

COMMENT

A Commercial Hobgoblin: Court Access and the Unrecognized Government

INTRODUCTION

According to Ralph Waldo Emerson, “a foolish consistency is the hobgoblin of little minds.”¹ The standards United States courts apply when granting standing to unrecognized governments suffer from an Emersonian “hobgoblin.” The President, not the courts,² exclusively controls the channels of diplomacy and the mechanisms for recognizing foreign governments.³ Thus, courts only grant standing⁴ to officially

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¹ R. EMERSON, *Self Reliance*, in *Essays: First and Second Series* 26, 35 (1926). A “hobgoblin” is a mischievous goblin. WEBSTER’S NEW COLLEGIATE DICTIONARY 539 (1981).

² See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964) (“Political recognition is exclusively a function of the Executive.”); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 205 comment a (1986) [hereafter RESTATEMENT OF FOREIGN RELATIONS LAW]. The *Restatement* states that:

An Executive decision not to recognize an entity as a state, or a regime as a government, is deemed to imply that the representatives of the entity or regime are to be denied the right to sue in courts of the United States. . . .

[I]t is binding on the states as well as federal courts.

Id.; see also Alder, *The Unrecognized Government in the Courts of the United States*, 5 VA. J. INT’L L. 36, 36 (1964).

³ See U.S. CONST. art. II, § 3 (“he [the President] shall receive Ambassadors and other public Ministers”); see also *United States v. Pink*, 315 U.S. 203, 223-26 (1942) (holding that the President controls recognition and has the power to establish relations with foreign governments); RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 2, at § 204 (“Under the Constitution of the United States, the President has exclusive authority to recognize or not to recognize a foreign state or government, and to maintain or not to maintain diplomatic relations with a foreign government.”). In this Comment, the terms President and State Department are used interchangeably.

⁴ Standing is a concept that determines whether a party’s interests are sufficiently

recognized foreign states,⁵ and usually require presidential recognition of the state's government.⁶ Accordingly, recognition determines whether

affected to insure that a justiciable controversy is presented to the court. *See* BLACK'S LAW DICTIONARY 1260 (5th ed. 1979). Plaintiff satisfies the standing requirement if it has a legally protectable and tangible interest at stake in the litigation. *Id.* For standing, party must fulfill the Constitution's case and controversy requirement. *See* U.S. CONST. art. III, § 2, cl. 1. For a discussion of standing requirements, see *infra* notes 124-28. For a discussion of cases involving "political questions" that may preclude a court from granting standing, see *infra* note 56.

⁵ Recognition of a state is not the same as recognition of a government. *See* Lehigh Valley R.R. v. Russia, 21 F.2d 396, 400 (2d Cir.), *cert. denied*, 275 U.S. 571 (1927) ("granting [to a foreign government] or refusal of recognition has nothing to do with the recognition of the state itself"); RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 2, § 201 ("Under international law, a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities."). For recognition, a state need not have a particular form of government, but it must have an authoritative voice capable of representing it in international relations. *Id.* § 201 comment d. Recognition of a state is formal acknowledgement that the entity possesses the qualifications for statehood, and implies a commitment to treat the entity as a state. The *Restatement* continues:

Recognition of a government is formal acknowledgement that a *particular regime is the effective government of a state* and implies a commitment to treat that regime as the state's government. A state cannot recognize or accept a regime as a government without thereby accepting statehood of the entity which the regime claims to govern. A state can, however, recognize or treat an entity as a state while denying that a particular regime is its government.

Id. (emphasis added).

Issues implicating statehood sometimes arise when a state has lost all or a large part of its territory. *Id.* § 202 reporters' note 5. Presently, the United States does not face many issues involving the recognition of states. *Id.* But, the Palestine Liberation Organization (PLO) presents issues implicating both state and government recognition. Some groups have recognized the PLO as a representative of the Palestinian people. Further, the United Nations has granted the PLO observer status. *Id.* at reporters' note 6. This despite the fact that the PLO lacks a recognized state. *Id.* However, the United States has not recognized or accepted any formal status for the PLO. *Id.*

⁶ Recognized governments are those regimes which the United States acknowledges as effectively controlling a state's government. *See* L. HENKIN, R. PUGH, O. SCHACHTER & H. SMIT, INTERNATIONAL LAW: CASES AND MATERIALS 242-43 (1987) [hereafter L. HENKIN]. Formal recognition of a government, like recognition of a state, is not mandatory. RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 2, § 203 comment b. Treating a regime as a government includes accepting its acts as creating international rights and obligations. *Id.* While the United States must respect an unrecognized government's international rights and obligations, it does not have to accord it the prerogatives usually provided to recognized governments — *i.e.*, access to United States courts. *Id.* For a discussion of the difference between recognition of a

a foreign government may sue in United States courts.⁷

state and governments, see *supra* note 5.

The issue of recognizing foreign governments recently arose between the United States and the government of Panama. In Panama, conflict developed between President Eric Arturo Delvalle and General Manuel Antonio Noriega, Commander of the Panama Defense Forces. See Leich, *Contemporary Practice of the United States Relating to International Law: Recognition of Governments*, 82 AM. J. INT'L L. 566, 566 (1988). Devalle dismissed Noriega in an attempt to restructure the Panamanian government. *Id.* Noriega's dismissal followed formal indictment in the United States for violations of United States narcotics laws. *Id.* Nevertheless, Noriega's control of both Panama's military and internal institutions allowed him to retain control of the government. *Id.* at 567. After his purported dismissal, Noriega brought about the dismissal of Delvalle through a rump session of the Panamanian National assembly. *Id.*

While the United States viewed Delvalle as Panama's legitimate ruler, Noriega still controlled the state. *Id.* Initially, the United States tried to support Delvalle by denying Noriega access to Panamanian funds held in United States banks. *Id.* at 569. When Noriega's government sued to recover these funds, the court held that as an unrecognized government, it could not recover the funds. *Id.*; see *Republic of Panama v. Republic Nat'l Bank of N.Y.*, 681 F. Supp. 1066 (S.D.N.Y. 1988). The United States restored these funds to the Noriega government when it identified Delvalle's inability to gain control of the state. *Id.*

⁷ *Pfizer, Inc. v. Government of India*, 434 U.S. 308, 319-20 (1977) (holding that President has plenary power in matters regarding recognition); *United States v. Pink*, 315 U.S. 203, 222-23 (1942) (discussing presidential power pursuant to decrees ancillary to recognition). The power of the President pursuant to recognition includes the power to determine the policy which is to govern the conduct of foreign relations recognition of a foreign sovereign, which determination conclusively binds the courts. *Id.*; see also *Land Oberoesterreich v. Gude*, 109 F.2d 635, 637 (2d Cir.), *cert. denied*, 311 U.S. 670 (1940) (permitting Austrian province to sue after it merged with Germany because the United States recognized the Third Reich as Germany's legitimate government); RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 2, § 205 comment a ("An Executive decision not to recognize a . . . regime as a government, is deemed to imply that the representatives of the entity or regime are to be denied the right to sue in courts in the United States. As national policy, within the constitutional authority of the President, it is binding on State as well as federal courts."). The State Department presently employs three levels of classification in categorizing "unrecognized" foreign governments. The first level involves those governments with whom the United States maintains no diplomatic relations. (Telephone discussion with Lawrence Durnahm, State Department Office of Protocol, April 20, 1989). As of April 20, 1989, these governments included Vietnam, Cambodia, North Korea, Albania, and Angola. *Id.* The next level includes those governments with whom the United States has severed relations. *Id.* On January 3, 1980, the United States severed relations with the government of Iran. *Id.* On January 3, 1961, the United States severed relations with the government of Cuba. *Id.* The Swiss government handles United States interests with these two governments. *Id.* In 1969, the government of Yemen severed relations with the United States. *Id.* The government of the United Kingdom handles interests between the government of Yemen and the United States. *Id.* The final level of relations involves those that are irregular. *Id.* These relations come the closest to formal recogni-

In recent months, United States' foreign policy regarding the unrecognized governments of Vietnam and North Korea has changed drastically.⁸ While the United States refuses to recognize either state's government, the prospects for diplomatic dialogue between the United States and both Vietnam and North Korea have increased.⁹ This proposed increased communication should change the political and commercial relationships between the United States and both nations.¹⁰

tion of the foreign government. *Id.* In 1980, the State Department classified diplomatic relations with the government of Afghanistan as "abnormal." *Id.* Similarly, in 1981, the State Department reduced relations with Libya to the lowest level consistent with diplomatic relations. *Id.*

⁸ The present Vietnamese government has remained unrecognized since the fall of Saigon in 1973. See *RESTATEMENT OF FOREIGN RELATIONS LAW*, *supra* note 2, § 202 reporters' note 6; see also *infra* note 78. Presently, relations between the United States and Vietnam have become more cordial. *J. COM. & COM.*, Dec. 28, 1988, at 1A, col. 2. Not only has Vietnam permitted the United States to recover the remains of some soldiers thought missing in action, see *N.Y. Times*, Dec. 16, 1988, § 1, at A6, col. 1, but there has been talk of relaxing trade restrictions with Vietnam. *J. COM. & COM.*, Dec. 28, 1988, at 3a, col. 2. Specifically, while the trade prohibition with Vietnam initiated in 1975 at the end of the Vietnam war is still in effect, major American companies such as Unocal are talking business with Vietnam. See *Unocal Confirms Discussion with Vietnam*, *L.A. Times*, Mar. 3, 1989, § 4, at 11, col. 1 [hereafter *Unocal Discussion*].

Likewise, the Government and "State" of North Korea has remained unrecognized since the partition of North and South Korea following the Korean war. See *RESTATEMENT OF FOREIGN RELATIONS LAW*, *supra* note 2, § 202 reporters' note 6; L. HENKIN, *supra* note 6, at 241 n.3, 241-42 n.4. The recent reapproachment between North and South Korea has prompted United States policy makers to reconsider the status of relations with North Korea. *Opposition Leader in Seoul Backs North's Call for Talks*, *N.Y. Times*, Dec. 25, 1988, § 1, at 8, col. 3. Specifically, the United States intends to relax travel and trade restrictions in an attempt to coax North Korea out of diplomatic isolation and toward normal relations with South Korea and other nations. Greenberger, *U.S. to Relax Certain Curbs on North Korea*, *Wall St. J.*, Nov. 11, 1988, § 1, at 25, col. 1.

⁹ See Greenberger, *supra* note 8, § 1, at 25, col. 1; see *J. COM. & COM.*, Dec. 28, 1988, at 3A, col. 2. Regarding North Korea, the United States intends to encourage unofficial, nongovernmental visits by North Koreans to the United States for athletic, cultural, and academic purposes, to relax restrictions on American travel to North Korea, and to permit certain limited commercial exports of humanitarian goods. See Pear, *U.S. Eases Some Curbs on North Korea*, *N.Y. Times*, Nov. 1, 1988, at A3, col. 4.

¹⁰ For example, contrast the present atmosphere of compromise and commercial prospects with United States policy a little more than 10 years ago. As stated by the Department of Commerce:

Sec. 1. Prohibition of movement of American carriers to North Korea or to the Communist-controlled area of Viet Nam.

No person shall sail, fly, navigate, or otherwise take any ship documented under the laws of the United States or any aircraft registered

Specifically, the United States is considering trading with North Korea and Vietnam.¹¹

If the United States relaxes its trade restrictions with these two states, the United States judiciary may be faced with a problem: whether to permit the unrecognized government of either Vietnam or North Korea to sue in United States courts. Specifically, if the judiciary requires presidential recognition of Vietnam and North Korea before permitting them to sue in United States courts, both of these governments will be precluded from resolving disputes between themselves and United States defendants in United States courts. A close analysis of United States standing policy does not justify the automatic conclusion that an unrecognized government must be denied court access. Thus, courts should not unconditionally defer to recognition policy when faced with an unrecognized government's commercial claim.

Respect for presidential recognition power does not necessarily require¹² that courts deny standing to an unrecognized government's commercial claim.¹³ These commercial claims not only involve presidential

under the laws of the United States to North Korea or to the Communist-controlled area of Viet Nam.

Sec. 2. Prohibition on transportation of goods destined for North Korea or the Communist-controlled area of Viet Nam.

No person shall transport, in any ship documented under the laws of the United States, or in any aircraft registered under the laws of the United States, to North Korea or to the Communist-controlled area of Viet Nam, any material commodity, or cargo of any kind . . .

