and November 6, 1966, and mandated a date by which such a claims program must be completed. Accordingly, the Commission concluded that its jurisdiction over such claims expired on July 6, 1972, and that it no longer has the authority to accept and take favorable action on those claims. Congress having provided its remedy for the 1949-1966 claims, the Commission is not at liberty to provide another.

This situation is not unique in the programs that the Commission had been authorized to administer in the past. Subsequent to completion

of claims programs against the Governments of Bulgaria, Hungary, and Rumania, on August 9, 1959, the Government of the United States reached claims agreements with those governments. The Commission was unable to implement the claims agreements under Title I of the Act without legislative authorization because the United States had declared the existence of a state of war against those countries during World War II. In each case the Congress enacted second claims programs by amending Title III of the International Claims Settlement Act of 1949, and limited the compensable claims to those for losses which occurred after the dates covered by the first claims programs. [82 Stat. 42 (1968); 88 Stat. 1386 (1944); 22 U.S.C. Sec. 1641].

Following the legislative precedent in these second programs which precluded the favorable consideration of claims that arose during the period covered by the first programs, the Commission concludes that it does not have the jurisdiction to consider claims against the PRC that arose prior to November 6, 1966, and after May 11, 1979, the date of the agreement with the PRC. (See Claim of Jose Maria Xavier, Claim No. CN-2-017, Decision No. CN-2-001.)

On the Statement of Claim, FCSC Form 780-2, claimant was advised that documentation must be submitted at the time of filing to establish the date and manner of the taking of the subject property. The claimant has submitted six statements and three letters from relatives in support of his claim. No documentary evidence of ownership has been submitted. Five of the six statements state knowledge of the ownership of the subject parcels by the claimant up to 1946 and the sixth statement indicates knowledge of such up to 1949. The parcels of real property upon which this claim is based are described in the claim as follows: (1) The Tai Huo Lu Compound, residential and rental property, purchased in 1929, consisting of a lot of approximately 14,500 square feet and a building with 1,400 square meters of floor space; and (2) the San Pei Fang commercial building consisting of three stories containing 369.64 square meters of floor space, purchased in 1928.

Four of the six statements submitted as evidence are affidavits stating personal knowledge of the ownership of the subject parcels by

the claimant up to 1946, when claimant and affiants left China. The names of the affiants and dates of their statements are as follows: (1) Chia In Rutkowski, February 18, 1980; (2) Quan Y. Ching, February 22, 1980; (3) Lucille Chang Lee, January 15, 1980; and (4) Po-Yee Huang Tseng, January 15, 1980. Another affidavit from Lung Chang King dated February 13, 1980 states personal knowledge of the claimant's ownership of the subject parcels up to 1949. The sixth statement from Wang Qi Xing dated February 22, 1980 is acknowledged but not sworn. In this statement Wang Qi Xing states personal knowledge of the claimant's ownership of the subject parcels up to 1946 and that the claimant's "nephew, Cheng Chao, was asked to look after the two properties."

The three letters submitted as evidence bear upon the alleged ownership and taking of the subject parcels of real property. Original and sworn translations of the purportedly pertinent portions of the letters have been submitted. One letter is dated July 10, 1973, is signed Nephew Te Hsiung, and states that buildings including the T'ai Ho Lu Compound were razed in January 1969 for expansion of the Great Hall and that his family was given a one day notice to move from their residence in the area. The other two letters are dated June 26, 1978 and September 5, 1975 and signed by Nephew Ch'eng Chao. The 1975 letter discusses the razing of the T'ai Ho Lu Compound buildings eight years earlier, being 1967, which differs from the 1969 razing indicated by Nephew Te Hsiung. This letter indicates that the Building Control Bureau and the Kunming City Revolutionary Committee were involved in providing compensation for razed buildings in the area, that compensation had been paid for other buildings razed in the area, that the buildings were razed to enlarge the city Great Hall square area, and that the Building Control Bureau calculated the area covered by the subject property but had not decided on the price to pay as compensation. The letter further indicates that the City Revolutionary Committee recognized that his uncle was a U.S. national and had property rights but that they were waiting for directions from the Central Government "as to how to handle property belonging to foreign nationals." Nephew Ch'eng Chao states that he delivered copies of an August 15 letter

from claimant to the departments concerned and requests claimant to write to the Ministry of Foreign Affairs in Peking or the PRC American Liaison Office in Washington, D.C., for a resolution of the compensation matter.

