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## Claims Against the Republic of Cuba

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# CLAIMS AGAINST THE REPUBLIC OF CUBA

MARIE L. MURPHY\*

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## I. INTRODUCTION

This paper hopefully will apprise the legal community of the results of a program of claims against the government of Cuba as conducted by the Foreign Claims Settlement Commission of the United States. In light of the events which have been occurring in Chile and Peru, it appears that a review of the Cuban program may be beneficial at this time.

It is well known that in both Chile and Peru for at least five years there have been systematic take-overs of private property. Under its agrarian reform, Chile had redistributed 1,236,000 hectares by 1968,<sup>1</sup> and by 1972, some 350 more large farms had been affected.<sup>2</sup> In Peru, large landholdings were expropriated including, in 1969, the W.R. Grace & Company sugar properties, said to include nearly 25,000 acres of plantations and a sugar processing plant.<sup>3</sup> Other farm lands were taken, over 5,000,000 acres of which had been redistributed by November 1971,<sup>4</sup> and it appears that all large haciendas in Peru will be taken by 1975.<sup>5</sup>

The installations of International Petroleum Co., Ltd. (a subsidiary of Standard Oil of New Jersey), were expropriated by Peru in 1969, assertedly for back taxes of \$690 million.<sup>6</sup> Later Peru took over the phosphate and potash concession of Bayovar Mining, 80 percent of which was considered to be owned by Kaiser Aluminum of the United States.<sup>7</sup> The Chilean government required the sale by Anaconda Company of stock in its subsidiaries, Andes Copper Mining, and Chile Exploration, for an

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1. BRITANNICA BOOK OF THE YEAR *Agriculture* 75, 80 (1969).
2. 32 FACTS ON FILE 1, 40, 254 (1972).
3. BRITANNICA BOOK OF THE YEAR *Agriculture* 73, 81 (1970).
4. 32 FACTS ON FILE 10 (1972).
5. BRITANNICA BOOK OF THE YEAR *Agriculture* 65, 69 (1972).
6. BRITANNICA BOOK OF THE YEAR *Peru* 607 (1970).
7. 32 FACTS ON FILE 372 (1972).

asserted book value of \$200 million.<sup>8</sup> It also nationalized private banks and bought out the American-owned Cia. Chilena de Electricidad.<sup>9</sup>

Chile proceeded with its intervention into and expropriation of other industries, including the purchase of Bethlehem Steel's iron mines.<sup>10</sup> Lists were published of companies and enterprises to be nationalized.<sup>11</sup> The DuPont plants (which supplied 75 percent of the explosives for mining) were also bought,<sup>12</sup> and in early 1972 the First National City Bank of New York turned over its operations to the Chilean government.<sup>13</sup>

The interest of American-owned copper mines were acquired by Chile through a curious device. An amendment to the Chilean constitution authorized, for purposes of valuation of nationalized foreign interests, a deduction from adjusted book value of "excess profits" earned since 1955; President Allende then declared that any return in excess of 10 percent of book value would be deducted.<sup>14</sup> In this manner, the interests of Anaconda and Kennecott Copper Corporation (for its nationalized mines) were destroyed since the constitutional deductions exceeded the income. Further, the Cerro Corporation was presented a bill for compensation to replace profits assertedly taken out of Chile.<sup>15</sup>

Kennecott sued Chile for the first installment on notes held for its El Teniente copper mine, and succeeded in blocking bank accounts of Chilean enterprises in the United States. Thereafter, Chile agreed to pay the first installment. Upon receipt thereof, the attachments were vacated. Anaconda and Andes also brought suit, and the assets of two Chilean corporations were attached.<sup>16</sup> Chile had announced that \$203 million in its notes held by Anaconda would not be honored.<sup>17</sup>

International Telephone & Telegraph Company's Chilean Telephone Company (Chitelco) was under state administration.<sup>18</sup> ITT valued this investment at \$153 million, two-thirds of which was said to be insured by "Overseas Private Investment Corporation (OPIC)." Chile, however, contended that the value was considerably less and proposed to nationalize Chitelco.<sup>19</sup> In March 1972, OPIC faced possible claims of \$216 million from United States companies which had lost assets in Chile.<sup>20</sup> It appeared

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8. BRITANNICA BOOK OF THE YEAR *Chile* 196, 197 (1970).

9. BRITANNICA BOOK OF THE YEAR *Chile* 188, 189 (1971).

10. BRITANNICA BOOK OF THE YEAR *Chile* 172, 173 (1972).

11. 32 FACTS ON FILE 1, 40, 150 (1972).

12. 32 FACTS ON FILE 277 (1972).

13. 32 FACTS ON FILE 112 (1972).

14. Note that the amendment to the Chilean constitution authorizing the deductions referred to in the text is indeed a curious device. For a discussion of this amendment see Schwebel, *Chile, Confiscation and the Law*, Washington Post, Feb. 3, 1973, § A, at 14, col. 3.

15. BRITANNICA BOOK OF THE YEAR *Chile* 172-73 (1972).

16. N.Y. Times, April 1, 1972, § 1, at 6, col. 8.

17. N.Y. Times, March 2, 1972, § 1, at 7, col. 1.

18. N.Y. Times, March 23, 1972, § 1, at 16, col. 1.

19. 32 FACTS ON FILE 265 (1972).

20. N.Y. Times, March 6, 1972, § 1, at 5, col. 1.

that as of June 1971, the total of all potential expropriation claims in Chile may have been \$631.8 million.<sup>21</sup>

## II. FRAMEWORK FOR CLAIMS AGAINST CUBA

The Foreign Claims Settlement Commission of the United States<sup>22</sup> was established on July 1, 1954, pursuant to the Reorganization Plan No. 1 of 1954.<sup>23</sup> This terminated the operations of the War Claims Commission and the International Claims Commission,<sup>24</sup> transferring their

21. *Id.*

22. Hereinafter referred to as The Commission.

23. Reorganization Plan No. 1 of 1954, 68 Stat. 1279 [currently codified at 5 U.S.C. *App.* 560 (1970)].

24. The previous operations of the War Claims Commission, which came into existence under the provisions of the War Claims Act of 1948 (50 U.S.C. *App.* §§ 2001-16 (1964), *as amended*, 50 U.S.C. *App.* §§ 2001-16 (1970)), included receiving and adjudicating three categories of claims:

(1) Claims of members of the Armed Forces of the United States imprisoned by the enemy during World War II and who, while so imprisoned, were not provided the quantity or quality of food required by the terms of the Geneva Convention of July 27, 1929. . . .

(2) Claims of civilian American citizens captured by the Imperial Japanese Government during World War II at Midway, Guam, Wake Island, the Philippine Islands, or any territory or possession of the United States invaded by such government, or while in transit to or from any such place, or who went into hiding at any such place in order to avoid capture. . . .

(3) Claims of certain religious organizations in the Philippines affiliated with religious organizations in the United States, or by the personnel of such Philippine organizations, for relief furnished to American servicemen or civilian American citizens in the Philippines during World War II. . . .

With the enactment of Public Law 303, 82d Congress, approved April 9, 1952 (66 Stat. 47), jurisdiction over two additional categories of claims was conferred upon the War Claims Commission:

(1) Claims of members of the Armed Forces of the United States imprisoned by the enemy during World War II and who, while so imprisoned, were inhumanely treated or forced to perform uncompensated labor in violation of the terms of the Geneva Convention of July 27, 1929. . . .

(2) Claims of religious organizations eligible for reimbursement under the earlier program, for the post war reconstruction cost of their schools, colleges, universities, scientific observatories, hospitals, dispensaries, orphanages, and other educational, medical, or welfare institutions in the Philippines destroyed or damaged as a consequence of World War II.

The International Claims Commission, was established by the International Claims Settlement Act of 1949, approved March 10, 1950 (64 Stat. 12, 22 U.S.C. §§ 1621-27 (1964)) . . . [and] was given jurisdiction to receive and adjudicate claims of the Government of the United States and of nationals of the United States included within the terms of the Yugoslav Claims Agreement of 1948, or included within the terms of any claims agreement hereafter concluded between the Government of the United States and a foreign government (exclusive of governments against which the United States declared the existence of a state of war during World War II) similarly providing for the settlement and discharge of claims of the Government of the United States and of nationals of the United States against a foreign government, arising out of the nationalization or other taking of property, by the agreement of the Government of the United States to accept from that government a sum in en bloc settlement thereof.

When the Claims Convention between the governments of the United States and Panama entered into force on October 11, 1950, the International Claims Commission acquired jurisdiction over certain claims against the Government of Panama, as well as claims against the Government of Yugoslavia, under the International Claims Settlement Act of 1949.

FOREIGN CLAIMS SETTLEMENT COMMISSION OF THE UNITED STATES: DECISIONS AND ANNOTATIONS (1968), 1, 2 [hereinafter cited as FCSC DEC. & ANN. (1968)].

functions to the new commission. Various programs administered by the Commission in the past have involved claims against the governments of Bulgaria, Rumania, Hungary, Italy, Czechoslovakia, Poland, the Soviet Union and Yugoslavia, as well as a General War Claims program.<sup>25</sup>

At the beginning of 1959, the government of Cuba was taken over by Fidel Castro. The Castro regime seized much of the property in Cuba which was owned by the United States and its nationals. Contrary to accepted rules of international law, no payment was made by the Cuban government for the seized property. As a result of the hostile actions of the Castro regime, Congress enacted Public Law 88-666 (approved October 16, 1964), creating Title V of the International Claims Settlement Act, which, as amended,<sup>26</sup> provides for the determination of the amount and validity of claims against the government of Cuba by nationals of the United States.