U.S. Dep't of Commerce, Transportation Order T-2 (Amended), 37 Fed. Reg. 25040 (1978) (to be codified at 32A C.F.R. § 702 (1978)), *reprinted in* L. HENKIN, *supra* note 6, at 1241; *See also* Pear, *supra* note 9, at A3, col. 4; *Unocal Discussion*, *supra* note 8, § 4, at 11, col. 1.

¹¹ Greenberger, *supra* note 8; *see* J. COM. & COM., Dec. 28, 1988, at 3a, col. 2.

¹² Adjudicating an unrecognized government's commercial claim does not declare the litigant to be a de jure sovereign for political or diplomatic purposes. *See* Note, *Access to United States Courts by Juristic Entities Created By Unrecognized Governments: Federal Republic of Germany v. Elicofon*, motion to intervene by Kunstsammlungen zu Weimar (E.D.N.Y. 1972), 12 COLUM. J. TRANSNAT'L L. 155, 166 (1973).

¹³ This Comment adopts the commercial claim standard developed by the Foreign Sovereign Immunity Act, 28 U.S.C. §§ 1330, 1332, 1602-1611 (Supp. IV 1986), Pub. L. No. 94-583, 90 Stat. 2892 (1976). Immunity is not extended to actions based "upon a commercial activity carried on in the United States by a foreign state . . . or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere . . ." *Id.* § 1605(a)(2) (Supp. IV 1986). A commercial claim arises from any trade or business that could take place between private parties or governments. *See, e.g.,* De Sanchez v. Banco Central de Nicaragua, 770 F.2d 1385, 1392-93 (5th Cir. 1985) (courts must determine whether the activity in question is one which private persons ordinarily perform or whether it is peculiarly within the realm

recognition power, but also implicate congressional commerce power.¹⁴ Hence, courts must be sensitive to potential conflicts of power within a commercial claim. Moreover, courts must be prepared to defer to both congressional and presidential power when determining standing for an unrecognized government's commercial claim.¹⁵

At present, courts are uncertain as to the specific prerequisites for granting unrecognized governments standing. This uncertainty stems from ambiguous constitutional and statutory standing requirements,¹⁶ coupled with inconsistent presidential recognition practices.¹⁷ Specifically, it is uncertain whether standing requires (1) recognition of the state, or (2) recognition of the state as well as its current government.¹⁸ Granting an unrecognized government access to United States courts may imply recognition of that government.¹⁹ Courts are hesitant to take this risk because it may unnecessarily embarrass the President by contradicting his recognition policy.²⁰

Courts are additionally hindered by an inconsistent presidential recognition policy. Consequently, courts believe that granting standing

of governments). For a discussion of the Foreign Sovereign Immunities Act, see *infra* notes 171-72 and accompanying text.

This Comment only addresses cases in which an unrecognized government brings a claim for its own commercial activities. The barriers to trade an unrecognized government faces are not usually imposed on private individuals within the foreign state. See *Iran Handicraft and Export Center v. Marjan Int'l Corp.*, 655 F. Supp. 1275, 1277 (S.D.N.Y. 1987), *aff'd*, No. 88-7746 (2d Cir. filed Dec. 15, 1988) (holding that an Iranian citizen could sue in United States court even though the Iranian government was unrecognized because Iran qualifies as a "foreign state" under 28 U.S.C. § 1332(a)(2) (1982), which enables its citizens, but not its government, to sue in United States courts); See RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 2, § 421(1) (noting that a state may exercise jurisdiction if the person or thing has a relationship with the state to make the exercise of jurisdiction reasonable).

¹⁴ For a discussion of congressional commerce power, see *infra* notes 133-48 and accompanying text.

¹⁵ This Comment later asserts that Congress' foreign commerce power provides an adequate justification for a statutory expansion of federal jurisdiction to permit adjudication of an unrecognized government's commercial claim. Congress' interests do not always conflict with the President's, but in the instances they do, they should not be ignored by the courts. See *infra* notes 122-32 and accompanying text.

¹⁶ For a discussion of ambiguous constitutional and statutory standing requirements, see *infra* notes 48-49 and accompanying text.

¹⁷ For a discussion of the changing recognition practice, see *infra* notes 35-47 and accompanying text.

¹⁸ The United States differentiates between recognition of states and recognition of a state's government. See *supra* note 5 and accompanying text.

¹⁹ See Note, *supra* note 12, at 166.

²⁰ *Id.*

to an unrecognized government encroaches upon presidential recognition power.²¹

This Comment asserts that absent a politically sensitive foreign policy interest,²² courts should exercise their independent authority and

²¹ See, e.g., *National City Bank v. Republic of China*, 348 U.S. 356, 358 (1955) (“The status of the Republic of China in our courts is a matter for determination by the Executive and is outside the competence of this court.”); *United States v. Pink*, 315 U.S. 203, 223 (1942) (the power of the President pursuant to recognition includes the power to determine the policy which is to govern recognition; objections to recognition policies are not for courts to judge); *id.* at 240 (“New York denied Russia access to her courts . . . on the single and conclusive ground: ‘We should do nothing to thwart the policy which the United States has adopted.’”) (Frankfurter, J., concurring); *Russian Socialist Federated Soviet Republic v. Cibrario*, 235 N.Y. 255, 262, 139 N.E. 259, 262 (1923) (standing denied to Soviet Union’s unrecognized government due to judicial deference to the Presidents political decisions); see also *infra* notes 63-83.

²² This Comment defines a sensitive foreign policy interest as issues within an unrecognized government’s commercial claim that conflict with present political policy and impair foreign policy operations. For example, suspending litigation with a foreign government may be an important foreign policy tool for the United States. See, e.g., *Dames & Moore v. Regan*, 453 U.S. 654 (1981). In *Dames & Moore*, the President, with congressional approval, nullified judicial attachments and ordered the transfer of Iranian assets held in the United States back to Iran. *Id.* at 673-77. Further, the President suspended claims brought by United States parties against Iran. The suspension operated as a precondition for releasing hostages. *Id.* Adjudicating the claims in this instance interfered with a specific and important foreign policy objective, namely freeing American hostages in Iran. See *id.* at 687.

While *Dames & Moore* upheld the President’s order suspending the claims against the Iranians, it in part relied on the President’s promise to provide a joint tribunal to resolve the claims against Iran. *Id.* at 687; see also L. HENKIN, *supra* note 6, at 928. Through the Algerian Accords, a provision was made for United States claimants to present their claims to a United States-Iran Tribunal sitting in the Hague. *Id.* The tribunal maintained a fund to settle claims against Iran. *Id.*

Further, a federal court reviewed the legitimacy of arbitration awards granted by the Iran-United States Claims Tribunal in the Hague. *Ministry of Defense of the Islamic Republic of Iran v. Gould, Inc.*, No. CV 87-03673-RG (C.D. Cal. Filed Sept. 2, 1987). The court held that the express determination of the executive branch that Iran, an unrecognized government, could sue in the United States courts was dispositive on issue of court access. *Judicial Decisions*, 82 AM. J. INT’L L. 591, 591 (1988). Specifically, the court held that access is ultimately in the “exclusive power of the Executive Branch.” *Id.* at 593. Finally, in addressing the issue of presidential power to bind third parties to arbitration agreements, the court stated: “The question of whether the Executive can bind U.S. persons to such arrangement as if they were signatories [to arbitration agreements signed in writing] is quite effectively dispatched by the *Dames & Moore* decision.” *Id.* at 594; see also *Ozanic v. United States*, 188 F.2d 228, 231 (2d Cir. 1951) (“The constitutional power of the President extends to the settlement of mutual claims between a foreign government and the United States, at least when it is an incident to the recognition of that government.”).

adjudicate an unrecognized government's commercial claim. If courts refuse, then Congress should grant standing based on its power to expand federal court jurisdiction and control foreign commerce.

Part I of this Comment describes the President's recognition prerogatives. It then examines courts' constitutional power to hear an unrecognized government's commercial claim. Part II analyzes congressional power to grant standing. Specifically, it focuses on congressional control over federal court jurisdiction and commerce. Finally, Part III provides

Recently, the Second Circuit Court of Appeals granted standing to Iran's unrecognized government. *National Petrochemical Co. v. M/T Stolt Sheaf*, 860 F.2d 551 (2d Cir. 1988). *National* involved a claim by Iran's National Petrochemical Company (NPC) against American defendants, M/T, for fraud, conversion, falsifying bills of lading, and the general breach of M/T's duties and responsibilities under the bills of lading. *Id.* at 552-53. These claims were set against a backdrop of President Carter's Executive Order No. 12,205, 45 Fed. Reg. 24,099 (1980), barring the sale of American Products to Iran. *Id.* at 552. NPC tried to circumvent the order, finding intermediaries through which it could obtain American chemical products. Defendant M/T supplied these chemicals. *Id.* Before M/T could complete delivery of the goods, war broke out between Iran and Iraq. *Id.* M/T diverted the chemicals to Taiwan and resold them there. *Id.* NPC eventually brought suit in the United States. *Id.* The district court dismissed the suit, holding that NPC, as an entity of an unrecognized foreign government, could not bring suit in United States courts. *Id.* at 553.

Nevertheless, the appellate court granted NPC standing. The court specifically cited the political climate between the United States and Iran and the need for the presidential discretion in matters involving "sensitive, fast-changing, and complex foreign policy relationships." *Id.* at 555 (emphasis added). Some of these "relationships" included the ongoing hostage situation, in which Iranian-sponsored groups continue to hold United States hostages in Lebanon, and the downing of the Iranian civilian airliner by the U.S.S. Vincennes. *Id.* at 555. The court determined that the Executive Branch, despite withholding recognition, "evinced a willingness to permit Iran to litigate its claims in the U.S. forum." *Id.* at 555.

Specifically, the United States submitted a Statement of Interest, stating, "it is the position of the Executive Branch that the Iranian government should be afforded access to our courts for purposes of resolution of the instant dispute." The aggregate of sensitive political interests, coupled with explicit presidential intent, persuaded the court to grant standing:

This is not a case where the Executive Branch is attempting to prohibit a formally recognized government from bringing a single suit in the United States courts, not is it a case where the Executive is arbitrarily allowing some suits by an unrecognized government while disallowing others. Rather, here, the Executive Branch—after entering into treaties with Iran, after establishing a claims tribunal to adjudicate disputes between the two countries, and after complying with U.S.-Iran agreements—expressly entered this case as Amicus requesting that Iran be given access to our courts.

Id. at 555-56.

a framework for courts to use in determining whether or not to adjudicate an unrecognized government's commercial claim.

I. RECOGNITION PRACTICES AND JUDICIAL RESPONSES

A. *An Inconsistent Recognition Practice*

Presidents often utilized their recognition power as a political tool.²³ Specifically, they withheld recognition to coerce change in a foreign state's domestic institutions.²⁴ Regardless of their varying motivations or foreign policy objectives, presidential administrations have established three prerequisites before recognizing foreign governments:²⁵ (1) a foreign government's control of its territory and internal institutions; (2) the support and consent of the people governed; and (3) a government's willingness to respect its state's international obligations and treaties with the United States.²⁶

Unfortunately, successive administrations have adopted different interpretations of the second prerequisite, "consent of the people." United States recognition practice has subsequently fluctuated between two standards: (1) *de facto*, and (2) *de jure* recognition.

Under *de facto* recognition, the President recognizes a government

²³ See L. GALLOWAY, *RECOGNIZING FOREIGN GOVERNMENTS* 11-12 (1978). Galloway comments on the utility of recognition, stating that:

[T]he importance attached to recognition derives in part from the weight of tradition and in part from the sense of legitimacy recognition confers. And because states granting or receiving recognition perceive the act as important, they have made it a precondition for other actions that do have inherent significance, such as the continuance of aid or the resumption of diplomatic relations.

....

... No one disputes that states repeatedly have used recognition to advance their political interests in the course of the past 2 centuries.

Id.

²⁴ See *id.* at 12.

²⁵ *Id.* at 5-6.

²⁶ One of the most important determinations in deciding whether to grant recognition is a successor government's willingness to honor the previous government's agreements. These agreements usually bind subsequent governments. See L. HENKIN, *supra* note 6, at 266 ("The rights, capacities and obligations of a state appertain to the state as such and are not affected by changes in its government."). But, the United States will not assume that any government in actual control will acknowledge or fulfill international obligations entered into by its predecessor until the unrecognized government acknowledges the legitimacy of those previous agreements. L. GALLOWAY, *supra* note 23, at 22.

effectively controlling both its citizenry and internal institutions.²⁷ Acquiescence to a government's control signifies the people's consent²⁸ regardless of the government's method of control or the nature of its domestic institutions.²⁹ The de facto recognition standard is simply a remnant from the nineteenth century, in which recognition policy turned on the question of effective control.³⁰

Unlike the de facto standard, de jure recognition examines both the legitimacy of government control and the institutions facilitating control.³¹ De jure recognition adopts a far more subjective determination of "the support and consent of the people governed" by examining how governments control their state.³² For example, "consent of the people" may or may not require religious freedom, free elections, or domestic tranquility.³³

The Wilson Administration, in adopting a de jure recognition standard,³⁴ initiated a dramatic change in recognition policy.³⁵ The shift

²⁷ L. GALLOWAY, *supra* note 23, at 14.