The 1978 letter from Nephew Ch'eng Chao states that the Cheng I Road area, including the San P'ai Fang Building of claimant, had become a municipally owned area. The letter, further, states that Nephew Ch'eng Chao was directed by a government official to bring "documentary proof to the Building and Property Control Bureau to collect JMP\$2032.80 for the demolition of the San P'ai Fang Building, at a calculated rate of JMP \$5.50 per square meter of condemned building property area, for an area of 369.6 square meters. Nephew Ch'eng Chao indicates that he told the government official that he must wait for direction from the claimant before accepting the compensation; that the government official told him that the government was aware of the claimant's desire to rebuild his property, but that he would have to request land elsewhere to rebuild, for no private property was allowed in this area; and that he should take the compensation for the demolition, then request a piece of land for construction. Nephew Ch'eng Chao requests guidance from his uncle, the claimant, herein. No further evidence was submitted in regard to the alleged taking of the subject parcels nor the pursuit of compensation therefor in China.

The claimant has not submitted any official documentation of ownership of the subject parcels nor explained the absence thereof. Such documentary evidence was requested by letter of October 4, 1979 to the attorney for the claimant, to which no response has been received except the submission of statements regarding ownership, as discussed above. The evidence is unclear as to the state of ownership of the subject parcels after the claimant left China in 1946. The evidence submitted is, also, unclear as to dates of taking of the subject parcels.

The Commission is not persuaded by the contentions of the claimant that the evidence submitted establishes a taking of property of the claimant between November 6, 1966 and May 11, 1979.

The Regulations of the Commission provide:

Claimant shall be the moving party and shall have the burden of proof on all issues involved in the determination of his claim. (FCSC Reg., 45 C.F.R. §531.6(d) (1977).)

Based on the foregoing, the Commission finds that the evidence of record in this claim is not sufficient to establish that the property or interest therein claimed was nationalized or otherwise taken by the PRC between November 6, 1966, and May 11, 1979.

Accordingly, the Commission concludes that this claim must be and it hereby is denied.

It should be noted that, even if the requisite ownership and dates of taking were sufficiently established, from the state of the record, it appears that the alleged takings might not be in violation of international law, which is a requisite element of compensability of a claim. Section 185 of the Restatement of Foreign Relations Law provides:

The taking by a state of property of an alien is wrongful under international law if either

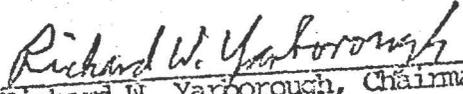
(a) it is not for a public purpose,

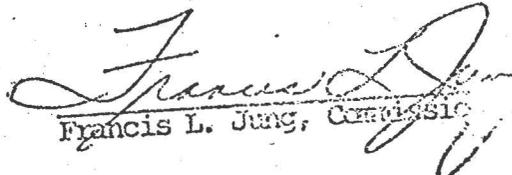
(b) there is not reasonable provision for the determination and payment of just compensation, as defined in §187, under the law and practice of the state in effect at the time of taking

The evidence of record in this claim appears to indicate that the subject parcels were taken for use by the municipality of Kunming City and that provisions were established for compensation to those individuals who incurred losses. The Commission does not make any determination on this element of the claim.

Dated at Washington, D.C.
and entered as the Proposed
Decision of the Commission

OCT 8 1980


Richard W. Yarborough, Chairman


Francis L. Jung, Commission

NOTICE: Pursuant to the Regulations of the Commission, if no objections are filed within 15 days after service or receipt of notice of this Proposed Decision, the decision will be entered as the Final Decision of the Commission upon the expiration of 30 days after such service or receipt of notice, unless the Commission otherwise orders. (FCSC Reg., 45 C.F.R. 531.5(e) and (g), as amended.)