The Act does not provide for the payment of losses by American citizens in claims against the government of Cuba.<sup>27</sup> Provision is made only for the determination by the Commission of the validity and amounts of such claims, with certification of the Commission's findings to the Secretary of State. This "pre-settlement adjudication" is designed to provide the Secretary of State with appropriate information useful in future negotiation of a claims settlement agreement with a friendly government in Cuba when diplomatic relations may be resumed.<sup>28</sup>

25. 68 Stat. 1279, 5 U.S.C. *App.* 560 (1970); 10th FCSC SEMIANN. REP. (June 30, 1959); 14th FCSC SEMIANN. REP. (June 30, 1961); 17th FCSC SEMIANN. REP. (July-Dec. 1962); 24 FCSC SEMIANN. REP. (Jan.-June 1966); 1967 FCSC ANN. REP.; and FCSC DEC. & ANN. (1968), *supra* note 24. See also Re, *The Foreign Claims Settlement Commission: Completed Claims Programs*, 3 VA. J. INT'L L. 101 (1963) [hereinafter cited as Re].

26. Act of Oct. 19, 1965, Pub. L. No. 89-262, 79 Stat. 988, *amending* International Claims Settlement Act, tit. V, 78 Stat. 1110 (1964), 22 U.S.C. §§ 1643a-k (1964), as *amended*, 22 U.S.C. §§ 1643a-k (1970). Throughout this article, the International Claims Settlement Act, tit. V, 78 Stat. 1110 (1964), 22 U.S.C. §§ 1643a-k (1964), as created by Pub. L. No. 88-666, will be cited as Title V. The original version, as codified, will be referred to, except where amendments are pertinent to the discussion, in which case the amendments will also be cited. Title V, as amended, can be found at 22 U.S.C. §§ 1643a-k (1970). See Re, *The Foreign Claims Settlement Commission and the Cuban Claims Program*, 1 THE INT'L LAWYER 81 (1966).

Specific actions of Cuba included the Agrarian Reform Law of May, 1959, Law 851 of July 1960, providing for the expropriation of American-owned properties, the Urban Reform Law, and many others. See Sutton, *American Claims Against Cuba*, 3 THE INT'L LAWYER 741 (1969) [hereinafter cited as Sutton], for a description of some of the laws and leading cases, so far as then determined.

27. The matter of payment of losses sustained by Americans was considered by the Congress as well as by the executive branch of our government when this legislation was examined prior to enactment. The proposal originally included a section which would have provided for the liquidation of Cuban assets in the United States, making the proceeds available for payments on losses determined by the Commission. However, after a study by the Treasury Department and the Department of State upon the direction of the President, it was concluded that Cuban government assets in the United States were not sufficient to warrant such action. This section was then deleted from the legislation. For mention of the earlier proposals, see Re, *supra* note 25, and also Re, *Domestic Adjudication and Lump-Sum Settlement as an Enforcement Technique*, 58 AM. SOC'Y INT'L L. PROC. 39 (1964). See also Sutton, *supra* note 26, at 742.

28. See Lillich, *The Cuban Claims Act of 1964*, 51 A.B.A.J. 445 (1965). The language of footnote 25 *supra* was subsequently deleted from the legislation as being too broad whereas

Title V, as enacted, gave the Commission jurisdiction over claims of United States nationals against the government of Cuba. It gave the Commission authority to receive and determine, in accordance with applicable substantive law, including international law, the amount and validity of such claims arising since January 1, 1959 for (1) losses resulting from the taking of property including rights or interests therein, owned wholly or partially, directly or indirectly at the time by United States nationals; and (2) disability or death resulting from actions taken by or under the authority of the government of Cuba.<sup>29</sup>

The program set forth in Title V was scheduled to be completed by May 1, 1970. However, due to budgetary limitations imposed, the Commission requested and was granted an extension of time, and the completion date was moved to July 6, 1972 (which for practical purposes called for completion by June 30, 1972, the close of the fiscal year).<sup>30</sup>

### III. FILING OF CLAIMS

The program officially opened on November 1, 1965, and the deadline for filing such claims was May 1, 1967.<sup>31</sup> Under the Commission's Regulations,<sup>32</sup> notice of an intent to file a claim given during April, 1967 extended the time to May 31, 1967. As of April, 1972, 8,813 claims had been filed under this program.<sup>33</sup> This included 1,036 claims which the Commission opened on behalf of Americans who had been unable to leave Cuba prior to the close of the formal filing period.<sup>34</sup>

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the kind of debt involved would be eligible for consideration if the refusal to pay first arose after January 1, 1959. See H.R. REP. NO. 706, 89th Cong. 1st Sess. 1-2 (1965). See also Re, *The Presettlement Adjudication of International Claims, International Arbitration* (Sanders 1967), cited in and enlarged upon in Freidberg, *A New Technique in The Adjudication of International Claims*, 10 VA. J. INT'L L. 282 (1970) [hereinafter cited as *Claims Adjudication*].

Comment has been made as to the handing down of decisions. E.g., *Claims Adjudication*, *supra* at 284. Upon inauguration of the program on April 1, 1966, research commenced, aids were accumulated, procedures were set up and some decisions issued. A staff was transferred to the Division in May 1967, upon completion of the General War Claims program. By the end of 1968, 3,402 decisions had been handed down in 8,368 claims, or about 40.17 percent. Additional claims were received thereafter. Many of the claims were of the class-action type, i.e., shareholders of corporations not qualifying as United States nationals (*Claims Adjudication*, *supra* at n.14) or certain bondholders. See Sutton, *supra* note 26 at 284. These approximated 3,725 cases (or about 42 percent of 8,806 claims as of December, 1971) which did not require individual legal research in each case. Approximately, 1,720 claims were dismissed at different times for various reasons. Thus, possibly 2,521 were perhaps "hard core" cases not determined by the beginning of 1969 (not including 438 not then on record). It may be noted that a massive reduction in force occurred in September 1968. By the beginning of 1969, the class action decisions were commencing to issue. This clarification is offered in the interest of closer accuracy in future examinations.

The status of claims as of early 1969 is also discussed in Sutton, *supra* note 26, at 742.

29. Title V, § 503, 78 Stat. 1110 (1964), 22 U.S.C. § 1643(b) (1964).

30. 22 U.S.C. § 1643i (1970).

31. 30 Fed. Reg. 212 (1965).

32. FCSC Reg., 45 C.F.R. §§ 531.1(d), 531.2(j) (1972).

33. Cuban Docket of the Foreign Claims Settlement Commission of the United States.

34. This is not inconsistent with Sutton, *supra* note 26, at 742, because the statistics in that work apparently discounted some claims already dismissed for lack of prosecution after return of the individuals to the United States.

As stated above, the declared purpose of Congress in enacting the subject legislation was to provide a vehicle for American nationals to have their losses determined and reported to the Secretary of State for future negotiation of a claims settlement agreement.<sup>35</sup> Accordingly, the Commission ruled that it would accept, for consideration on the merits, claims filed after the deadline as long as such consideration did not impede the determination of timely-filed claims.<sup>36</sup> It also decided to allow consideration of claims which arose for the first time after the close of the filing period.<sup>37</sup>

#### IV. NATIONALITY AND CONTINUOUS UNITED STATES CHARACTER

Title V requires that for a claim to be considered, the property must be owned in some degree by a *national* of the United States on the date of the loss and that the claim must have been *continuously owned* by a United States national or nationals from the date the claim arose until the date of filing.<sup>38</sup> With respect to individuals, the Act defined a national of

35. Title V, § 507(a), 78 Stat. 1112 (1964), 22 U.S.C. § 1643f(a) (1964).

36. Claim of John Korenda, FCSC Claim No. CU-8255 (Mar. 26, 1969). Claimant was a merchant seaman who received no notice of the program or filing period. The claim being based on an indemnity agreed to by the Cuban Government and acknowledged in 1959 for the shooting of claimant's brother.

37. Claim of Vivian Lopez Morales, FCSC Claim No. CU-8739 (Jan. 12, 1971). The claim arose when claimant was permitted to leave Cuba, subsequent to the close of the formal filing period.

38. Title V, § 504(a), 78 Stat. 1111 (1964), 22 U.S.C. § 1643c(a) (1964); Claim of Sigridur Einarsdottir, 25 FCSC SEMIANN. REP. 45 (July-Dec. 1966) (filed by a non-United States national based on a bank account inherited from a son who had been a United States national).