²⁸ *Id.* at 15.

²⁹ Galloway states:

[F]or practical purposes, United States recognition policy was virtually automatic, turning solely on a question of fact — did the new government have effective control? If it did, recognition was granted. Whatever its democratic sympathies, the United States normally followed the simple formula that the government de facto was equally de jure.

Id. at 15-16 (citations omitted).

³⁰ *See id.* One basic policy usually adopted along with the de facto recognition standard was nonintervention in foreign governments. *Id.* at 15. According to President Jefferson, "every one may govern itself according to whatever form it pleases, and change these forms at its own will." *Id.*

³¹ *See Recent Decisions*, 14 VA. J. INT'L L. 329, 333 (1974) [hereafter *Recent Decisions I*].

³² L. GALLOWAY, *supra* note 23, at 28-29.

³³ *See id.* Many of the political objectives behind de jure recognition condoned intervention into the political affairs of sovereign foreign states. *Id.* Specifically, those who adopt a de jure recognition standard may consider diplomatic recognition as an instrument of national policy which is to be exercised on behalf of the "objective consideration of national interest." *State Department Memorandum: U.S. Policy on Nonrecognition of Communist China*, 39 DEP'T ST. BULL. 385, 385 (Sept. 8, 1958) [hereafter DEP'T ST. BULL.]. Further, de jure recognition provided a way to secure that new governments would not intrude with American investments. *United States Recognition of Foreign Governments: Hearings Before the Committee on Foreign Relations, United State Senate on S. Res. 205*, 91st Cong., 1st Sess. 2 (1969) (statement of Senator Alan Cranston) [hereafter *Hearings on S. Res. 205*].

³⁴ *See* L. GALLOWAY, *supra* note 23, at 27-29.

³⁵ President Wilson was one of the first Presidents to use recognition as a tool to modify a foreign state's domestic policy. *Id.* at 28-29. Wilson added the dimension of

from a de facto to a de jure standard signified that recognition no longer hinged solely on a determination of effective control.³⁶ Instead, a "just" (*i.e.*, one which the United States government would recognize) government ruled with the consent of its people.³⁷ Thus, the United States refused to recognize, or delayed recognizing, unpopular governments that took control by force.³⁸

Since the 1920s, recognition policy has alternated between a de jure and a de facto standard.³⁹ President Roosevelt adopted the de facto standard in recognizing Russia's Soviet regime.⁴⁰ Following Roosevelt, President Truman employed a de jure recognition standard,⁴¹ which interpreted "consent of the people" to require a staunchly anti-Communist government.⁴² The Eisenhower administration adopted Truman's standard in refusing to recognize Communist China.⁴³

democratic legitimacy into the recognition picture. *Hearings on S. Res. 205, supra* note 33, at 3.

³⁶ Specifically, a "just government rests always upon the consent of the governed We can have no sympathy with those who seek to seize the power of government to advance their own personal interests or ambitions." L. GALLOWAY, *supra* note 23, at 27 (quoting public statement of President Wilson made Mar. 11, 1913).

³⁷ *Id.*

³⁸ RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 2, § 203 reporters' note 1.

³⁹ L. GALLOWAY, *supra* note 23, at 27-42.

⁴⁰ *Id.* at 30-35. President Roosevelt favored nonintervention in a foreign state's domestic policy, stating that "[t]he maintenance of constitutional government in other nations is not a sacred obligation devolving upon the United States alone." *Id.* at 31.

⁴¹ *Id.* While Truman recognized many Latin American dictatorships that came to power during his administration (though sometimes he did delay recognition), he consistently refused to recognize the People's Republic of China. *Id.* at 38. Truman (and following Truman, President Eisenhower), claimed to have had four reasons for denying Communist China recognition: (1) it did not control its entire land; (2) the new Chinese government did not represent the will of the Chinese people; (3) the communist government was not willing to honor all of its international agreements, and; (4) as a sovereign state, the United States was free to withhold recognition. *Id.*

⁴² Truman's (and later Eisenhower's) refusal to recognize Communist China paralleled the United States' earlier nonrecognition of the Soviet Union. *See id.* Recognition did not turn on who controlled the Chinese state. *Id.* at 41. Instead, the Communist Chinese, like the Russians before them, were seen at the enemy, and thus, did not deserve recognition. *See id.* Galloway cites the Eisenhower Administration's perspective to state that "we are forced to take account of the fact that the Chinese Communist regime has been consistently and viciously hostile to the U.S." *Id.* (quoting Secretary of State Dulles, Apr. 12, 1959).

⁴³ DEP'T ST. BULL., *supra* note 33, at 385. Eisenhower's main concern centered on whether the new government was anti-Communist in nature. L. GALLOWAY, *supra* note 23, at 39.

By the 1970s, Presidents began to de-emphasize the political use of recognition and instead to focus on the relative advantages and disadvantages of diplomatic relations.⁴⁴ The fading prominence of recognition calls into question its validity in determining whether or not to grant a foreign government standing.⁴⁵ Thus, courts should look to national interests, and not solely recognition policy, when determining standing for an unrecognized government's commercial claim.⁴⁶

B. A Court's Constitutional Power to Hear an Unrecognized Government's Commercial Claim

The Constitution grants federal courts jurisdiction to hear claims "between a State or the Citizens thereof, and foreign states, Citizens, or Subjects."⁴⁷ While recognition of a foreign state differs from recognition of that state's government,⁴⁸ neither the Constitution nor the federal statutes granting jurisdiction over foreign states distinguish between recognized and unrecognized governments.⁴⁹ Further, neither sets forth

⁴⁴ When possible, the State Department concerns itself with the question of whether it wishes to have diplomatic relations with a new government. For a discussion of this change in practice see *RESTATEMENT OF FOREIGN RELATIONS LAW*, *supra* note 2, § 203 reporter's note 1.

⁴⁵ See, e.g., *S. Res. 205, 91st Cong., 1st Session (1969) and State Department Comment*, reprinted in 64 *AM. J. INT'L L.* 172, 172 (1970) ("Resolved, that is the sense of the Senate that when the United States recognizes a foreign government and exchanges diplomatic representatives with it, this does not of itself imply that the United States approves of the form, ideology, or policy of that foreign government."). The resolution further stated that "when the United States recognizes a foreign government and exchanges diplomatic representatives with it, this does not imply that the United States necessarily approves of the form, ideology, or policy of the foreign government." *Id.* at 173. Thus, it seems the United States has implied adoption of a de facto recognition standard, making the requirements of de jure recognition unnecessary prior to a judicial grant of standing. *Hearings on S. Res. 205, supra* note 33, at 5 ("The evidence is overwhelming that withholding recognition from governments of which we disapprove, and with whom our relations are particularly hostile, has failed totally to advance our values or to achieve any other significant or enduring purpose.").

⁴⁶ See, e.g., *Transportes Aeroes de Angola v. Ronair, Inc.*, 544 F. Supp. 858 (D. Del. 1982) (permitting Angola's unrecognized government to sue in United States because a grant of standing did not conflict with national policy).

⁴⁷ U.S. CONST. art. III, § 2, cl. 1.

⁴⁸ Even if the United States recognizes a state, its government may not be recognized. Recognition of a state is not the same as recognition of its government. Within existing states, governments come and go and normally the changes raise no question of recognition. L. HENKIN, *supra* note 6, at 242; see also *supra* note 5.

⁴⁹ Section 1332(a)(4) of the United States Code states:

The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of \$10,000, . . . and is

a standing doctrine requiring recognition of a state's government.⁵⁰ Instead, both the Constitution and the federal statutes mention only states (implying recognized states), and are silent on governments.⁵¹ Thus, once a President recognizes a foreign state,⁵² its official representatives, citizens, and corporations should be able to sue in United States courts upon the same basis as domestic corporations or individuals.⁵³

Nevertheless, courts have adopted the rule that standing requires presidential recognition of foreign governments (*i.e.*, *de jure* recognition).⁵⁴ Courts specifically rely on a *de jure* recognition standard and deny standing to unrecognized governments during times of political conflict between the United States and the unrecognized government.⁵⁵

between

(4) A foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

28 U.S.C. § 1332(a)(4) (Supp. IV 1986).

28 U.S.C. § 1603 (Supp. IV 1986) provides:

(a) A "foreign state" . . . includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b)

(b) An "agency or instrumentality of a foreign state" means any entity—
 (1) which is a separate legal person, corporate or otherwise, and
 (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof. . . .

Id.

⁵⁰ See *supra* notes 48-49 and accompanying text.

⁵¹ *Id.*

⁵² See *supra* note 5 and accompanying text.

⁵³ See, *e.g.*, *Pfizer, Inc. v. Government of India*, 434 U.S. 308, 318-20 (1978) (stating that foreign nations are generally entitled to prosecute civil claims in United States courts upon the same basis as domestic corporations or individuals); *Land Oberoesterreich v. Gude*, 109 F.2d 635, 637 (2d Cir.), *cert. denied*, 311 U.S. 670 (1940) (presidential recognition permits a foreign government, including its corporations, to sue).

⁵⁴ *Id.* This inference is unjustified. This Comment asserts that courts have reacted to presidential interests, and not presidential recognition by adopting a case-by-case determination of standing. This determination hinges on the state of relations and the political climate between the United States and the government bringing suit. See, *e.g.*, *Russian Socialist Federated Soviet Republic v. Cibrario*, 235 N.Y. 255, 139 N.E. 259 (1923) (standing denied during a time of intense political hostility between the United States and the unrecognized government of the Soviet Union, cited *infra* notes 65-83); *Transportes Aeroes de Angola v. Ronair, Inc.*, 544 F. Supp. 858 (D. Del. 1982) (standing granted when Angola's unrecognized government and the United States maintained a politically neutral relationship; adjudication did not offend presidential interests, cited *infra* notes 96-103).

⁵⁵ See, *e.g.*, *Guaranty Trust Co. v. United States*, 304 U.S. 126, 137 (1938) (holding

Courts often abstain from litigating cases involving substantial political issues⁵⁶ or Communist governments.⁵⁷

issue of recognition to be a political decision determined by the political branches of government conclusive on all domestic courts); *Republic of Vietnam v. Pfizer, Inc.*, 556 F.2d 892, 893-94 (8th Cir. 1977) (standing denied to North Vietnamese government for claim originally brought by South Vietnam due to hostile political relations between the unrecognized Vietnamese government and the United States); *Cibrario*, 235 N.Y. at 262, 139 N.E. at 260 (standing denied to unrecognized and hostile Russian government).

⁵⁶ Courts must deal with the political question doctrine when adjudicating claims involving foreign affairs or foreign relations. The political question doctrine embraces two very different ideas. T. FRANCK & M. GLENNON, *FOREIGN RELATIONS AND NATIONAL SECURITY LAW: CASES, MATERIALS AND SIMULATIONS* 723 (1987) [hereafter T. FRANCK]. The first idea deals with a court finding that the question before it has been constitutionally allocated exclusively to one or both of the other branches of the federal government, *i.e.*, the political branches. *Id.* The second idea reflects a court policy that a claim normally within its scope of review is nevertheless not adjudicable due to such factors as a lack of obtainable evidence, manageable standards or judicial prudence. *Id.* A finding of a political question preempts all future judicial inquiry into the subject matter. *Id.* In the context of foreign affairs, courts adopt both avenues of the political question doctrine; the handling of foreign affairs is allocated to the government's political branches. *Id.* at 725. Further, judicial meddling in foreign affairs could create determinations and consequences detrimental to the United States in foreign relations. *Id.*

Specifically, in *Oetjen v. Central Leather Co.*, 246 U.S. 297 (1918), the Supreme Court stated, "The conduct of the foreign relations of our Government is committed by the Constitution to the Executive and Legislative — the 'political' — Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." *Id.* at 302; *see also* *Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948) ("They [political questions] are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.").