In connection with the principle of continuous nationality, reference must be made to an article by Sidney Freidberg (an ex-Commissioner of the Foreign Claims Settlement Commission) entitled: *Unjust and Outmoded—The Doctrine of Continuous Nationality in International Claims*, 4 THE INT'L LAWYER 835 (1970). In discussing the Polish Claims Program, provided for by the Polish Claims Agreement of July 16, 1960 and which was administered by the Commission under Title I of the International Claims Settlement Act of 1948, as amended, Mr. Freidberg noted that the agreement provided for the payment of such claims as were, from the date of taking "to the date of entry into force of the Agreement" continuously owned by nationals of the United States. The enabling statute provided that the Commission should apply: (1) provisions of applicable claims agreements; and then (2) applicable principles of international law, justice and equity. Freidberg, *supra* at 842, however states the first provision declared the date of the Agreement to be the last date when the claimed property needed be owned by a United States national (whereas a reading shows it must in fact be owned to at least that date). Mr. Freidberg asserted that the Commission simply ignored the first provision, leaped the hurdle by taking no notice of its existence, and found itself on solid footing apparently by citing a portion of Title IV which provided for claimed property to be continuously United States-owned to the date of filing. Claim of Richard O. Graw, Ex'r of the Estate of Oscar Meyer, Deceased, Claim No. PO-7595 (unpublished decision).

It now becomes necessary to allude to the *Graw* decision, FCSC DEC. & ANN. (1968) 466-67. The discussion refers to the requirement of international law of continuous ownership of a claim from the time it arose until presentation to the adjudicating body. The entire decision is found in 23 FCSC SEMIANN. REP. 52 (July-Dec. 1965). A careful reading of the decision discloses the statement that the Commission has consistently held that the continuity of nationality principle must be applied to the claims before it under the International Claims Settlement Act, citing Claim of the Hanover Bank, 10 FCSC SEMIANN. REP. 16 (Jan.-June 1959).

the United States as a natural person who is a citizen of the United States.<sup>39</sup>

In the matter of processing claims based on bond and stock interests, the Commission found itself faced with a problem shared by many claimants in establishing the fact of continuous United States ownership of the claim from the date of loss to the date of filing. This was resolved following a study which disclosed that securities of this type were almost entirely owned and traded by persons or firms having addresses in the United States. The Commission found that it would be justified to infer that the claimed securities were continuously owned by a national or nationals of the United States from the date of loss to the date on which they were purchased by the claimant.<sup>40</sup>

Moreover, in connection with the matter of continuous United States ownership of a claim, there arose the problem of claims which had been sold or assigned. In a claim based upon the asserted loss of payment for merchandise shipped to Cuba, an assignor who transferred his claim to another prior to filing a claim with the Commission was found not to be a proper party claimant.<sup>41</sup> However, it was determined that an assignee by purchase, who qualified as a United States national prior to filing of claim with the Commission, would be entitled to recover for the amount paid to the United States national assignor for property lost in Cuba.<sup>42</sup> Further, the purchase in 1964 of all assets of a company operated to trans-

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In *Hanover Bank*, the beneficial owner of the bonds in question did not become a national of the United States until some time after he inherited his interest. In the decision on the matter, necessarily denying the claim, the Commission referred to H.R. REP. No. 624, 84th Cong., 1st Sess. 13 (1956), dealing with H.R. 6382, which became Title III of the International Claims Settlement Act, and the Commission set out certain language:

[I]n connection with all categories of claims (referred to in Sections 303, 304 and 305) the Commission is authorized and directed to determine the claims in accordance with applicable substantive law, including international law.

.....  
 Another general principle of international law which could come into play in the consideration of these claims is the general rule that such a claim must have been continuously owned by a United States national (not necessarily the same one) at all times between the time the claim arose and the presentation of the claim, whether directly to the foreign government or before the appropriate adjudicating body. Thus, if at any time subsequent to the time of the loss, a claim originally accruing to a United States national had become vested in a non-national . . . the claim would not be espoused even if it was thereafter reacquired by a United States national.

(It is seen that the discussion in FCSC DEC. & ANN. (1968) at 178, contains a printer's error.)

Reverting to the *Graw* decision, it becomes clear that the additional reference therein to the language of Title IV merely sets out the rule as already recognized by the legislators. This same language was repeated in Title V, § 504(a), 78 Stat. 1111 (1964), 22 U.S.C. 1643c(a) (1964). See Claim of Sigridur Einarsdottir, 25 FCSC SEMIANN. REP. 45 (July-Dec. 1966). The *Graw* case required the Commission to take cognizance of the fact that in claims filed and administered under Title I of the Act, it must observe the applicable principles of international law concerning continuous nationality.

39. Title V, § 502(1)(A); 78 Stat. 1110 (1964), 22 U.S.C. § 1643a(1)(A) (1964); Claim of Joseph Dallos Hollo, 25 FCSC SEMIANN. REP. 46 (July-Dec. 1966).

40. Claim of Samuel J. Wikler, 1968 FCSC ANN. REP. 47.

41. Claim of Michael Vasti, 1967 FCSC ANN. REP. 62.

42. Claim of Pan. Am. World Airways, Inc., FCSC Claim No. CU-2576 (July 31, 1968).



fer the company's claim against Cuba, and the assignee was then entitled to a certification for the loss, both parties having qualified.<sup>43</sup> However, the sale of stock certificates which evidenced ownership of an interest in a nationalized corporation, after a claim had been filed with the Commission, was found to divest the claimant-assignor of his claim against Cuba in the absence of evidence to the contrary in the record.<sup>44</sup> In addition, the Commission held that no loss could be certified for the difference between the price paid for stock in 1951 and the sales price in November, 1960.<sup>45</sup>

The term "national of the United States" also includes

a corporation or other legal entity which is organized under the laws of the United States, or any State, the District of Columbia, or the Commonwealth of Puerto Rico, if natural persons who are citizens of the United States own, directly or indirectly, 50 per centum or more of the outstanding capital stock or other beneficial interest of such corporation or entity.<sup>46</sup>

An illustration of this concept was the Commission's holding that the General Aniline & Film Corporation (GAF) qualified as a national of the United States.<sup>47</sup> GAF was organized in Delaware, and its claim against Cuba (for unrecovered sums due from customers in Cuba) arose in 1960. At that time, over 90 percent of all outstanding shares of stock of the corporation were held by the Attorney General of the United States, having been vested in the Alien Property Custodian in 1942.<sup>48</sup> On November 12, 1964, there was a reclassification of the stock, followed by public sale of all shares held by the Attorney General on March 17, 1965. Thereafter, the record showed that over 99 percent of the outstanding shares of the Corporation were held by persons with addresses in the United States, and who were presumed to be nationals of the United States. Although claims presented by the United States of America could not, consistent with legislative intent, be considered,<sup>49</sup> the Commission found that the United

43. Claim of Lunkenheimer Co., FCSC Claim No. CU-0869 (Sept. 20, 1967).

44. Claims of Harry Mitgang & Anna Mitgang, 1967 FCSC ANN. REP. 66.

45. Claim of Pearl Taul Flaumhaft, FCSC Claim No. CU-8579 (Sept. 22, 1971).

46. Title V, § 502(1)(b), 78 Stat. 1110 (1964), 22 U.S.C. § 1643a(1)(B) (1964), Claim of F.L. Smidth & Co., 25 FCSC SEMIANN. REP. 44 (July-Dec. 1966); Claim of Cia. Ganadera Becerra, S.A., 25 FCSC SEMIANN. REP. 47 (July-Dec. 1966).

Some 1,146 claims have been filed by corporations, an increase in the figure of 1,076 reported by Sutton, *supra* note 26, in July 1969.

47. Claim of GAF Corp., FCSC Claim No. CU-1953 (Apr. 7, 1971). See also Claim of Silesian Am. Corp., 23 FCSC SEMIANN. REP. 49 (July-Dec. 1965).

48. 7 Fed. Reg. 3148 (1942).

49. Claims of the United States of America, 1967 FCSC ANN. REP. 50. Earlier decisions were in Claim of George H. Earle III, 10 FCSC SEMIANN. REP. 24 (Jan.-June 1959), and Claim of United States of America, 24 FCSC SEMIANN. REP. 31 (Jan.-June 1966). The congressional intent to exclude from Title V claims by the United States is expressed in the report of the Committee on Foreign Affairs of the House of Representatives in H.R. No. 9336 which became Public Law No. 89-262 (amending Title V of the International Claims Settlement Act. H.R. REP. NO. 706, 89th Cong., 1st Sess. 4 (1965)). In that report, it is stated:

U.S. Government claims against Cuba are not governed by this act and will be handled separately from the U.S. private claims to be adjudicated under this legis-

States of America and its officers, the Attorney General and the Alien Property Custodian, qualified as nationals of the United States, and permitted the finding made in the GAF claim.<sup>50</sup>

Several claims raised the problems of to whom the nationality test applied. A claim based on an ownership interest in a corporation which itself qualified as a national of the United States could not be considered.<sup>51</sup> However, where a nationalized corporation did not qualify as a United States national, the American stockholder could claim for his respective interest in the loss.<sup>52</sup> A claim based upon a direct ownership interest in a non-United States national corporation was to be considered without regard to the percent of ownership vested in the claimant.<sup>53</sup> But a claim based upon an indirect interest could be considered only if at least 25 percent of the ownership was vested in nationals of the United States.<sup>54</sup>

The Commission maintained its established position that the test of United States nationality must be applied to the beneficial owner of the claim and not to the nominal or mere legal title holder.<sup>55</sup>

## V. PROPERTIES AND TAKING

Title V provides for claims for losses resulting from "nationalization, expropriation, intervention, or other taking of, or special measures directed against, property. . . ."<sup>56</sup> Property is defined as meaning any property, right, or interest, including leasehold interests, and debts of the Government of Cuba, or nationalized enterprises; as well as debts which constituted a charge on property taken by Cuba.<sup>57</sup> A "taking," as it is commonly used, refers to a deprivation of property through confiscation, nationalization, intervention, or loss of control. The Cuban Government has used many forms of "taking." One method used has been confiscation because of alleged unjust enrichment, and this was the subject of a series of laws concerning the recovery of assertedly misappropriated property.<sup>58</sup>

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lation. However, in order that the full extent of the U.S. Claim Against Cuba be known, it is recommended that the total of U.S. government claims (including claims arising from official U.S. property, the Moa-Bay nickel development, and Export-Import Bank loans) be promptly compiled and made available to this Committee.

50. Claim of GAF Corp., FCSC No. CU-1953 (April 7, 1971).

51. Title V, § 505(a), 78 Stat. 1110 (1964), 22 U.S.C. § 1643d(a) (1964), *as amended*, 79 Stat. 988 (1965), 22 U.S.C. § 1643d(a) (Supp. I, 1965); Claim of Mary F. Sonnenberg, 25 FCSC SEMIANN. REP. 48 (July-Dec. 1966).

52. Claim of Parke, Davis & Co., 1967 FCSC ANN. REP. 33. It is of interest to note that by April 1972 some 996 entities were the subject of claims (as distinguished from corporate claimants). See note 46 *supra*.

53. Title V, § 505(b), 78 Stat. 1111 (1964), 22 U.S.C. § 1643d(b) (1964); Claim of Ruth Anna Haskew, 1968 FCSC ANN. REP. 31.

54. Title V, § 505(c), 78 Stat. 1112 (1964), 22 U.S.C. § 1643d(c) (1964); Claim of Avon Products, Inc., 1967 FCSC ANN. REP. 35.

55. Claim of The Florida Nat'l Bank & Trust Co., 1970 FCSC ANN. REP. 67.

56. Title V, § 503(a), 78 Stat. 1110 (1964), 22 U.S.C. § 1643b(a) (1964), *as amended*, 79 Stat. 988 (1965), 22 U.S.C. § 1643b(a) (Supp. I, 1965).

57. Title V, § 502(3), 78 Stat. 1110 (1964), 22 U.S.C. § 1643a(3) (1964).

58. Law No. 16 of January 17, 1959 Gaceta Oficial (Cuba); Law No. 78 of February

Confiscation was also effected as a penalty imposed in criminal proceedings in cases of counter-revolutionary crimes, but this method of "taking" has been held not to be within the scope of the Act. In one case, a claimant had stated that she was sentenced to prison after being convicted of counter-revolutionary activities. The assertion that she was convicted for such activities was supported by a substantial amount of evidence, including a certified translation of the court decree, her own affidavit, and a copy of an article which she had written on the subject. It was undisputed that her properties in Cuba were confiscated as a result of her conviction for violating the criminal laws of Cuba. The issue was whether the confiscation fell within the purview of Title V.

The Commission adhered to the principle that a State has authority to punish those who violate its criminal laws, and that such punishment may include fines, imprisonment and confiscation of properties. In order for a claimant to succeed in an action based on such taking, it must be shown that a violation of international law occurred. Nothing of record suggested that the claimant was denied due process of law at the trial, nor that there was a denial of justice such as an unfair trial; further, the sentence of confiscation was held not to be unusual or excessive punishment. It appeared that the claimant had been represented by able counsel, and that she declined to have anyone from the United States Embassy present at the proceedings. Accordingly, the Commission found that no rule of international law had been violated by the confiscation of the claimant's properties.<sup>59</sup>

Other forms of taking utilized by the Cuban government included nationalization,<sup>60</sup> intervention,<sup>61</sup> and loss of control. The latter was the consequence of a series of governmental restrictions applied to the maritime industry which resulted in the deprivation of dominion and control over American owned subsidiaries in Cuba, and was found to constitute a constructive taking of such subsidiaries by the Government of Cuba even in the absence of any formal act of nationalization or taking.<sup>62</sup>

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19, 1959 Gaceta Oficial (Cuba); Law No. 715 of January 26, 1960 Gaceta Oficial (Cuba); Law No. 784 of April 27, 1960 Gaceta Oficial (Cuba).

59. Law No. 664 of December 23, 1959 Gaceta Oficial (Cuba); Claim of Geraldine Isabella Shamma, 1969 FCSC ANN. REP. 49.

60. Claim of Berwind Corp., FCSC Claim No. CU-0538 (Feb. 7, 1968).

The Commission held that it did not follow that the decrees of October 13, 1960 (Laws 851, 890, and 891), cited by Rafat, *Legal Aspects of the Cuban Expropriation of American-Owned Property*, 11 ST. LOUIS U.L.J. 45 (1966), nationalized all United States property in Cuba (Law 851), and that Laws 890 and 891 primarily affected non-American interests. In fact, these laws were followed by innumerable resolutions (in addition to the three most publicized) and, moreover, Law 890 was followed two days later by a "corrected" version, which purported to omit several non-American names and add several others.

61. Claim of Parke, Davis & Co., 1967 FCSC ANN. REP. 33.

62. Claim of Garcia & Diaz, Inc., 1970 FCSC ANN. REP. 30. See also H.R. REP. NO. 706, 89th Cong., 1st Sess., 3-4 (1963), stating in part:

No special measures by the Castro government directed against the property of nationals of the United States are needed to show nationalization or confiscation when it is evident that a Cuban corporation owned by U.S. nationals is deprived of its management and assets by or with the concurrence of the Castro government.

Among the first of the claims to be determined was one based on so called "old" bank accounts—those established prior to the currency exchange of August, 1961 (discussed below). The Commission determined that such old bank accounts were subject to Cuban Law 989,<sup>63</sup> which took the properties of those who left Cuba, and with nothing to the contrary appearing in the record, the Commission entered a finding to that effect.<sup>64</sup>

On August 4, 1961, the Cuban Government published Law 963,<sup>65</sup> which provided for a currency exchange to be carried out on August 6-7, 1961. Old currency was to be turned in for new notes, with no change in value. Although a 60-day extension was provided to those showing good reason for not surrendering on the specified days, Article XI of Law 963 declared all currency which at the time of promulgation was outside the jurisdiction of the Cuban State to be null and of no legal force. In view of this provision, the Commission found that a claimant who had left prior to that time without being able to convert her currency, suffered a loss within the contemplation of the Act.<sup>66</sup>

Law 963 further provided that no one was allowed to receive more than 200 new pesos, and that all currency in excess of that amount was placed in a special account in the individual's name. It was clear that Law 963 was intended to draw funds then in circulation and not on deposit into the government's possession. Thereafter, by Law 964,<sup>67</sup> published on August 9, 1961, provisions were made for drawing up to 1,000 pesos from the "special accounts," the balance up to 10,000 pesos to remain in the accounts (which were nevertheless beyond the control of the owners), with all amounts over 10,000 pesos passing to the State Treasury. The Commission found that such accounts were effectively confiscated by the provisions of Law 964 as of its effective date of August 9, 1961.<sup>68</sup>

In 1959, Cuba enacted an agrarian reform law,<sup>69</sup> which was published on June 3, 1959. This established the National Agrarian Reform Institute and provided for the expropriation of rural properties and distribution of such properties among agricultural workers. The Fifth Transitory Provision thereof<sup>70</sup> provided that until regulations for the law were promulgated, it should be applied through resolutions of the National Agrarian

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Constructive nationalization or confiscation could be shown as the actual result of such actions by the Castro government and should be sufficient grounds for a valid claim for loss of property under this act.

63. Law No. 989 of December 6, 1961 *Gaceta Oficial* 23705 (Cuba).

64. Claim of Floyd W. Auld, 25 *FCSC SEMIANN. REP.* 55 (July-Dec. 1966).

65. Law No. 963 of August 4, 1961 *Gaceta Oficial* (Cuba) [hereinafter cited as Law 963].

66. Claim of Betty G. Boyle, 1968 *FCSC ANN. REP.* 81.

67. Law No. 964 of August 9, 1961 *Gaceta Oficial* 15005 (Cuba) [hereinafter cited as Law 964].

68. Claim of Dorothy G. O'Kieffe, *FCSC Claim No. CU-1242* (Jan. 3, 1968).

69. Agrarian Reform Law of June 3, 1959 *Gaceta Oficial* (Cuba).

70. The Agrarian Reform Law is divided into nine chapters, containing 67 "Articles," followed by a section entitled "Transitory Provisions."