Nevertheless, a political issue within a case does not necessarily mandate a court's refusal to adjudicate the claim. *See* *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774 (D.C. Cir.), *cert. denied*, 470 U.S. 1003 (1984). In *Tel-Oren*, the court rejected the notion that the political question doctrine rendered nonjusticiable all "political cases." *Id.* at 796-98. Further, the political question doctrine does not provide the judiciary with a carte blanche license to block adjudication of difficult or controversial cases. *See* McGowan, *Congressmen in Court*, 15 GA. L. REV. 241, 256-57 (1981); *see also* *Langenegger v. United States*, 756 F.2d 1565, 1570 (Fed. Cir.), *cert. denied*, 474 U.S. 824 (1985) ("While cases involving foreign affairs may make the courts uncomfortable, the Constitution mandates the role of the judiciary without regard to its comfort. . . . Ultimately, the political question doctrine is rooted in concern for the separation of powers. . . . The doctrine is one of 'political questions' not one of 'political cases.'") (citations omitted). This Comment asserts that while an unrecognized government's commercial claim may involve political issues, the mere existence of a political issue does not mandate judicial abstention based on the political question doctrine.

⁵⁷ *See, e.g., Cibrario*, 235 N.Y. at 263-64, 139 N.E. at 262 (holding that in the

Still, courts have occasionally disregarded presidential recognition policy and adjudicated an unrecognized government's commercial claim.⁵⁸ Thus, the United States national policies and national interests⁵⁹ have not always closed the courts to unrecognized governments.

C. A Judicial Reaction to Recognition Policy

Courts have developed three standing categories for unrecognized governments. In the first category, courts give absolute deference to presidential recognition policy.⁶⁰ In the second category, courts examine issues beyond recognition to justify adjudicating an unrecognized government's commercial claim.⁶¹ In the third category, courts balance the

context of hostile political relations, the Soviet Union's Communist government could not sue prior to recognition).

⁵⁸ See, e.g., *Transportes*, 544 F. Supp. 858. In these instances, courts often employed a variety of judicial fictions to provide standing. See T. FRANCK, *supra* note 56, at 473; see also *infra* notes 90-103 and accompanying text. Similarly, courts, in deference to sensitive political interests, may grant standing to those governments who otherwise should be denied a forum. See *National Petrochemical Co. v. M/T Stolt Sheaf*, 860 F.2d 551, 552 (2d Cir. 1988). In *National*, the court, absent any presidential request, should have denied standing to the Iranian government litigant. In this instance, a sensitive foreign policy interest mandated a grant of standing. *Id.* at 555. Thus deference, whether in the context of a grant or denial of standing to the unrecognized foreign government, is an appropriate judicial reaction to a sensitive foreign policy interest. See *id.*; see also *supra* note 22.

⁵⁹ An interpretation of national interests often depends on the State Department's attitude and posturing. When it has been desirable to have an unrecognized government's suit proceed, the State Department has aided the courts by the requested or voluntary statement that the United States government recognized the plaintiff's state, though not its present government, intimating the State Department and President admit that nonrecognition should not preclude a government from acquiring standing. See Note, *supra* note 12, at 155; see also *National Petrochemical Co.*, 860 F.2d at 555.

⁶⁰ See, e.g., *Guaranty Trust Co. v. United States*, 304 U.S. 126 (1938) (holding recognition and subsequent access to courts a political rather than judicial determination); *Republic of Vietnam v. Pfizer, Inc.*, 556 F.2d 892, 894-95 (8th Cir. 1977) (stating that the right to bring a claim initiated by a predecessor government vests with the state until the United States recognizes a subsequent government); *Cibrario*, 235 N.Y. at 255, 139 N.E. at 259. For a discussion of the deferential standard, see *infra* notes 63-84 and accompanying text.

⁶¹ See, e.g., *Amtorg Trading Corp. v. United States*, 71 F.2d 524 (C.C.P.A. 1934) (permitting Soviet Union government corporation to sue despite the unrecognized status of the Soviet government); *Transportes*, 544 F. Supp. 858 (permitting unrecognized Angolan government to sue when adjudication did not occur in a politically hostile climate or offend presidential political objectives); *Upright v. Mercury Business Mach. Co.*, 13 A.D.2d 36, 213 N.Y.S.2d 417 (1961) (holding that unrecognized East German

President's foreign policy interests against the interests of the parties in court.⁶²

1. Judicial Deference to Presidential Policy

Courts consistently deny standing to unrecognized governments either (1) openly hostile to the United States,⁶³ or (2) claiming judicial rights of a recognized predecessor government.⁶⁴ Two cases substantially developed this deferential standard: *Russian Socialist Federated Soviet Republic v. Cibrario*,⁶⁵ and *Guaranty Trust Co. of New York v. United States*.⁶⁶

In *Cibrario* the court was asked to adjudicate a claim clearly hostile to United States foreign policy interests.⁶⁷ The court held that a foreign government's right to bring a claim was not absolute, but an extension

government can assign its contractual rights to a third party). For a discussion of a commercial exception, see *infra* notes 96-103 and accompanying text.

⁶² See, e.g., *The Maret*, 145 F.2d 431, 442 (3d Cir. 1944) (standing denied when conflicted with presidential policy refuting the Soviet Union's annexation of the Baltic states); *Federal Republic of Germany v. Elicofon*, 358 F. Supp. 747 (E.D.N.Y. 1972), *aff'd sub nom. Kunstsammlungen zu Weimar v. Elicofon*, 478 F.2d 231 (2d Cir. 1973) (standing denied when the rights of the unrecognized government did not outweigh the interest of presidential policy), *cert. denied*, 415 U.S. 931 (1974). For a discussion of the balanced approach, see *infra* notes 104-13 and accompanying text.

⁶³ See, e.g., *Cibrario*, 235 N.Y. 255, 139 N.E. 259 (holding that in the context of hostile political relations, the Soviet Union's preresognition claim denied standing).

⁶⁴ See, e.g., *Guaranty Trust*, 304 U.S. at 136-37 (stating that the right of a foreign state to sue vests in the state, rather than in any government purporting to represent the state); *Pfizer*, 556 F.2d 892.

⁶⁵ 235 N.Y. 255, 139 N.E. 259 (1923). While this is a state court decision on a federal matter, both the United States Supreme Court and the American Law Institute have cited it with approval. See *United States v. Pink*, 315 U.S. 203, 240 (1942); *Guaranty Trust*, 304 U.S. at 137; see also RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 2, § 205 reporter's note 1.

⁶⁶ 304 U.S. 126 (1938) (holding that the President, not the courts, exclusively assigns judicial rights from predecessor to successor governments).

⁶⁷ The facts of *Cibrario* involved the Soviet government delivering \$1,000,000 to the American Commercial attache in Moscow to deposit in a New York bank. The attache agreed to purchase certain equipment in the United States, but failed to do so. The Soviet Government sued to recover these funds. See Lubman, *The Unrecognized Government in American Courts: Upright v. Mercury Business Machs.*, 62 COLUM. L. REV. 275, 298 (1962).

In commenting on the state of relations between the United States and the Soviet Union, the *Cibrario* court elaborated that, "We cannot recognize, hold official relations with, or give friendly reception to the agents of a government which is determined and bound to conspire against our institutions." *Cibrario*, 235 N.Y. at 264-65, 139 N.E. at 260 (citing Secretary Colby, Official Note, Aug. 10, 1920).

of comity.⁶⁸ The court justified its denial of standing by looking to the State Department's (*i.e.*, presidential) determination that the Soviet government was illegitimate and a threat to democracy.⁶⁹

Thus, courts consider presidential interests when adjudicating claims impacting foreign policy.⁷⁰ In *Guaranty Trust*⁷¹ the Supreme Court held that the President determines whether an unrecognized successor government may maintain its predecessor government's claim in United States courts.⁷² The Court believed that determining whether a government represented a sovereign state was a political rather than a judicial question.⁷³ The Court looked to the President to answer this political question by recognizing the successor government.⁷⁴

In the process of deferring to presidential determinations, the *Guaranty Trust* Court set forth a vested right theory. Under this theory, the right to bring a cause of action vests in a foreign "state" rather

⁶⁸ In the words of the court:

[T]o hold otherwise might tend to nullify the rule that public policy must always prevail over comity. . . . To permit [the plaintiff] to recover in our courts funds which might strengthen it or which might even be used against our interests would be unwise. We should do nothing to thwart the policy which the United States has adopted.

Cibario, 235 N.Y. at 263, 139 N.E. at 262.

⁶⁹ Some legal analysts question whether the perceived illegitimacy of the Soviet government justified *Cibario*'s holding. See Lubman, *supra* note 67, at 299. It was arguably inequitable for the United States to deny standing to the Soviet government, because a United States representative helped to transfer the Russian funds in the course of ordinary business activities:

It is one thing to deny a state favors because we do not like its government; it is quite another to hold up its own funds. . . . To allow suit contradicts nothing that the Department of State has said or done, creates no conflict between the departments. If it places limits on the effectiveness of a particular foreign policy, that merely testifies that the claims of foreign policy are no more absolute than any other.

L. JAFFE, JUDICIAL ASPECTS OF FOREIGN RELATIONS 155-56 (1933).

⁷⁰ See, e.g., *Guaranty Trust*, 304 U.S. 126; *Republic of Vietnam v. Pfizer, Inc.*, 556 F.2d 892 (8th Cir. 1977).

⁷¹ 304 U.S. 126 (1938).

⁷² *Id.* at 137.

⁷³ *Id.* For a discussion of the political question doctrine, see *supra* note 56.

⁷⁴ *Guaranty Trust*, 304 U.S. at 138 ("Its [the State Department's] action in recognizing a foreign government . . . is conclusive on all domestic courts. . . ."). The Supreme Court granted standing to the Soviet Government pursuant to a presidential decree ancillary to recognition. The grant of standing enabled the newly recognized Soviet Government to recover money deposited in United States banks by the previously recognized Russian Government. *Id.*

than in any "government" purporting to represent the state.⁷⁵ Thus, the privilege to sue should not automatically pass to successor governments. Instead, a state maintains the right to adjudicate claims of a predecessor government only through an "authorized" (*i.e.*, recognized) successor government.⁷⁶

The subsequent case of *Republic of Vietnam v. Pfizer, Inc.*,⁷⁷ follows *Guaranty Trust's* vested rights theory.⁷⁸ Furthermore, other cases acknowledge that presidential policy objectives may justify presidential determination of the ultimate disposition of claims involving foreign governments.⁷⁹ Courts respect presidential political and diplomatic prerogatives⁸⁰ and accordingly refuse to inject⁸¹ themselves into cases infringing upon these rights.⁸² Courts will adjudicate claims in a manner

⁷⁵ *Id.* at 137.

⁷⁶ *Id.* ("[A] suit in its [the state's] behalf may be maintained in our courts only by that government which has been recognized by the political department of our own government as the authorized government of the foreign state.").

⁷⁷ 556 F.2d 892, 894 (8th Cir. 1977) (interpreting *Guaranty Trust* holding to state "[t]he law is well settled that a foreign government that is not recognized by the United States may not maintain suit in state or federal court.").

⁷⁸ In *Pfizer*, the North Vietnamese government tried to maintain an action initiated by the South Vietnamese government. *Id.* The court cited *Guaranty Trust* when it denied standing. *Id.* *Pfizer* took place in a politicized climate. *Id.* at 893-94. The *Pfizer* claim originated from a fundamentally different government. *Id.* at 894. In fact, the United States refused to recognize both the state and government of Vietnam. The *Pfizer* court continued, "The Republic of Vietnam, both as a state and as a government, had ceased to exist in law or in fact, and the United States had not recognized any government as the sovereign authority in the territory formally known as South Vietnam." *Id.* at 895 n.9.

⁷⁹ See *supra* note 22 and accompanying text.

⁸⁰ See, *e.g.*, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964). In *Sabbatino*, the Supreme Court elaborated on the role diplomatic relations play in the standing issue. In *Sabbatino*, an official branch of the Cuban government brought suit against a commodities broker for the conversion of bills of lading. *Id.* at 406-07. Before the suit, the United States severed diplomatic relations with Cuba. *Id.* at 410. The *Sabbatino* Court declined to intervene in what it considered a political matter, stating, "lacking some definite touchstone for determination, we are constrained to consider any relationship, short of war, with a recognized sovereign power as embracing the privilege of resorting to the United States courts." *Id.* It seems proper that the courts would not refuse standing to a recognized though hostile government. Strained diplomatic relations do not justify the withdrawal of judicial privileges. *Id.*

⁸¹ In discussing the issue of granting or denying judicial recognition, the Supreme Court observed that "[w]hether a foreign sovereign will be permitted to sue involves a problem more sensitive politically than whether the judgment of its courts may be re-examined, and the possibility of embarrassment to the President in handling foreign relations is substantially more acute." *Id.* at 412.