Reform Institute. Regulations for carrying out the expropriation of such rural property were subsequently set forth in Law 588,<sup>71</sup> published in October 9, 1959. As a consequence, not all agricultural properties were taken as of the date of publication of the Agrarian Reform Law, but were taken at different times.<sup>72</sup>

Law 851,<sup>73</sup> published on July 7, 1960, authorized the expropriation of properties belonging to United States citizens. Under this law, implemented by Resolution 2,<sup>74</sup> published on September 17, 1960, the assets of The First National City Bank of New York, The First National Bank of Boston, and The Chase Manhattan Bank were nationalized. Claims therefor were filed with the Commission.<sup>75</sup>

Bonds, in general, represent debts which may be certifiable as debts of nationalized enterprises,<sup>76</sup> except that if the issuing enterprise qualified as a national of the United States, and its properties were nationalized, the debt must have been a charge on the property which was taken by Cuba.<sup>77</sup> Of course, not all charges on nationalized property were represented by bonds issued by enterprises. Claims based on mortgages on such nationalized properties were also found to be within the scope of the Act.<sup>78</sup>

A large number of the claims presented were based on losses incurred as a result of goods shipped to customers in Cuba, who deposited payment in banks which in turn were precluded from transferring such funds to the United States. When the draft was paid to the bank, it was no longer a debt of the consignee, and it was the duty of the bank to request permission to release dollars for transfer to the consignor. The Cuban Stabilization Fund, and later the Exchange Board of The National Bank of Cuba, indulged in extraordinary requirements for documentation to be considered in connection with requests for dollar releases.<sup>79</sup>

71. Law No. 588 of October 9, 1959 Gaceta Oficial (Cuba).

72. Heirs of Grenville M. Dodge, Deceased, FCSC Claim No. CU-1290 (Feb. 12, 1968); see also Rafat, *Legal Aspects of the Cuban Expropriation of American-Owned Property*, 11 St. Louis U.L.J. 45 (1966).

73. Law No. 851 of July 7, 1960 Gaceta Oficial 16367 (Cuba) [hereinafter cited as Law 851].

74. Resolution No. 2, Sept. 17, 1960, XXIV Leyes del Gobierno Provisional de la Revolucion (Septiembre 1960) 127 (Cuba), translated in 43 DEP'T STATE BULL. 316 (1960).

75. These banks filed FCSC Claims Nos. CU-2628, CU-2268 and CU-2685, respectively, pertaining to bank assets. FCSC Claim No. CU-2628 can be found at 1969 FCSC ANN. REP. 58; FCSC Claim No. CU-2268 can be found at 1969 FCSC ANN. REP. 58.

76. Title V, § 502(3), 78 Stat. 1110 (1964), 22 U.S.C. § 1643a(3) (1964); Claim of Michael Hanley, FCSC Claim No. CU-2118 (Dec. 23, 1968), which claim was based on bonds issued by the Cespedes Sugar Company (of Cuba).

77. Title V, § 505(a), 78 Stat. 1111 (1964), 22 U.S.C. § 1643d(a) (1964), as amended, 79 Stat. 988 (1965), 22 U.S.C. 1643d(a) (Supp. I, 1965). Claim of Anaconda American Brass Co., 1967 FCSC ANN. REP. 60 was based in part on a debt of the Cuban Electric Company which qualified as a United States national (FCSC Claim No. CU-2578 (Aug. 19, 1970)); and Claim of Boise Cascade Corp., 1969 FCSC ANN. REP. 66 was based in part on certain mortgage bonds issued by the Cuban Electric Company.

78. Claim of Robert F. Sanchez, FCSC Claim No. CU-0116 (Mar. 19, 1969).

79. The requirements referred to are mentioned in the Commission's decision in Claim

On September 29, 1959, the Cuban Government published Law 568<sup>80</sup> which made it an offense for a bank to transfer funds without government permission. In fact, consignees were also precluded from making payments to the bank in satisfaction of the drafts. The Commission considered this matter at length, and while recognizing the sovereign authority of a nation to control its national economy and, in furtherance of that end, to regulate foreign exchange, nevertheless recognized that such a law must have a genuine intention and must not contravene international law. Thus, the Commission concluded that Law 568 and the Cuban government's implementation thereof was not in reality a legitimate exercise of its sovereign authority to regulate its foreign exchange, but constituted an intervention by the government of Cuba into the contractual rights of claimants which resulted in the taking of American-owned property within the meaning of the Act.<sup>81</sup>

Debts of the Cuban Government are specifically included in the Act,<sup>82</sup> and a study of the history of events with respect to bond obligations of the Republic of Cuba reveals that the Cuban Government defaulted on the payment of interest on its 4½ percent Bonds of the External Debt of the Republic of Cuba, 1937-1977, on December 31, 1960. The Commission concluded that the failure of the Government of Cuba to make such obligated payment, occurring after January 1, 1959, gave rise to a claim for the unpaid indebtedness.<sup>83</sup> Other bond issues of the Republic of Cuba were found to be within the scope of Title V.<sup>84</sup> Additional claims were based on other instances of unpaid Cuban Government debts, such as asserted losses in connection with a contract with the Government of Cuba. In one of these instances, after a contract concerning the transportation of mail had been terminated, the Government of Cuba continued to acknowledge the debt to the claimant as late as December 14, 1959. On the basis of the record, the Commission held that the Government of Cuba had failed and refused to honor an existing obligation to the claimant, and concluded that the claimant sustained a loss as of December 15, 1959.<sup>85</sup>

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of Schwarzenbach Huber Company, 25 FCSC SEMIANN. REP. 58 (July-Dec. 1966). They included demands for information and evidence with respect to the Cuban agent's commission, an independent audit of consignee's accounts as well as an audit of the auditor's accounts, an explanation of deductions, an explanation of length of time in passage, and a complete list of consignee's accounts payable.

80. Law No. 568 of September 29, 1959 *Gaceta Oficial* (Cuba).

81. Claim of Schwarzenbach Huber Co., 25 FCSC SEMIANN. REP. 58 (July-Dec. 1966); and Claim of Etna Pozzolana Corp., 1967 FCSC ANN. REP. 46.

82. Title V, § 502(3), 78 Stat. 1110 (1964), 22 U.S.C. § 1643a(3) (1964).

83. Claim of Clemens R. Maise, 1967 FCSC ANN. REP. 68.

84. These included: 4 percent Republic of Cuba Veterans Courts and Public Works Bonds, 1953-1983 (Claim of Westchester Fire Insurance Co., CU-1703 (unpublished decision)); 5 percent Republic of Cuba Internal Debt Bonds of 1905; 4½ percent Cuban Government Bonds of the Tunnel of Havana (Claim of Frederick Snare Corp. and Frederick Snare Overseas Corp. CU-2035 (unpublished decision)); 4 percent Bonds of the Public Debt of Cuba 1950-1980 (Claim of Patricia O'Donoghue de Broeh, CU-2927, Amended Proposed Decision (unpublished decision)).

85. Claim of Peninsular & Occidental S.S. Co., FCSC Claim No. CU-2218 (Mar. 26, 1969).

Debts of nationalized enterprises, other than bonds, involving services rendered and disbursements made on behalf of The Cuba Railroad Company, which did not qualify as a national of the United States although incorporated in New Jersey, were held allowable.<sup>86</sup> However, where a nationalized enterprise did not show a net worth, and the assets were sufficient to cover the debt, this was found certifiable.<sup>87</sup> On the other hand, where the assets of a nationalized Cuban subsidiary were not sufficient to cover its debts and, moreover, the enterprise was wholly insolvent when nationalized, the Commission found that the loss claimed was not due to a taking by the Government of Cuba.<sup>88</sup>

In general, mining and petroleum concessions in Cuba were affected by Cuban Law 617 of October 30, 1959<sup>89</sup> and Law 635 of November 23, 1959<sup>90</sup> which cancelled applications for exploration and exploitation of concessions.<sup>91</sup>

The motion picture industry was also the source of a number of claims based generally on rights which were affected by Resolution 2868, published by the Government of Cuba on May 10, 1961.<sup>92</sup> These claimants were engaged in the distribution, in Cuba, of motion picture products which were obtained principally from their respective production units. However, rights to prints produced by independent producers were also acquired by some.<sup>93</sup>

Pensions were the basis for a number of claims. The Cuban Government enacted Law No. 351 on May 29, 1959,<sup>94</sup> providing for the establishment of the Banco de Seguros Sociales de Cuba as an agency of the Government to supervise and administer social insurance, as well as to direct the policy concerning all social security matters. This law also provided for the transfer of the assets and liabilities of all pension funds to the Banco de Seguros Sociales de Cuba. Evidence before the Commission showed that retirees received their pensions up to the time of departure from Cuba, and thereafter the benefits remained unpaid. Accordingly, the

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86. Claim of Kramer, Marx, Greenlee and Backus, 25 FCSC SEMIANN. REP. 62 (July-Dec. 1966).

87. Claim of Goodyear Tire & Rubber Co., FCSC Claim No. CU-0887 (Jan. 10, 1968); and Claim of Honeywell, Inc., FCSC Claim No. CU-2678 (Nov. 6, 1968).

88. Claim of Pepsico, Inc., FCSC Claim No. CU-3596 (May 19, 1971).

89. Law No. 617 of October 30, 1959 Gaceta Oficial 17 (Cuba).

90. Law No. 635 of November 23, 1959 Gaceta Oficial 26499 (Cuba).

91. Claim of Felix Heyman, FCSC Claim No. CU-0412 (Aug. 14, 1968). In this claim, based on loss of an interest in Cuban Venezuelan Oil Voting Trust of Cuba, the record disclosed that the stockholders of 24 Cuban companies transferred their interests to the Trust which was authorized to act for them. The areas held by the companies forming the Trust included oil concessions, in various conditions, over a total area of 6,483,942 hectares of land.