⁸² A fundamental question exists as to why the courts' jurisdiction should come sec-

consistent with these foreign policy interests.⁸³

2. A Commercial Claim and a Grant of Standing

When the President's political policies do not conflict with adjudicating a claim, courts recognize the judicial (*i.e.*, de facto) existence of unrecognized governments.⁸⁴ In particular, one month prior to *Cibrario*, the same court adopted the de facto recognition standard in *Wulfsohn v. Russian Socialist Federated Soviet Republic*.⁸⁵ In *Wulfsohn* the court held the Soviets immune from suit for confiscatory acts within Russian territory.⁸⁶ Soviet government control over the state⁸⁷ satisfied sovereign immunity requirements.⁸⁸ Hence, the presi-

ond to presidential embarrassment. The judiciary has a legitimate duty to interpret and oversee the laws of the United States. Presidential embarrassment should not infringe upon the judiciary's constitutional power. *See generally* L. JAFFE, *supra* note 69. If the courts are the conscience of the country, or at least the apparatus for enforcing the country's laws, then the subjective embarrassment of one branch should not foreclose another branch's valid exercise of power. *See* Note, *supra* note 12, at 166. Courts interpret the Constitution to provide the President with the power to implement the country's laws. *See* U.S. CONST. art. II, § 1, cl. 1. Nevertheless, the Supreme Court has also interpreted article III of the Constitution to grant the courts the power to oversee and judge the constitutionality of laws. *See* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803); U.S. CONST. art. III, § 2, cl. 1 ("The judicial Power shall extend to *all* Cases in Law and Equity, arising under this Constitution . . . between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.") (emphasis added).

⁸³ *See, e.g.*, *Amtorg Trading Corp. v. United States*, 71 F.2d 524 (C.C.P.A. 1934) (permitting instrumentality of state corporation to sue); *Transportes Aeroes de Angola v. Ronair, Inc.*, 544 F. Supp. 858 (D. Del. 1982) (permitting Angola's unrecognized government's corporation to sue); *Upright v. Mercury Business Mach. Co.*, 13 A.D.2d 36, 213 N.Y.S.2d 417 (1961) (permitting East German government's assignee to sue on East Germany's contract claim).

⁸⁴ For a discussion of cases adopting the commercial exception, see *infra* notes 96-103 and accompanying text.

⁸⁵ 234 N.Y. 372, 138 N.E. 24 (1923). Federal courts view this decision, like the *Cibrario* decision, as good law. *See* RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 2, § 205 reporter's note 1.

⁸⁶ *Wulfsohn*, 234 N.Y. at 376, 138 N.E. at 26.

⁸⁷ The court found the Soviets to be a sovereign existing government. *See id.* While it is true that this case involved the unrecognized government as a defendant rather than a plaintiff, it is still significant in that the court acknowledged the existence and control of the Soviet government. *See* Lubman, *supra* note 67, at 281.

⁸⁸ One aspect of sovereign immunity, the Act of State Doctrine, prohibits courts from examining the internal acts of sovereign states. The basis for the Act of State Doctrine stems from the holding in *Underhill v. Hernandez*, 168 U.S. 250, 252 (1897) ("Every sovereign State is bound to respect the independence of every other sovereign State, and the court of one country will not sit in judgement on the acts of the government of

dential policy compelling *Cibrario's* denial of standing supported *Wulfsohn's* de facto recognition standard.⁸⁹

In the past, a judicial de facto recognition standard effectively shadowed presidential policy.⁹⁰ This standard evolved into a limited exception to the general rule denying standing to an unrecognized government.⁹¹ This exception permitted an unrecognized government's corpo-

another done within its own territory."'). Courts will not judge the validity of a government's actions within its own territory. *Id.*; see also RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 2, § 443. The *Restatement* states that:

In the absence of a treaty or other unambiguous agreement regarding controlling legal principles, courts in the United States will generally refrain from examining the validity of a taking by a foreign state of property within its own territory, or from sitting in judgement on other acts of a governmental character done by a foreign state within its own territory and applicable there.

Id. The doctrine was developed by the Court on its own authority, as a principle of judicial restraint and international comity. *Id.* at comment a. If the court viewed the Soviet government as a sovereign power, and acting as the sovereign authority for the state (as it must under the Act of State Doctrine), then it inferred that the Soviets' government effectively controlled the state. See *id.* at reporter's note 3.

⁸⁹ The court's determination that the Soviets were immune from suit supported certain considerations of public policy. *Wulfsohn*, 234 N.Y. at 373, 138 N.E. at 24. Specifically, the *Wulfsohn* court held that "whether recognized or not, the evil of such an attempt [to bring an unrecognized foreign government in court] would be the same [as in the case of a recognized one]." *Id.* at 376, 138 N.E. at 26. This standard must be viewed in light of the court's previous holding under *Cibrario* that, "We [the courts] should do nothing to thwart the policy which the United States has adopted . . . public policy must always prevail over comity. *Russian Socialist Federated Soviet Republic v. Cibrario*, 235 N.Y. 255, 263, 139 N.E. 259, 262 (1923); see also Adler, *supra* note 2, at 39. It is plausible to argue that if the *Cibrario* holding had involved a neutral political issue like the one in *Wulfsohn*, the Soviets' de facto existence would provide standing. See *id.*; Lubman, *supra* note 67, at 281.

⁹⁰ After the Civil War, public policy supported returning the country to a state of commercial and political stability. Courts thus adopted a de facto standard to validate certain functions of the confederate states in an attempt to quell any further civil strife. See Lubman, *supra* note 67, at 292; see, e.g., *United States v. Ins. Co.*, 89 U.S. (22 Wall.) 99 (1875) (permitting post-Civil War suits by corporations created by confederate states). Earlier, in *Texas v. White*, 74 U.S. (7 Wall.) 700 (1868), the Supreme Court reasoned, "acts, which would be valid if emanating from a lawful government, must be regarded in general as valid when proceeding from an actual, though unlawful government; and that acts in furtherance or support of rebellion against the United States . . . must, in general, be regarded as invalid or void." *Id.* at 733.

⁹¹ See, e.g., *Amtorg Trading Corp. v. United States*, 71 F.2d 524 (C.C.P.A. 1934). In *Amtorg*, a Russian-owned corporation sued to recover an antidumping penalty. *Id.* at 527-28. At that time, the United States had not recognized the Soviet government. *Id.* The court refused to pierce *Amtorg's* corporate veil and recognize Soviet control. *Id.* Subsequently, the court allowed a corporation of an unrecognized government to ac-

rations, or the government's arms or instrumentalities to sue.⁹² By the 1960s,⁹³ courts began to expand the exception by shifting their standing analysis to examine not only the question of recognition, but also the nature of claims asserted.⁹⁴ Subsequently, courts granted standing to an unrecognized government's assignee, and acknowledged the judicial existence (*i.e.*, *de facto* existence), of an unrecognized government.⁹⁵

quire standing in a United States court. *Id.* Normally, the arms or instrumentalities of an unrecognized government are denied standing. *See Note, supra* note 12, at 161; *see also* Federal Republic of Germany v. Elicofon, 358 F. Supp. 747, 753 (E.D.N.Y. 1972), *aff'd sub nom.* Kunstsammlungen zu Weimar v. Elicofon, 478 F.2d 231 (2d Cir. 1973), *cert. denied*, 415 U.S. 931 (1974). *Contra* Petrogradsky Mejdunarodny Kommerchesky Bank v. National City Bank of New York, 253 N.Y. 23, 28-29, 170 N.E. 479, 481 ("The every day transactions of business or domestic life are not subject to impeachment, though the form may have been regulated by the command of the usurping government."), *cert. denied*, 282 U.S. 878 (1930); RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 2, § 204 comment a.

⁹² A corporate commercial claim exception involves a foreign instrumentality either being owned by, or a branch of, an unrecognized government. *See Note, Transportes Aeroes de Angola v. Ronair, Nonaccess to U.S. Courts by Unrecognized Governments — A New Exception?*, 8 N.C.J. INT'L L. & COM. REG. 225, 232 (1983). Normally, recognition of a government implies recognition of a government's instrumentalities as having a legal personality and performing both governmental and nongovernmental functions. *See RESTATEMENT OF FOREIGN RELATIONS LAW, supra* note 2, § 205 reporters' note 1; *see also Note, supra* note 12, at 161.

⁹³ *See Upright v. Mercury Business Mach. Co.*, 13 A.D.2d 36, 213 N.Y.S.2d 417 (1961). In *Upright*, a branch of the East German government assigned contractual rights to a United States resident. *Id.* at 37, 213 N.Y.S.2d at 419. The resident then sued the corporation, accusing it of defrauding the East German government. *Id.* The assignee recovered a judgment for the contracted amount. *Id.* at 42, 213 N.Y.S.2d at 423.

Usually, an assignment must convey adequate judicial rights to bring suit. *See, e.g.*, W. FESSLER, CONTRACTS: MORALITY, ECONOMICS AND THE MARKETPLACE 805 (1982) ("One trader may not use the unilateral machinery of assignment to impose any material alteration in the other trader's duty. To do so would be to permit a stranger to oblige the other trader to a bargain he did not form."). With this in mind, it is possible to say the court ratified East Germany's right to litigate the claim. Otherwise, East Germany could not assign a right to litigate an illegitimate claim. *Id.*

⁹⁴ The *Upright* court held recognition inconclusive, a preliminary material fact in determining standing. *See Upright*, 13 A.D.2d at 41, 213 N.Y.S.2d at 422. Thus, "in order to exculpate defendant from payment for the merchandise it has received, defendant would have to allege and prove that the sale upon which the trade acceptance was based, or the negotiation of the trade acceptance itself, violated public or national policy." *Id.* at 41, 213 N.Y.S.2d at 422-23. Hence, the fact that a contract involved an unrecognized government's arm or instrumentality should not preclude liability. *Id.* at 38-39, 213 N.Y.S.2d at 419.

⁹⁵ *Id.* at 38, 213 N.Y.S.2d at 419. The court specified acts that might have a juridically cognizable existence (acts which are legally identifiable without recognition) as

Recently, in *Transportes Aeroes de Angola v. Ronair, Inc.*,⁹⁶ a court granted standing to an unrecognized government's corporation.⁹⁷ In *Transportes*, the State Department informed the court that adjudicating a claim arising out of a purely commercial transaction did not contradict presidential policy.⁹⁸ In granting standing to the Angolan government, the court adopted the de facto standard as a legitimate basis to grant standing.⁹⁹

In *Transportes*, the court openly distinguished a government's recognition status from a grant or denial of standing.¹⁰⁰ Indeed, the court held that granting standing gave full effect to the President's sensitive political judgments.¹⁰¹ Furthermore, the decision refuted past holdings limiting the rights of an unrecognized government to sue.¹⁰² The court

"obligations arising either as a result of activity in, or with persons or corporations within the territory controlled by such de facto government." *Id.*

⁹⁶ 544 F. Supp. 858 (D. Del. 1982).

⁹⁷ Angola's breach of contract claim emanated from the defendant's failure to deliver a prepaid Boeing 707-321 plane. *Id.* at 860.

⁹⁸ According to the President (*i.e.*, State Department), *Transportes* lacked a politically sensitive interest. *Id.* at 861. In *Transportes*, the State Department sent the court a letter advocating a grant of standing for the Angolan Government. The pertinent part of the letter follows:

The United States does not maintain, and has never maintained diplomatic relations with the People's Republic of Angola. At the same time, the United States Government has not discouraged trade between the United States and Angola. . . . The Export-Import Bank of the United States has granted substantial credits for the U.S. exports to Angola.

In these circumstances, the Department of State believes that allowing access to the United States Courts by Angolan airline TAGG, a State-owned business enterprise, for the resolution of a claim *arising out of a purely commercial transaction*, would be consistent with the foreign policy interests of the United States.

Id. (emphasis added).

⁹⁹ See Note, *supra* note 92, at 236. For a review of the de facto recognition standard, see *supra* notes 27-30 and accompanying text.

¹⁰⁰ See Note, *supra* note 92, at 236.

¹⁰¹ *Transportes*, 544 F. Supp. at 863. Further, while the *Transportes* court noted the dichotomy and commercial impracticality of denying court access to unrecognized governments' commercial claims, it nevertheless felt bound by presidential policy. *Id.* at 862 n.3. For an example of a sensitive political interest, see *supra* note 22.

¹⁰² See *Transportes*, 544 F. Supp. at 862-63; *Federal Republic of Germany v. Elicofon*, 358 F. Supp. 747, 753 (E.D.N.Y. 1972), *aff'd sub nom.*, *Kunstsammlungen zu Weimar v. Elicofon*, 478 F.2d 231 (2d Cir. 1973), *cert. denied*, 415 U.S. 931 (1974); see also *Pfizer, Inc. v. Government of India*, 434 U.S. 308, 319-20 (1977) ("It has long been established that *only* governments recognized by the United States and at peace with us are entitled to access to our courts, and that it is within the exclusive power of the Executive Branch to determine which nations are entitled to sue.") (em-

spoke of its independent authority to judge whether claims contained sensitive political issues. Specifically, the court suggested that it might have adjudicated the *Transportes* claim even without State Department approval or prompting.¹⁰³ However, a judicial de facto recognition standard may be inappropriate for cases more politically volatile than *Transportes*. In these cases, courts should balance the interests of presidential policy against those of the parties in court.

3. A Balance of the Interests in Court

The final standing category involves cases neither political nor commercial in nature. These cases may lack a direct United States party. Adjudicating these cases may intrude on presidential policy.¹⁰⁴ For example, claims involving property or border disputes between North and South Korea will necessarily involve determining North Korea's status as an international personality. Here, courts must balance the claimant's needs against those of the President's recognition policy.¹⁰⁵ Issues present in *The Maret*¹⁰⁶ litigation illustrate this situation.

In *The Maret*, adjudication conflicted with the United States' refusal to recognize the Soviet annexation of Latvia, Estonia, and Lithuania.¹⁰⁷

phasis added).

¹⁰³ *Transportes*, 544 F. Supp. at 861-62. The court inferred the claim's commercial basis provided authority to adjudicate the claim. *Id.* If the *Transportes* court could independently grant standing, then other courts can do the same. Courts already have the authority to determine whether the case before the court is a "political question." T. FRANCK, *supra* note 56, at 723; *see also supra* note 56. Once a court finds that adjudication is not barred by the political question doctrine, it could then determine whether a claim conflicts with the President's sensitive political interests.

¹⁰⁴ Specifically, the courts could be faced with a judicial determination conflicting with express presidential policy denying the legitimacy of a foreign government. Absent an independent commercial claim, a court holding that the unrecognized government is the de facto government courts could intrude into presidential policy. *See generally infra* notes 105-15 and accompanying text.

¹⁰⁵ The absence of a direct United States party to the suit warrants increased deference to the President. The United States has neither facilitated nor participated in the disputed commercial relation. The claim does not emanate from United States commercial policy. *See, e.g.,* *Kunstsammlungen zu Weimar v. Elicofon*, 478 F.2d 231 (2d Cir. 1973), *cert. denied*, 415 U.S. 931 (1974) (denying East German government intervention in judicial proceedings determining ownership of German art work); *see also The Maret*, 145 F.2d 431, 440-41 (3d Cir. 1944) (refusing to contradict presidential policy refuting Soviet Union's annexing of Baltic countries).

¹⁰⁶ 145 F.2d 431 (3d Cir. 1944).

¹⁰⁷ In *Maret*, a representative entered the United States courts to settle claims based on nationalization decrees. *Id.* at 438. The Secretary of State certified that the United States did not recognize the absorption of Estonia by the Soviet Union, or the legality of

The court abstained from ruling on the merits because the claim involved acts in the "political field."¹⁰⁸ Instead, hostile political relations between the United States and the Baltic countries encouraged the court to deny standing to the foreign plaintiff and acquiesce to presidential policy.¹⁰⁹

Following *The Maret*, courts adopted a balancing test¹¹⁰ to determine whether public and national policy interests transcended those of the parties in court.¹¹¹ Courts denied standing when presidential interests, as manifested through "presidential implication," outweighed those of the unrecognized government.¹¹² Thus, "presidential action" should either support or oppose a grant of standing.¹¹³

the so-called "nationalization" decrees. *Id.* The United States also refused to recognize Russian sponsored decrees purporting to confiscate the states' privately owned shipping. *Id.* The United States still does not recognize the validity of the Soviet sponsored governments. See T. FRANCK, *supra* note 56, at 468.

¹⁰⁸ Lubman, *supra* note 67, at 289. For a discussion of the political question doctrine, see *supra* note 56.

¹⁰⁹ The United States froze Baltic citizens' assets to prevent their transfer to "unlawful" rulers. *Maret*, 145 F.2d at 431, 442.

¹¹⁰ See *Federal Republic of Germany v. Elicofon*, 358 F. Supp. 747 (E.D.N.Y. 1972), *aff'd sub nom. Kunstsammlungen zu Weimar v. Elicofon*, 478 F.2d 231 (2d Cir. 1973), *cert. denied*, 415 U.S. 931 (1974). In *Elicofon*, an agency of East Germany's unrecognized government sought to intervene in the recognized Federal Republic of Germany's suit to recover two paintings stolen during the United States' occupation of Germany. *Id.* at 748-49; see also *Recent Decisions*, 7 VAND. J. TRANSNAT'L L. 213, 213 (1973).

¹¹¹ Permitting East German intervention in *Elicofon* would have conflicted with presidential policy by acknowledging East Germany's ability to speak for the German people. When stolen, the art work belonged to a state museum of a unified Germany. The court's permission of East German intervention would imply East Germany's right to act for a unified German state. *Elicofon*, 358 F. Supp. at 752-53; see also *Recent Decisions I*, *supra* note 31, at 333.

¹¹² The *Elicofon* court adopted a balancing test to determine whether or not to grant standing. While the *Elicofon* court would not interfere with presidential foreign policy interests in this instance, it supported judicial access for commercial claims inoffensive to American policy. The court stated:

There may be special circumstances in which action by the President can be interpreted as creating an exception to the rule. . . . [T]he act of the Executive in *permitting American nationals to engage in commercial transactions with unrecognized governments carries with it a grant . . . of standing to litigate claims* arising out of those transactions.

Elicofon, 358 F. Supp. at 752 n.4 (emphasis added).

¹¹³ The *Elicofon* court denied standing because it believed that the East German Government failed to satisfy the balancing test. *Id.* at 753. It is also interesting to note that the *Elicofon* court seemed to disregard the *Amtorg* holding permitting corporations of an unrecognized government to sue. The *Elicofon* court stated that "If after a hear-

Unfortunately, it is difficult to ascertain the intent of presidential actions when faced with contradictory commercial and political activities.¹¹⁴ Specifically, trade and politics often operate on very different levels.¹¹⁵ Furthermore, Congress' constitutional control over foreign commerce complicates determinations of whether to grant standing to unrecognized governments' commercial claims.

II. CONGRESSIONAL AUTHORITY FOR STANDING

Adjudicating an unrecognized government's commercial claim places Congress' authority¹¹⁶ in the middle of an already muddled standing doctrine.¹¹⁷ Specifically, Congress' constitutional power to expand federal court jurisdiction¹¹⁸ and control foreign commerce¹¹⁹ collides with presidential recognition power.¹²⁰ Congress' power to regulate foreign

ing it is found that the Weimer Art Collection is an arm or instrumentality of the German Democratic Republic, the court will have no choice but to hold that it too is barred from bringing suit." *Id.*

¹¹⁴ Trade policy and recognition policy operate on different levels. Thus, neither should dominate the other. See L. JAFFE, *supra* note 69, at 157; see also *infra* notes 120 & 159-65 and accompanying text.

¹¹⁵ *Id.* For a discussion of presidential control over exports, see *infra* notes 120, 159-65.

¹¹⁶ See *infra* notes 123-48 and accompanying text.

¹¹⁷ See T. FRANCK, *supra* note 56, at 432. Franck argues:

While the Congress and President may have struggled from time to time over control of the recognition power, a third party, the judiciary, has also been involved in the question of who speaks for the United States . . . the recognition power may have important, even dispositive, effects on the legal interest of foreign nations, individuals, states of the union and other legal entities . . . currently, the question primarily appears in terms of the extent to which United States courts should defer to the Executive.

Id.

¹¹⁸ U.S. CONST. art. III, § 2, cl. 1.

¹¹⁹ *Id.* art. I, § 8, cl. 3.

¹²⁰ In these instances, courts should look to see if the President has taken affirmative steps to ban trade with the unrecognized government. If the motivations behind nonrecognition extend into the commercial arena, then the President can work with Congress to ban trade to that country. See RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 2, § 812(2) ("Under the law of the United States, the President may, upon making determinations required by statute [referring the General Agreement on Tariffs and Trade] restrict exports to safeguard national security, to further foreign policy, to comply with international obligations of the United States, or to conserve resources in short supply.") (emphasis added). For example, the United States banned wheat sales to the Russians following the invasion of Afghanistan. *Id.* at reporter's note 2. This Comment equates an attempt to persuade Congress to ban trade with a foreign government with evidence of the President's political interests. If trade continues despite the President's

commerce, coupled with the power of the necessary and proper clause,¹²¹ provides a foundation for Congress to grant standing.

A. Congress' Control of Federal Jurisdiction

Legislative authority to grant standing emanates from Article III of the Constitution,¹²² which grants Congress the power to limit or expand federal court jurisdiction.¹²³ Once a party fulfills the Constitution's case and controversy requirement,¹²⁴ and satisfies other prudential standing requirements,¹²⁵ federal jurisdiction is subject to Congress' exceptions.¹²⁶

Congress may provide courts with authority to adjudicate legitimate

persuasion, then the courts should take this into consideration when granting standing. *Id.* Export controls have been used to deter or *protest conduct by foreign states hostile to the national interests of the United States.* *Id.* at comment c. See *National Petrochemical Co. v. M/T Stolt Sheaf*, 860 F.2d 551, 552 (2d Cir. 1988) (discussing litigation resulting from President Carter's trade embargo with Iran pursuant to Executive Order No. 12,205, 45 Fed. Reg. 24,099 (1980), barring the sale of American products to Iran). For a discussion of the *National* case, see *supra* note 22.

¹²¹ U.S. CONST. art. I, § 8, cl. 18.

¹²² *Id.* art. III, § 2, cl. 1 (stating federal court jurisdiction extends to "[a]ll Cases, In Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, . . . under their Authority, . . .").

¹²³ The post-Civil War case of *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1868), permitted Congress to withdraw jurisdiction by repealing a portion of a statute that the plaintiff had challenged on constitutional grounds. The Court upheld the withdrawal of jurisdiction because Congress had originally granted jurisdiction to the plaintiff. *Id.* at 512. The Court stated: "It is clear that when the jurisdiction of a cause depends upon the statute, the repeal of the statute takes away the jurisdiction." *Id.*

¹²⁴ See *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979). *Gladstone* states:

Congress may, by legislation expand standing to the full extent permitted by Art. III, thus permitting litigation by one "who otherwise would be barred by prudential standing rules." In no event, however, may Congress abrogate the Art. III minima: A plaintiff must always have suffered a "distinct and palpable injury to himself" that is likely to be redressed if the requested relief is granted.

Id. (citations omitted); see also *Safir v. Dole*, 718 F.2d 475, 478 (D.C. Cir. 1983), *cert. denied*, 467 U.S. 1206 (1984) ("Congress itself may not confer standing to sue where the case and controversy requirements of Article III of the Constitution are not met.").

¹²⁵ One of these prudential issues influencing a grant of standing may be the political question doctrine. For a discussion of this doctrine, see *supra* note 56.

¹²⁶ *McCardle*, 74 U.S. at 513. The statutory standing advocated in this Comment would apply uniformly to both types of federal jurisdiction. See *Chang v. Northwestern Memorial Hosp.*, 506 F. Supp. 975, 978 n.3 (N.D. Ill. 1980) (holding Taiwan Relations Act's grant of standing to the unrecognized state and government of Taiwan for federal diversity purposes proper under a de facto recognition theory); see also *infra* note 167.

claims¹²⁷ that might otherwise be denied standing because of court discretion.¹²⁸ The legitimacy of a claim should not turn on whether or not a government is recognized. The Taiwan Relations Act¹²⁹ (TRA) highlights the full effect of congressional power. Specifically, the TRA grants standing to judicial claims of Taiwan's unrecognized government,¹³⁰ ensuring Taiwan's continued access¹³¹ to United States courts.¹³² Further justifications for a grant of statutory standing emanate from Congress' commerce power.