92. Resolution 2868 of May 10, 1961 Gaceta Oficial (Cuba) pursuant to Cuban Law No. 851.

93. A description of such a claim, the transactions and treatment by the commission, including the valuation of black and white prints and color prints, is set out in the Claim of Twentieth Century-Fox Film Corp., FCSC Claim No. CU-2114 (Feb. 3, 1971).

94. Law No. 351 of May 29, 1959 Gaceta Oficial (Cuba).

Commission found that this failure to honor and transfer such benefits constituted a taking of property.<sup>95</sup>

In addition to the Agrarian Reform Law<sup>96</sup> and other forms of taking, real property was also subject to the Urban Reform Law of October 14, 1960.<sup>97</sup> Article 2 of this law outlawed the renting of urban properties and all transactions involving transfer of the total or partial use of such properties. It covered residential, commercial, industrial and business office properties. The Commission found the numerous provisions of this law to constitute the basis of takings within the scope of Title V.<sup>98</sup>

Contracts for the hire of safe deposit boxes in Cuban banks were declared null and void as of February 17, 1961, pursuant to an Administrative Instruction of February 15, 1961, issued by the President of the National Bank of Cuba.<sup>99</sup> Lessees were allowed thirty days to open and remove the contents, in the presence of the bank director. Further, boxes not opened within the stipulated time were to be forced open. This was also held to constitute a taking of such property as may have been removed from the control of a claimant.<sup>100</sup>

## VI. DISABILITY AND DEATH CLAIMS

Title V also provided for claims based on disability or death resulting from actions of the Government of Cuba.<sup>101</sup> The Commission had occasion to consider several such claims. In the *Claim of Julio Lopez Lopez*,<sup>102</sup> which was based in part on an allegedly permanent disability resulting from actions of the Government of Cuba, the Commission held that in such a claim for disability under the pertinent section, it must be established that the disability was the proximate result of the actions of the Government of Cuba in violation of international law. The record showed a history of hypertension followed by permanent disability. Cuba's action, however, in taking the claimant's property, was not the proximate cause of claimant's disability.

In another claim based on alleged personal injuries, mental anguish, slander and false arrest, the Commission held that the express language of the section which speaks only of disability or death did not by necessary

95. Claim of A. M. Joy de Pardo, 1969 FCSC ANN. REP. 71.

96. Agrarian Reform Law of June 3, 1959 Gaceta Oficial (Cuba).

97. Urban Reform Law of October 14, 1960 Gaceta Oficial (Cuba).

98. Claim of Henry Lewis Slade, 1967 FCSC ANN. REP. 39.

99. In reference to the Administrative Instruction of February 17, 1961, it may be noted that the Cuban National Bank had dictatorial powers in connection with control of all foreign exchange transactions, and the sale of precious metals and gems. The President of the Cuban National Bank issued an "administrative instruction" of February 15, 1961, terminating safe deposit box services as of February 17, 1961. It appears that the Cuban Government informed foreign missions in Cuba of this matter. The information was transmitted to the commission from the State Department.

100. Claim of Anna Littner, FCSC Claim No. CU-3655 (Feb. 3, 1971).

101. Title V, § 503(b), 78 Stat. 1111 (1964), 22 U.S.C. § 1643b(b) (1964); and see Title V, § 504(b), 78 Stat. 1111 (1964), 22 U.S.C. 1643c(b) (1964).

102. FCSC Claim No. CU-3259 (Jan. 14, 1969).



implication cover unlawful and illegal false arrest regardless of intent. Accordingly, the claims for slander and false arrest were found not to be within the scope of the Act. It was further held that the claimant failed to establish that he sustained a disability within the scope of the Act.<sup>103</sup>

The Commission also found the record in the *Claim of Geraldine Isabella Shamma* insufficient to warrant favorable action.<sup>104</sup> Claimant had been arrested and convicted for violating the criminal laws of Cuba. The record did not corroborate her version as to how her disabilities arose. Although she may have been disabled from a heart attack, it did not appear that this was the proximate result of Cuban Government actions in violation of international law.

In a claim based on the death of one Robert Otis Fuller,<sup>105</sup> the Commission held that the same considerations applied as in *Lopez*.<sup>106</sup> Here the record showed that two Americans and two Cuban nationals were arrested and charged with promoting an uprising against the State. After a trial on October 15, 1960, the two Cuban nationals were sentenced to 30 years imprisonment each, and the two Americans were sentenced to death. Appeals were entered and heard in about five minutes, and the executions were carried out on the following day. While the Commission recognized that a State has inherent authority to punish persons within its jurisdiction who are convicted of violating its criminal law, and while it is not unusual for a State to decree death upon conviction of counter-revolutionary activities, in this case it appeared clear that the Americans were executed because of their nationality, and despite evidence that the two Cubans were equally guilty. The Commission fully considered the matter and held that the death sentence given the Americans for the same crime for which the Cuban nationals were sentenced to imprisonment was clearly a discrimination directed to persons alien to Cuba, was disproportionate to the punishment meted out to the Cubans, and constituted a denial of justice and a violation of international law for which Cuba may be held responsible. The decedent was survived by an infant daughter, and she was added as a party claimant who suffered a loss. The indemnity to which she was found entitled was based on the expected contributions the decedent would have made for his daughter from the time of his death to the date of her majority.

Both the *Lopez* and the *Fuller* decisions were followed in the determination of a claim filed by Dorothy S. McCarthy on behalf of herself and her four children based in part upon the death of Howard F. Anderson, former husband of Dorothy S. McCarthy and father of the children, because of his execution by the Government of Cuba.<sup>107</sup>

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103. Claim of Bernard Weiss, FCSC Claim No. CU-2357 (June 9, 1971).

104. Claim of Geraldine Isabella Shamma, 1969 FCSC ANN. REP. 49.

105. Claim of Jennie M. Fuller, FCSC Claim No. CU-2803 (May 19, 1971).

106. Claim of Julio Lopez Lopez, FCSC Claim No. CU-3259 (Jan. 14, 1969).

107. FCSC Claim No. CU-0697 (June 23, 1971).

## VII. VALUATION

Title V provides that in making determinations with respect to the validity and amount of claims and value of properties, rights, or interests taken, the Commission shall take into account the basis of valuation most appropriate to the property and equitable to the claimant, including but not limited to fair market value, book value, going concern value, or cost of replacement.<sup>108</sup> The Commission has examined this valuation provision in depth and found that the question in all cases would be to determine the basis of valuation which, under particular circumstances, would be most appropriate to the property and equitable to the claimant. The Commission concluded that this phraseology did not differ from the international legal standard that would normally prevail in the evaluation of nationalized property, but that it was designed to strengthen that standard by giving specific bases of valuation that the Commission should consider.<sup>109</sup>

The Commission has necessarily adhered to its position that the burden of proof rests with the claimant, while nevertheless affording the claimant all possible assistance.<sup>110</sup> Thus, it must follow that despite efforts

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108. Title V, § 503(a), 78 Stat. 1110 (1964), 22 U.S.C. 1643b(a) (1964), *as amended*, 79 Stat. 988 (1965), 22 U.S.C. 1643b(a) (Supp. I, 1965). Lillich, in *The Cuban Claims Act of 1964*, 51 A.B.A.J. 445, n.49 (1965), points out that, in effect, this provision "codifies traditional American practice," and includes references.

109. Claim of Berwind Corp., FCSC Claim No. CU-0538 (Feb. 7, 1968). This decision also reflects the Commission's awareness of appreciation in value. *See also Claims Adjudication*, *supra* note 28, at 286. In connection with Mr. Freidberg's footnote 19, it may be of interest to note that 1,146 claimants were of corporate character, and that claims were filed against 995 entities in Cuba. Most of these claims appear to have been filed by individuals doing business in Cuba. *See also* Freidberg, *The Measure of Damages in Claims Against Cuba*, 23 INTER-AMERICAN ECONOMIC AFFAIRS 67 (Summer 1969) [hereinafter cited as *Measure of Damages*]. Mr. Freidberg's *Claims Adjudication* includes a section on valuation material essentially similar to that in his *Measure of Damages*. Although at first asserted that the Commission had "detailed" figures on labor and material costs, the adjective was properly dropped in 1970.

Numerous elements considered by the commission in connection with the criteria set out in Title V, § 503(a), 78 Stat. 1110 (1964), 22 U.S.C. 1643b(a) (1964), *as amended*, 79 Stat. 988 (1965), 22 U.S.C. § 1643b(a) (Supp. I, 1965), are itemized in *Measure of Damages*. As *Measure of Damages* and *Claims Adjudication* adequately cover the area projected, the section on valuation in this paper will merely touch upon the highlights and add other decisions.

It is noted that Mr. Freidberg's work has been somewhat updated in Freidberg & Lockwood, *The Measure of Damages in Claims Against Cuba*, THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW (R. Lillich ed. 1972), reviewed by Leonard J. Theberge in 6 THE INT'L LAWYER 667 (1972).