¹²⁷ If a plaintiff alleges a palpable injury, Congress may grant an express right of action otherwise barred by prudential standing rules. *See* *Warth v. Seldin*, 422 U.S. 490, 501 (1975) ("Congress may grant an express right of action who otherwise would be barred by prudential standing rules. Of course, Art. III requirement remains: the plaintiff still must allege a distinct and palpable injury . . ."); *McCardle*, 74 U.S. at 513.

¹²⁸ In the face of judicial prudence, Congress can provide a forum if plaintiff suffered a distinct and palpable injury. *See, e.g.,* *McMichael v. Napa County*, 709 F.2d 1268 (9th Cir. 1983). The *McMichael* court added that "Congress may, by legislation, expand standing to the full extent permitted by Article III thus permitting litigation by one who would be barred by prudential standing rules. *Congress may discard prudential standing rules by statute, thus expanding standing.*" *Id.* at 1271 (citations omitted, emphasis added).

¹²⁹ *See, e.g.,* The Taiwan Relations Act, 22 U.S.C. §§ 3300-3318 (Supp. V 1987) [hereafter TRA].

¹³⁰ *Id.* § 3303(b)(7) (Supp. V 1987).

¹³¹ The pertinent section of the TRA states:

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 . . . things of value . . . acquired or earned by the governing authorities on Taiwan.

22 U.S.C. § 3303(b)(3)(B) (Supp. V 1987) (emphasis added). Congress basically told the courts to adjudicate the claims irrespective of recognition. 22 U.S.C. § 3303(b)(7) states that, "The capacity of Taiwan to sue and be sued in courts of 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." *Id.* The TRA's expansion of standing has been held valid by a federal court. *See infra* note 167 and accompanying text.

¹³² *See* *Chang v. Northwestern Memorial Hosp.*, 506 F. Supp. 975, 978 n.3 (N.D. Ill. 1980) (interpreting the TRA and noting that the United States government sought to preserve "extensive, close, and friendly relations between the people of the United States and the people on Taiwan").

B. Congress' Plenary Power over Commerce

Article I of the Constitution grants Congress the power to control commerce.¹³³ Federal commerce power supersedes state commerce power,¹³⁴ and allows Congress to use its broad and expansive¹³⁵ domestic¹³⁶ and foreign commerce power¹³⁷ to prescribe the conditions in which to conduct commerce.¹³⁸ This power supports virtually any legislation relating to foreign relations and foreign commerce.¹³⁹ Congress could simply provide a forum in which to resolve legitimate commercial disputes by legislating the expansion of jurisdiction for unrecognized governments.¹⁴⁰

C. The "Necessary and Proper" Power

Congressional powers extend beyond those explicitly granted in the Constitution.¹⁴¹ The framers provided Congress with extensive power.¹⁴² Congress may use any unprohibited means to achieve a legiti-

¹³³ U.S. CONST. art. I, § 8, cl. 3 ("Congress shall have Power to regulate . . . [c]ommerce with foreign Nations, and among the several States. . .").

¹³⁴ *Gibbons v. Ogden*, 22 U.S. (1 Wheat.) 1 (1824) (giving an early interpretation of Congress' plenary commerce power).

¹³⁵ During the Depression, Congress used its commerce power to regulate the individual home production of wheat. See *Wickard v. Filburn*, 317 U.S. 111 (1942). The *Wickard* Court held that one man's plot of wheat had a substantial effect in defeating and obstructing a regulation's purpose. *Id.* at 128-29. Obviously, if one plot of wheat substantially affects domestic wheat production, then one contract with an unrecognized government could similarly impact international trade.

¹³⁶ See *United States v. Darby*, 312 U.S. 100 (1941). During the Depression, *Darby's* holding permitted Congress to expand its commerce power through legislating wage and hour standards. *Id.* at 114. Congressional authority to control commerce extends to commercial activity having an appreciable effect on interstate commerce. *Id.* The *Darby* Court further stated that Congress could choose the appropriate means to accomplish its commercial policy. *Id.* at 115.

¹³⁷ Congressional power to regulate foreign commerce is as great, if not greater, than its power to regulate interstate commerce. See *Thurlow v. Massachusetts*, 46 U.S. (5 How.) 504, 578 (1847) (refuting argument that individual states have power superseding federal commerce power).

¹³⁸ *Welton v. Missouri*, 91 U.S. 275, 279-80 (1876).

¹³⁹ See *California Bankers Ass'n v. Schultz*, 416 U.S. 21, 46 (1974) ("The plenary authority of Congress . . . over foreign commerce is not open to dispute, and that body was not limited to any one particular approach to effectuate its concern. . ."); see also L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 70 (1972).

¹⁴⁰ See, e.g., TRA, *supra* notes 129-32 and accompanying text.

¹⁴¹ See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 420 (1819) (holding that the necessary and proper clause expanded Congress' commerce power).

¹⁴² U.S. CONST. art. I, § 8, cl. 18 ("Congress shall have the Power to make all Laws

mate constitutional goal¹⁴³ and exercise its best judgment to execute its commerce power.¹⁴⁴ Congress can pass legislation targeting specific activities affecting or influencing commerce.¹⁴⁵ In the process, it may prevent misuse of channels of commerce, and remove commercial obstructions.¹⁴⁶

A congressional statute controlling or influencing commerce only needs to rationally relate to commercial activity to be upheld by the courts.¹⁴⁷ Defrauding a trading partner involves a moral and economic evil,¹⁴⁸ which may adversely affect foreign commerce. Thus, the congressional interest in providing an adequate forum for an unrecognized government's commercial claim rationally relates to an expansion of jurisdiction.

which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or any Department or Officer thereof." See *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 148 (1963) ("Congress has broad power under the Necessary and Proper Clause to enact legislation for regulation of foreign affairs."); *Ex parte Curtis*, 106 U.S. 371, 372 (1882) ("Within the legitimate scope of this grant Congress is permitted to determine for itself what is necessary and what is proper.").

¹⁴³ *McCulloch*, 17 U.S. (4 Wheat.) at 421.

¹⁴⁴ See *California Bankers Ass'n v. Schultz*, 416 U.S. 21, 46 (1974); see also *Buttrey v. United States*, 690 F.2d 1186 (5th Cir. 1982), *cert. denied*, 461 U.S. 927 (1983). Congress has the authority to facilitate the smooth operation of its statutes as it develops and promotes foreign commerce. *Id.* at 1189. Granting standing to claims arising out of foreign trade with nonrecognized states neither offends nor expands congressional power under the necessary and proper clause if it promotes the smooth operation of foreign commerce. *Id.* Past congressional activities based on the necessary and proper and commerce clauses provide an adequate, if not a convincing justification for congressional action.

¹⁴⁵ See, e.g., TRA, *supra* notes 129-32 and accompanying text; see also *Perez v. United States*, 402 U.S. 146 (1971). Congress can reach even those acts remotely relating to the traditional concepts of commerce through an "affecting standard." *Perez*, 402 U.S. at 150. The *Perez* Court categorized local loan sharking as an activity affecting or influencing commerce. *Id.*

¹⁴⁶ *Perez*, 402 U.S. at 150. During the Civil Rights movement of the 1960s, the courts upheld legislation determining discrimination a burden on the channels of interstate commerce. See, e.g., *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258 (1964).

¹⁴⁷ *Katzenbach v. McClung*, 379 U.S. 294, 304 (1964) (holding commerce clause justified congressional civil rights legislation because discrimination burdened the channels of interstate commerce).

¹⁴⁸ See *North Am. Co. v. SEC*, 327 U.S. 686, 705 (1946) (determining Congress' power to regulate interstate commerce includes the authority to control practices that spread or promote evil).

III. A FRAMEWORK FOR APPLICATION

Adjudicating an unrecognized government's commercial claim¹⁴⁹ does not unconstitutionally usurp presidential recognition power. Changes in recognition practice and the international political climate challenge the courts' policy of absolutely deferring to recognition policy when faced with a politically neutral commercial claim.¹⁵⁰ Courts' standing requirements do not need to vacillate in response to recognition policy.¹⁵¹ Presidential political prerogatives must not impinge upon the judiciary's nonpolitical functions.¹⁵² Instead, courts should look to see whether issues beyond nonrecognition justify a denial of standing.

When an unrecognized government's claim involves a compelling presidential interest, courts should deny standing. A compelling presidential interest may involve (1) resolving claims of an unrecognized government hostile to United States¹⁵³ or, (2) assigning the judicial rights of a predecessor government to its unrecognized successor.¹⁵⁴ In these instances, adjudication may intrude upon the President's foreign policy.¹⁵⁵ Nevertheless, courts should not unnecessarily extend this rationale to claims inoffensive to presidential policy.

Second, courts should grant standing to an unrecognized government's commercial claim if its claim lacks a sensitive political issue.¹⁵⁶

¹⁴⁹ For a definition of commercial claim, see *supra* note 13 and accompanying text; see also The Foreign Sovereign Immunity Act, 28 U.S.C. § 1603 (Supp. IV 1986).

¹⁵⁰ Specifically, courts have acknowledged that recognition or nonrecognition does not determine the overall character of a foreign government. An unrecognized government is not always an evil thing. All that occurs within its governmental purview are not always evil. *Upright v. Mercury Business Mach. Co.*, 13 A.D.2d 36, 41, 213 N.Y.S.2d 417, 422-23 (1961).

¹⁵¹ See Lubman, *supra* note 67, at 291-97.

¹⁵² See *Bank of China v. Wells Fargo Bank & Union Trust*, 104 F. Supp. 59, 63 (N.D. Cal. 1952) ("To permit this expression of executive policy to usurp entirely the judicial judgment would relieve the court of a burdensome duty, but it is doubtful that the ends of justice would thus be met.").

¹⁵³ See, e.g., *Russian Socialist Federated Soviet Republic v. Cibrario*, 235 N.Y. 255, 139 N.E. 259 (1923). See *supra* notes 67-69 and accompanying text.

¹⁵⁴ See, e.g., *Guaranty Trust Co. v. United States*, 304 U.S. 126 (1938); *Republic of Vietnam v. Pfizer, Inc.*, 556 F.2d 892 (8th Cir. 1977); see also *supra* notes 71-83 and accompanying text.

¹⁵⁵ The President, not the courts, should determine whether a successor unrecognized government can maintain the claims of its recognized predecessor. See *Guaranty Trust*, 304 U.S. at 137; see also *supra* notes 71-74 and accompanying text. For an example of when adjudication comports with presidential policy, see *supra* note 120 (discussing *National Petrochemical Co. v. M/T Stolt Sheaf*, 860 F.2d 551 (2d Cir. 1988)).

¹⁵⁶ For examples of politically sensitive interests, see *supra* note 22.

Either the courts' independent constitutional or statutory authority¹⁵⁷ or a congressional statute¹⁵⁸ justify granting standing.

Courts should not assume that nonrecognition of a government necessarily reflects national policy. It is inconsistent for courts to cite "national policy" as a justification for banning an unrecognized government's commercial claim¹⁵⁹ unless national policy also prohibits trade with that government.¹⁶⁰ The diversity of diplomatic and trade policies aptly demonstrates that foreign policy is neither uniform nor absolute.¹⁶¹

Instead, if the United States directly or indirectly facilitates trade,¹⁶² then it should provide a mechanism to resolve the problems trade creates.¹⁶³ As evidenced by the *Transportes* holding, the political objectives

¹⁵⁷ See *supra* notes 5-6 & 47-49 and accompanying text.

¹⁵⁸ See *infra* notes 168-74 and accompanying text.

¹⁵⁹ The President may restrict trade in the interest of national policy. See *supra* note 120 and accompanying text. If the President has not restricted trade, then it is difficult to cite a national policy justification for denying standing. Absent a prohibition, the United States courts should not deny an unrecognized government a judicial remedy when the United States permits or encourages an unrecognized government to bring funds into the United States. See Adler, *supra* note 2, at 40; Lubman, *supra* note 67, at 300 ("[I]f commercial transactions are permitted between Americans and persons or entities subject to the authority of unrecognized governments, it is anomalous to deny a forum in which disputes arising from such transactions may be resolved.").

¹⁶⁰ See Lubman, *supra* note 67, at 308. If there is a prohibition of trade with an unrecognized government's state, then national policy supports the judicial ban. Lubman states:

It may happen, as in the case of relations with the People's Republic of China, that trade . . . is prohibited. When it is not prohibited, however, a fear that courts will erode national policy by allowing suits on transactions entered into as part of permitted trade is unfounded. The legality of the transactions is sufficiently expressive of national policy.

Id. Similarly, courts, in deference to sensitive political interests, may grant standing to those governments who otherwise should be denied a forum. See, e.g., *National Petrochemical Co. v. M/T Stolt Sheaf*, 860 F.2d 551, 552 (2d Cir. 1988). For a discussion of *National*, see *supra* note 22.

¹⁶¹ *Id.*

¹⁶² See *Transportes Aeroes de Angola v. Ronair, Inc.*, 544 F. Supp. 858, 863-64 (D. Del. 1982) ("[W]here the executive branch, either by its *actions* or words, evinces a definite desire to remove the impediment to a suit brought by an unrecognized government, or an instrumentality thereof, that determination necessarily frees this Court from any strictures placed on the exercise of its jurisdiction.") (emphasis added).

¹⁶³ This Comment asserts that the United States has an obligation to provide a forum for the resolution of an unrecognized government's commercial claims. An unrecognized government has limited options in bringing suit against the United States. The United States may not honor judgments rendered outside its borders. See *RESTATEMENT OF FOREIGN RELATIONS LAW*, *supra* note 2, § 482.

behind nonrecognition may differ from the commercial objectives of trade.¹⁶⁴ Thus, courts should not blindly defer to recognition policy but instead adopt a case-by-case approach in determining when to grant standing to an unrecognized government.¹⁶⁵

If courts fail to exercise their authority, then Congress should intervene and specifically grant standing to an unrecognized government's commercial claim. Congress previously provided a forum for the com-

The Supreme Court, in *Hilton v. Guyot*, 159 U.S. 113 (1895), treated the enforceability of foreign country judgments as a matter of the "comity of this nation." *Id.* at 202. Comity called for enforcement of judgments rendered in a foreign state in favor of a citizen of that state against a noncitizen only on the basis of reciprocity. *Id.* Nevertheless, most United States courts reject the requirements of reciprocity in construing the UFMJRA. *See, e.g.*, *Johnston v. Compagnie Generale Transatlantique*, 242 N.Y. 381, 152 N.E. 121 (1926).

The United States created the Uniform Foreign Money-Judgments Recognition Act, 13 U.L.A. 261 (1986). The Act codifies state rules that the majority of United States state courts follow. *See* RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 2, at Chapter 8 Introductory note. Most case law covering the enforcement of foreign judgments comes from state court decisions, or from federal courts applying state law. *Id.* at 592-93. Generally, in the absence of a federal treaty or statute, the recognition and enforcement of a foreign judgment is a matter of state law. *Id.* § 481 comment a.

Assuming the United States' party has no assets within the unrecognized government's state, satisfaction of the unrecognized government's judgment would depend on the cooperation of the United States courts. State courts, like federal courts, should and usually do consider foreign affairs when recognizing foreign judgments. *See* RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 2, § 481 comment a. One justification for not recognizing a foreign judgment is if "[t]he cause of action on which the judgment was based, or the judgment itself, is repugnant to the public policy of the United States." *Id.* § 482(2)(d). If the courts fail to grant standing to an unrecognized government due to presidential policy, then that same policy could bar recognition of a foreign judgment. Further, the International Court of Justice's lack of an effective enforcement mechanism makes it an inappropriate forum to resolve the claims. *See generally* T. FRANCK, *JUDGING THE WORLD COURT* (1986).

¹⁶⁴ *See supra* note 98 and accompanying text.

¹⁶⁵ If courts adopt a circumstance specific approach to standing, they can maintain their past practice of determining the political interest and justifications behind presidential policy. *See* T. FRANCK, *supra* note 56, at 451. Thomas Franck details this practice:

After World War II, . . . the State Department often issued specific "suggestions" or instructions to courts, frequently prompted by the requests of individual litigants. . . . Most cases, and all recent ones, have relied on the Department's "suggestions" whenever these have been forthcoming. At times the Department has acted to instruct the court on its own initiative, relaying its views through the Department of Justice. More often, individual litigants have requested the Department to provide information.

Id. (citations omitted).

mercial claims of Taiwan's unrecognized government,¹⁶⁶ and should provide the same forum for other unrecognized governments.¹⁶⁷ A statutory expansion of standing for unrecognized governments addresses a legitimate congressional interest: commerce.

Congress possesses broad powers to facilitate its control over foreign commerce. Through this power, Congress may prevent unfair trade practices by United States citizens at home and abroad.¹⁶⁸ Congress should exercise its constitutional power to foster foreign commerce with all interested trading partners¹⁶⁹ by providing a forum where unrecog-

¹⁶⁶ See *supra* notes 129-32 and accompanying text.

¹⁶⁷ A federal court has reviewed and upheld the validity of a Congressional grant of standing to Taiwan in *Chang v. Northwestern Memorial Hosp.*, 506 F. Supp. 975 (N.D. Ill. 1980) stating, "The Taiwan Relations Act . . . explicitly recognizes the capacity of Taiwan to sue and be sued in courts in the United States . . ." *Id.* at 976-78 (quoting TRA § 3302 (4)(b)). Furthermore, the *Chang* court elaborated:

We digress on the recognition versus formal recognition point because it is generally acknowledged by both the Executive Branch and the courts that diplomatic relations with Taiwan have now formally ended There must be flexibility in foreign affairs as we approach the 21st century. . . .

Allowing only foreign nationals of countries "formally recognized" by the United States to sue in our federal courts would impair that flexibility.

Id. at 977 n.2. The court continued: "[S]omething less than formal recognition . . . will suffice to satisfy the foreign diversity jurisdiction requirement. The authorities suggest a *de facto* recognition standard, and we find such recognition here based on significant trade relations, cultural and/or other contacts with a nation on a nongovernmental level." *Id.* at 978 n.3 (emphasis added).

¹⁶⁸ The Government created the Federal Trade Commission (FTC) to address domestic problems associated with monopolies and unfair trade practice by United States' companies. See, e.g., *Branch v. Federal Trade Comm'n*, 141 F.2d 31 (7th Cir. 1944). While the FTC primarily focuses on domestic economic activity, it also deals with foreign commerce matters to the extent that it protects commerce controlled by United States citizens in other countries. *Id.* at 34. *Branch* involved the operations of an American correspondence school in Latin America. *Id.* at 33. The school falsely advertised itself as an Institute, offering courses in everything from agriculture to engineering to medicine to law, and represented the degrees it awarded as notarized and authenticated by Illinois' Secretary of State. *Id.* When the FTC brought suit, Branch argued a lack of jurisdiction because the acts took place in Latin America. *Id.* at 34-35. The court disagreed, stating, "The right of the United States to control the conduct of its citizens in foreign countries in respect to matters which a sovereign ordinarily governs within its own territorial jurisdiction has been recognized repeatedly." *Id.* at 35. The FTC attempted to compel petitioner to use fair methods in competing with his fellow countrymen and eliminate unfair, fraudulent, and deceptive practices. *Id.* at 34. If the FTC can prohibit and punish Branch's unfair trade activities abroad, then Congress can do the same thing to companies dealing with unrecognized governments.

¹⁶⁹ *Second Employers' Liability Cases*, 223 U.S. 1, 47 (1912) ("To regulate' . . . is to foster, protect, control and restrain [commerce], with appropriate regard for the wel-

nized governments could litigate their claims.¹⁷⁰

Courts may encounter problems distinguishing between an unrecognized government's commercial and political claims. The Foreign Sovereign Immunities Act (FSIA) of 1976¹⁷¹ provides a framework for courts to make this distinction. The FSIA categorizes a government's public and private acts, limiting immunity to political activities.¹⁷² It requires courts to determine whether an activity is one which private persons ordinarily perform or one peculiarly within the realm of government.¹⁷³ Once a court determines that an unrecognized government's claim is commercial and not political pursuant to the FSIA, it should

fare of those who are immediately concerned and the public at large. . . . This power over commerce . . . extends incidentally to every instrument and agent" carrying on commerce, and is only subject to constitutional limitations).

¹⁷⁰ As stated earlier, Congress has plenary foreign commerce power. *See supra* notes 133-40 and accompanying text. This power may extend to the field of foreign relations. *Id.*

¹⁷¹ 28 U.S.C. § 1602 (Supp. IV 1986) states: "Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for satisfaction of judgments rendered against them in connection with their commercial activities." *Id.*

¹⁷² 28 U.S.C. § 1603(d), (e) (Supp. IV 1986) states: "Commercial activity" means either a regular course of commercial conduct or a particular commercial transaction. . . . [A]n activity's commercial character is] determined by reference to the nature of the course of conduct or particular transaction or act rather than by reference to its purpose. *Id.*; *see also* RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 2, §§ 451, 453. *See, e.g.,* *De Sanchez v. Banco Central De Nicaragua*, 770 F.2d 1385 (5th Cir. 1985). The *De Sanchez* court defined "commercial activity" in the following fashion:

The focus of the exception to immunity recognized in § 1605(a)(2) is not whether the defendant generally engages in a commercial enterprise or activity . . . ; rather it is on whether the particular conduct giving rise to the claim in question constitutes or is in connection with commercial activity. . . . [W]e must determine whether the relevant activity is sovereign or commercial — a label which depends on the nature of the activity rather than on its purpose.

. . . .

. . . The legislative history of the FSIA provides more guidance. As examples of commercial activities, the House Report lists "a foreign government's sale of a service or a product, its leasing of property, its borrowing of money, its employment or engagement of laborers. . . . [C]ourts should "inquire whether the activity in question is one which private persons ordinarily perform or whether it is peculiarly within the realm of governments."

Id. at 1391-92, 1391 n.8 (citations omitted).

¹⁷³ *De Sanchez*, 770 F.2d at 1392.

grant standing.¹⁷⁴ However, claims may not always present distinguishable political and commercial transactions. In these instances, judicial restraint is proper.

Third, when a United States individual or corporation is not a direct party to the suit,¹⁷⁵ courts should balance political and commercial interests of both the United States and the unrecognized foreign government.¹⁷⁶ In many instances, courts may find that adjudication infringes on presidential policy.¹⁷⁷ For example, claims involving North and South Korea, or East and West Germany, may contain political issues requiring judicial abstention.¹⁷⁸ Compelling presidential interests may mandate restraint. If interests behind nonrecognition are irreconcilable with adjudicating the claim, courts must abstain.¹⁷⁹

It is understandable that courts distance themselves from difficult political litigation in deference to the President. But this distancing does not justify an unconditional judicial ban on unrecognized governments. Instead, courts should determine whether an unrecognized government's commercial claim offends a compelling presidential policy. Only after courts make this determination should they decide whether or not to grant standing.

¹⁷⁴ *Id.*; see also *supra* note 13.

¹⁷⁵ Courts can adjudicate claims not directly involving United States parties brought under international law. See RESTATEMENT OF FOREIGN RELATIONS LAW, *supra* note 2, § 111(1),(2):

(1) International law and international agreements of the United States are law of the United States and supreme over the law of the several States.

(2) Cases arising under international law or international agreements of the United States are within the Judicial Power of the United States and, subject to statutory limitations, and the requirements of justiciability are within the jurisdiction of the federal courts.

Id. The court has the power to hear these claims even without a United States party if the litigants bring forth a claim under customary international law. *Id.* comment e. The Federal Common Law of the United States adopts international law. *Id.* § 111. The United States Constitution refers to the "law of nations." U.S. CONST. art I, § 8.

¹⁷⁶ For a discussion of the balancing test, see *Federal Republic of Germany v. Elicofon*, 358 F. Supp. 747 (E.D.N.Y. 1972), *aff'd sub nom.*, *Kunstsammlungen zu Weimar v. Elicofon*, 478 F.2d 231 (2d Cir. 1973), *cert. denied*, 415 U.S. 931 (1974); see also *supra* note 112 and accompanying text.

¹⁷⁷ See *supra* notes 104-13 and accompanying text.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

CONCLUSION

Congress and the courts each possess authority to provide a forum for an unrecognized government's commercial claim. Courts should not blindly rely only on presidential recognition power to determine standing. If the motivations behind nonrecognition are irrelevant to the standing issue, then courts should adjudicate the claim.

When faced with competing presidential and congressional interests, courts must not use recognition to excuse themselves from adjudicating a claim.¹⁸⁰ The unconditional dismissal of an unrecognized government's commercial claim weakens Congress' control over commerce.¹⁸¹ If the United States continues in its path toward trading with the unrecognized North Korean and Vietnamese governments, then one branch of the United States government must assert itself and provide these foreign governments a forum for dispute resolution. Either Congress or the courts should grant standing to an unrecognized government's commercial claim, and finally put this commercial hobgoblin to rest.

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¹⁸⁰ See *supra* note 56 and accompanying text.

¹⁸¹ See *supra* notes 133-40 and accompanying text.