110. While the Commission staff is often described as a fact-finding body (*Claims Adjudication*, *supra* note 28), it should be noted that members of the staff must be attorneys admitted to practice and who not only ascertain the facts, but also make recommendations to the Commission respecting appropriate legal action. In this respect the staff differs from that of some other national commissions which, in the past, have employed adjudicators with no legal background (apart from a legal officer comparable to the General Counsel of the Foreign Claims Settlement Commission).

In this connection see R. LILLICH, INTERNATIONAL CLAIMS: THEIR ADJUDICATION BY NATIONAL COMMISSIONS, at 115 (1962), in which he suggests the use of a "defender of the fund," and see the very apt critique thereof by Re, *The FCSC and the Adjudication of*

to fix a rule for all cases, assertions of value must be susceptible of proof, and in practice it has been observed that claimants do not always support their claims with appropriate evidence.

In evaluating the several bank claims based on loss of assets in Cuba, the Commission found that the same method of evaluation was not applicable in each case. In the *Claim of The First National Bank of Boston*,<sup>111</sup> the Commission found that the appropriate basis of valuation should allot to the six branches in Cuba that portion of the fair market value of the whole enterprise which the net income of these branches bore to the net income of the whole, with deductions for certain recoveries. In the *Claim of The First National City Bank*,<sup>112</sup> which maintained eleven branches in Cuba, the Commission found that the value of these branches would be most appropriately computed on the basis of the branches' average net earnings, after Cuban taxes, capitalized at 10 percent, with deductions for certain offsets. In the *Claim of The Chase Manhattan Bank*<sup>113</sup> the Commission relied on the book value of the assets, subject to an action pending before the United States District Court for the Southern District of New York.<sup>114</sup> The Commission noted that should the claimant prevail therein, any amount allowed by the Court to be offset should be deducted from the loss determined. After oral hearing and receipt of additional evidence, the Commission determined that the loss must also include compensation for the business activities and found that 3½ percent of the average deposits during the last five years would reflect the premium the bank might have received had the branches been sold or consolidated with another bank.<sup>115</sup>

There were a number of claims in which the Commission determined that the value would be properly reached by capitalization of income.<sup>116</sup> Balance sheet figures, or book values, were sometimes utilized as the basis for an evaluation, but were also subject to adjustments where appropriate. In the *Claim of Air Reduction Company, Inc.*, based on stock interests in two Cuban companies, adjustments were made respecting accounts receivable, transactions in transit and intercompany accounts.<sup>117</sup>

In the matter of depreciation, the Commission, of course, had to determine the remaining useful life of property and deduct an amount for fair wear and tear of the property. In regard to buildings and improvements, it was generally found that depreciation might be offset by appre-

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*International Claims*, 56 AM. J. INT'L L. 728 (1962), and also the several essays in VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW, *supra* note 109.

111. FCSC Claim No. CU-2268 (Aug. 19, 1970).

112. FCSC Claim No. CU-2628 (Nov. 14, 1969).

113. FCSC Claim No. CU-2685 (Oct. 20, 1971).

114. *Banco Nacional de Cuba v. The Chase Manhattan Bank* (Index No. 60 Civ. 4663).

115. The decisions on the three foregoing claims may be consulted at the offices of the commission.

116. See *Claim of Sun Oil Co.*, FCSC Claim No. CU-2056 (April 8, 1970); *Claim of Julius J. Shepard*, FCSC Claim No. CU-0407 (April 30, 1969); *Claim of Heirs of Grenville M. Dodge, Deceased*, *supra* note 72.

117. FCSC Claim No. CU-0244 (June 26, 1969).

ciation, particularly after 1960. After a study of the entire matter, the Commission determined an appropriate standard for annual depreciation ranging from 2 percent in the case of buildings and improvements, to 20 percent in the case of clothing and household linens. Generally a 50 percent limitation was used in claims on improved realty not having appraisals.<sup>118</sup>

With respect to future or prospective earnings or anticipated profits with might have been earned if the Government of Cuba had not seized the property in question, the Commission held that such an item of claim is not a loss resulting from nationalization, expropriation, intervention or other taking of property within the scope of Title V of the Act.<sup>119</sup> In conforming to the position that such items of claim are not generally allowed under international law, the Commission gave consideration to the recognized treatise of Edwin M. Borchard, and its own earlier decisions, in finding that such prospective earnings depend on uncertain contingencies and are conjectural in nature.<sup>120</sup>

Asserted going concern and good will values were also among the factors considered by the Commission. Where the record did not contain evidence to support an asset called "good will," and moreover where the Cuban subsidiary was operating at a loss, such an item in a balance sheet should not be considered as an asset in determining the value of the subsidiary.<sup>121</sup> However, where a branch has been operating with progressively increasing profits, indicating that the value of the business in Cuba had risen, the Commission found that the item of good will was supported.<sup>122</sup>

Another claim was based on an insurance business conducted through a subsidiary in Cuba.<sup>123</sup> Claimant demanded allowance of good will, referring to an Internal Revenue Service formula which would capitalize average annual earnings from intangibles, following a somewhat complicated route, which the Commission found did not apply to ascertaining the value of losses sustained in Cuba. The record reflected that the claimant was entitled to an allowance based on earnings from its broker services, which if not "good will," might well be termed in the nature of "going concern" value. After considering testimony at a hearing and detailed evidence, including that from an insurance appraiser, the Commission determined that

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118. See the files of the commission.

119. Claim of Metro-Goldwyn-Mayer, Inc., FCSC Claim No. CU-2225 (Jan. 6, 1971). See *Claims Adjudication*, *supra* note 28 at 296, concerning motion picture claims. The gratuitous destruction of prints by RKO employees was found not to be a special measure within the Act. FCSC Claim No. CU-3341.

120. E. BORCHARD, *DIPLOMATIC PROTECTION OF CITIZENS ABROAD* (1914). See Claim of United Shoe Machinery Corp., 10 FCSC SEMIANN. REP. 238 (Jan.-June 1959); Claim of Aris Gloves, Inc., 17 FCSC SEMIANN. REP. 239 (July-Dec. 1962); Claim of Wladyslaw Ziemiak, 20 FCSC SEMIANN. REP. 15 (Jan.-June 1964). See generally FCSC DEC. & ANN. (1968), *supra* note 24. See also W. G. FRIEDMANN, *THE CHANGING STRUCTURE OF INTERNATIONAL LAW*, at 203 (1964).

121. Claim of Bartlett-Collins Co., FCSC Claim No. CU-2192, 1968 FCSC ANN. REP. 39.

122. Claim of Gillette (Japan), Inc., FCSC Claim No. CU-2326 (October 1, 1969).

123. Claim of Johnson & Higgins, FCSC Claim No. CU-0769 (Sept. 8, 1971).

the appropriate valuation was to be obtained from applying a multiple of two to the average annual gross income from commissions from 1955 to 1959.

The *Claim of Pan-American Life Insurance Company*<sup>124</sup> involved an insurance company underwriter with income from premiums and investments rather than a brokerage concern or agent with income from commissions. It was based in part on the value of its business or good will. Initially, the Commission found claimant had not established a value over the asset value. An oral hearing was held in the matter and the Commission thereafter held that the claimant had two assets not shown on its books: (1) equity in insurance contracts, and (2) a going business value. As to the equity in insurance contracts, profits, projected for 1961 through 1975 were subject to a 12 percent discount rate to arrive at the value of the reserves; and as to the second item, the evaluation of the claimant was found to be fair and reasonable, considering its recorded investment in thirty trained agents in Cuba.

In determining whether organization and development expenses should be allowed as an asset in reaching evaluation, consideration was given by the Commission to: (1) whether the item enhanced the value of the corporation, and (2) whether the business was a going concern at the time of taking by Castro, thus benefiting the Cuban economy, apart from a situation similar to liquidation, when it would seem such an item would be a bookkeeping expense item.<sup>125</sup> In the *Wimberly* claim,<sup>126</sup> the Commission considered a statement of assets and capitalized assets for the company, and found that an item of "unrecovered promotional, exploratory and development costs" included general administrative expenses, rents and salaries, interest, fees and similar expenses which could not properly be treated as assets; and additionally, substantial amounts referred to as assets were capitalized expenses attributable to the drilling of dry holes, and could not be considered property taken by Cuba. On the other hand, certain other items such as geological expenses, concession expenses, acquisition costs, exploitation expenses on a producing well, were allowed.

Among the numerous claims based on mining interests were those of Moa Bay Mining Company, Freeport Minerals Company (formerly Freeport Sulphur Company), and Nicaro Nickel Company.<sup>127</sup>

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124. FCSC Claim No. CU-3651 Claim (July 7, 1971).

125. See note 91 *supra*. See also Claim of D. R. Wimberly, FCSC Claim No. CU-3417 (Jan. 8, 1969), based on an interest in Trans-Cuba Oil Co.

126. Claim of D. R. Wimberly, FCSC Claim No. CU-3417 (Jan. 8, 1969).

127. Claim of Moa Bay Mining Co., FCSC Claim No. CU-2619 (Feb. 3, 1971); Claim of Freeport Minerals Co., FCSC Claim No. CU-2625 (Sept. 8, 1971); Claim of Nicaro Nickel Co., FCSC Claim No. CU-2624 (Sept. 30, 1971). However, Moa based its claim on (1) loss of earnings, plant and equipment, mining concessions (in the vicinity of Baracoa, Oriente) and other properties; and (2) loss of earnings from reinvestment of excess cash. The Commission considered in depth detailed reports on the concessions, the proven ore reserves, net values per pound for nickel and cobalt, liquidated value of plant and equipment, and the discounting of resulting aggregate net income. As to the second part of the claim, the Commission was constrained to hold that there was no valid basis for estimat-

The *Freeport Minerals Company* claim<sup>128</sup> was based on the asserted loss of mining concessions which belonged to a wholly owned Cuban subsidiary, in Las Villas, Pinar del Rio and Oriente, and was valued on the capitalized cost of mining concessions. However, the Commission was required to determine the value of properties on the date of loss and thus the claim was construed to be based on the value of any ores in the mines on that date. The Commission found that computations indicating the gross value of the ores in the ground were insufficient to establish what value they would have had after considering mining and related costs. The mines were never operated because the reserves were not considered ripe for commercial development and there was no evidence as to costs of mining and processing the ores. The Commission held that while a claimant's investment in mines may have had some probative value, it was insufficient to establish the value of the mines on the date of loss. Accordingly, it was held that the claimant had failed to prove that its mining concessions had any value on that date, and the claim was denied. Upon appeal the Commission found no basis for altering its decision and it was affirmed.<sup>129</sup>

The *Nicaró Nickel Company* claim<sup>130</sup> was also based on the loss of certain mining concessions and other assets in Cuba. A considerable quantity of evidence was submitted in this matter. Initially the Commission found no valid reason for allowing any amount on account of asserted probable and possible ore reserves, but allowed for claimant's proven ore in the aggregate of 33,300,000 tons, applying a discount rate of 12 percent for the period 1961 to 1979. An allowance was also made for the physical plant at Nicaro. Upon hearing claimant's objections, the Commission found that the claimant's proven ore, probable ore and possible ore should be allowed; and further that the values should be determined by the application of annual discount rates of 8 percent, 12 percent and 15 percent.

With regard to the statutory reference<sup>131</sup> to "cost of replacement," the Commission found no basis for holding that it meant the cost of replacing properties with new properties, but held that it meant replacement in kind, taking into consideration the age and condition of the properties on the date of loss.<sup>132</sup>

In determining the amount of certifiable loss, Title V is clear in requiring the Commission to deduct all amounts the claimant may have received from any source on account of the same loss or losses. This would include payment by an insurance company on account of the loss.<sup>133</sup>

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ing how much capital would have become available for reinvestment, nor that it would be reinvested and would earn the amount estimated, and accordingly found this item of claim speculative, and it was denied.

128. Claim of Freeport Mineral Co., FCSC Claim No. CU-2625 (Sept. 8, 1971).

129. *Id.*

130. Claim of Nicaro Nickel Co., FCSC Claim No. CU-2624 (Sept. 30, 1971).

131. Title V, § 503(a), 78 Stat. 1110 (1964), 22 U.S.C. 1643b(a) (1964), as amended, 79 Stat. 988 (1965), 22 U.S.C. 1643b(a) (Supp. I, 1965).

132. Claim of M & M Dredging & Construction Co., FCSC Claim No. CU-0219 (Feb. 26, 1969).

Further, Title V provides<sup>134</sup> that the amount determined to be due on an assignee's claim, acquired by purchase, shall not exceed the amount of consideration paid by the assignee. So in the *Claim of Samuel J. Wikler*<sup>135</sup> based on railroad securities purchased subsequent to the established date of loss (October 13, 1960), the amount of loss was limited to the actual consideration paid. This precluded "windfalls" by reason of speculation in claims. With respect to interest on the certification, the Commission held that it could not be paid from the aforesaid date of loss but rather from the date the decedent acquired the claim.

The Commission has held that, in determining the value of loss of an entity operating a branch in Cuba, the branch's liabilities are not deductible since the claimant may remain liable. However, taxes due to Cuba, which do not represent a loss, are deductible as a set-off.<sup>136</sup> This is because Title V required determinations to be made in accordance with applicable substantive law, including international law.<sup>137</sup>

### VIII. OTHER ACTIONS OF THE COMMISSION

The Commission has held that claims filed by trustees on behalf of holders of bonds issued by Cuban Railways Company may serve to protect the holders of bonds to the extent that they may have their claims considered as timely filed. However, the trustee having no beneficial interest in the bonds could not have a certification.<sup>138</sup> In the matter of the Cuban Telephone Company, which had qualified as a United States national but had become inoperative, the Commission determined that claims based on ownership interests and debts would be entertained inasmuch as the assets were being utilized by the Government of Cuba. Further, the Commission determined to certify to the majority stockholder, *in trust* for the benefit of those shareholders and creditors not before the Commission, the amount of assets not claimed by other stockholders and creditors, setting out the terms of the trust.<sup>139</sup>

The Commission also determined that interest should be included in certifications of loss under Title V<sup>140</sup> with such interest to run from the

133. Title V, § 506, 78 Stat. 1112 (1964), 22 U.S.C. § 1643e (1964), as amended, 79 Stat. 988 (1965), 22 U.S.C. 1643e (Supp. I, 1965); see Claim of Richard G. Milk, 1967 FCSC ANN. REP. 63; Claim of Linden Stanley Blue, 1968 FCSC ANN. REP. 30.

134. Title V, § 507(b), 78 Stat. 1112 (1964), 22 U.S.C. § 1643f(b) (1964).

135. 1968 FCSC ANN. REP. 62.

136. Claim of Simmons Co., 1968 FCSC ANN. REP. 77.

137. Title V, § 503(a), 78 Stat. 1110 (1964), 22 U.S.C. § 1643b(a) (1964), as amended, 79 Stat. 988 (1965), 22 U.S.C. § 1643b(a) (Supp. I, 1965).

138. Claim of Morgan Guaranty Trust Co. as Trustee, FCSC Claim No. CU-1594 (Oct. 25, 1967); and Claim of The First National City Bank, FCSC Claim No. CU-2629 (Oct. 20, 1971).

139. Claim of International Telephone and Telegraph Corp., FCSC Claim No. CU-2615 (July 27, 1970).

140. Claim of Lisle Corp., FCSC Claim No. CU-0644 (Sept. 6, 1967); also see Claim of Joseph Senser, Docket Y1756 (Decision Y633), FCSC DEC. & ANN. (1968), final decision at 146. As to interest on awards in Balkan claims, see *id.* at 190, and Claim of John Hedio Proach, 17 FCSC SEMIANN. REP. 47 (July-Dec. 1962), and Sutton, *supra* note 26, at 755.

date of loss<sup>141</sup> to the date of settlement. Various claims arising prior to January 1, 1959 (and not acknowledged after that date) were held barred by the appropriate statute of limitations.<sup>142</sup> In cases where claimants did not keep the Commission informed as to changes of address, and the Commission was not able to obtain this information from other sources, it held that the mailing of a decision to the claimant's last known address would constitute service of a decision in accordance with the Commission regulations.<sup>143</sup>

### IX. CONCLUSION

As can be seen from the foregoing, this program of claims has included many large industrial and agricultural claims, as well as large and small claims of other property owners, and several death and disability claims. The many issues raised have been met squarely by the Commission in its decisions. The completion of the program has provided a fund of information as to kinds of claims, property values and extent of the dollar losses in Cuba of United States nationals. As provided by the Congress in its enactment of Title V of the International Claims Settlement Act, as amended, this data will be available to the Secretary of State for use in the event of negotiations in the future with the Government of Cuba.

A most compelling aspect of this situation is that when the parties sit down at the negotiating table, concrete information will be at hand. It will not then be necessary to indulge in estimates, to send questionnaires and compile information from the losers, because all this has been done. At an early date, subsequent to the Cuban takings, those deprived were accorded the privilege of filing data with the Department of State. With the advent of the Cuban claims program, this information was transferred to the Commission. It was used in contacting claimants and supporting the claims then filed. Thus determinations have been possible while evidence and witnesses were yet available. This has been particularly important in view of the absence of cooperation from Cuban authorities.

The work of the Commission on the whole has been particularly directed to the losses of United States nationals in many countries, under the legislation provided in each case. The accomplishments of the Commission represent a bulwark in the growing edifice of the law of international claims. It is hoped that this paper will be helpful to attorneys and students in the field of international claims in directing their attention to particular cases of interest.

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141. Except where the claim was purchased subsequent to the date of loss. *See* Claim of Samuel J. Wikler, 1968 FCSC ANN. REP. 47.

142. Claim of Emilio J. Pasarell, 1967 FCSC ANN. REP. 56; Claim of William H. Wilson, FCSC Claim No. CU-3409 (Sept. 24, 1960); Claim of Edward Kuerze, Ex'r. of the Estate of Edward J. Kuerze, Deceased, FCSC Claim No. CU-0638 (May 1, 1968); Claim of Louis P. Zinke, FCSC Claim No. CU-1857 (Nov. 22, 1967).

143. Commission Regs. 501 and 531; Claim of Geraldine Garcia Diaz, FCSC Claim No. CU-2992 (Jan. 3, 1968).