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THE FOREIGN CLAIMS SETTLEMENT COMMISSION: ITS FUNCTIONS AND JURISDICTION

Edward D. Re*

EVEN the casual student of nationalizations and confiscations must be aware of the fact that whereas nationalizations were formerly isolated occurrences, they have today become matters of almost common practice. The Mexican expropriations, the Soviet nationalizations, and the Iranian nationalization of the Anglo-Iranian Oil Company are in modern times merely landmarks of an apparently ever-widening path.¹ A reading of the daily newspapers has offered adequate warning to the American investor abroad that no part of the world has been immune from this phenomenon.² Whether under the label of "agrarian reform" or "socialization," these nationalizations are of the greatest importance, and, quite apart from their effect on foreign investments, reflect the ideological conflict concerning the notion of property as it has been traditionally understood by jurists and lawyers.³ Moreover, the unparalleled rise of United States investments abroad⁴ has imparted a note of intense urgency to our efforts in search of sound legal and practical solutions.

Although much has been written in recent years concerning the right of a nation under international law to nationalize foreign-

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¹ See generally Kuhn, *Nationalization of Foreign-Owned Property in its Impact on International Law*, 45 AM. J. INT'L L. 709 (1951). See also Connick, *The Effect of Soviet Decrees in American Courts*, 34 YALE L.J. 499 (1925); Fenwick, *The Order of the International Court of Justice in the Anglo-Iranian Oil Company Case*, 45 AM. J. INT'L L. 723 (1951); Kunz, *The Mexican Expropriations*, 17 N.Y.U.L.Q. REV. 327 (1940).

² See examples cited in Graving, *Shareholder Claims Against Cuba*, 48 A.B.A.J. 226 (1962); *Expropriation Case in Brazil*, 46 DEP'T STATE BULL. 460 (1962); The Washington Post, Feb. 18, 1962, p. A21, col. 5; May 25, 1962, p. A17, col. 5; U.S. News & World Report, April 2, 1962, p. 10. The American public is perhaps less aware of the post-war nationalization of American property in such countries as Czechoslovakia, Poland, Yugoslavia, Bulgaria, Rumania and Hungary discussed *infra*.

³ For the Communist position on nationalization, see the excellent summary in Seidl-Hohenveldern, *Communist Theories on Confiscation and Expropriation. Critical Comments*, 7 AM. J. COMP. L. 541 (1958). See also RESTATEMENT, FOREIGN RELATIONS § 190, Reporters' Note 3, at 664 (Proposed Official Draft 1962) [hereinafter cited RESTATEMENT DRAFT]. Cf. Folsom, "Agrarian Reform—the Myth?" Address delivered at the Princeton University Conference on "Latin America Since 1945: Progress and Problems" (mimeographed), April 5-6, 1962.

⁴ See, e.g., New York Times, Oct. 2, 1961, p. 47, col. 8; Wall Street Journal, Nov. 2, 1961, p. 1, col. 6.

owned property,⁵ for the American investor a more practical inquiry pertains to whether compensation need be made to the owners of the property nationalized. On this question, the American position has been eminently clear. The United States has consistently adhered to the "international legal standard"—that private property cannot be taken without the payment of just compensation.⁶ In the words of Cordell Hull, the owner is entitled to "adequate, effective, and prompt" compensation.⁷ Others, however, have taken the view that all that is required is "equality of treatment," which affords to the owner of the nationalized property the same treatment received by a national or citizen of the nationalizing state.⁸ In cases involving fundamental social reform a third alternative has been suggested—that "partial compensation" offers a solution both satisfactory and consistent with legal principle.⁹

Notwithstanding the vast literature that has emerged on the nationalization of property, the *procedural* methods which have been devised to indemnify the former owners in the event of a nationalization or confiscation have received inadequate treatment. Little attention has been given, for instance, to the historic role of the Department of State in this important area. Do any preventive techniques exist that would either eliminate or minimize the possibility that the American investor's property abroad would be nationalized by the foreign country? And, if a nationalization does

⁵ See authorities cited in RE, FOREIGN CONFISCATIONS IN ANGLO-AMERICAN LAW (1951); RE, *Judicial Developments in Sovereign Immunity and Foreign Confiscations*, 1 N.Y.L.F. 160 (1955); RE, *Nationalization and the Investment of Capital Abroad*, 42 GEO. L.J. 44 (1953); RE, *The Nationalization of Foreign-Owned Property*, 36 MINN. L. REV. 323 (1952).

⁶ See 1 HACKWORTH, DIGEST OF INTERNATIONAL LAW 21 (1940); Doman, *Postwar Nationalization of Foreign Property in Europe*, 48 COLUM. L. REV. 1125, 1131-32 (1948); Wilson, *Property-Protection Provisions in United States Commercial Treaties*, 45 AM. J. INT'L L. 83, 85-87 (1951). See also RESTATEMENT DRAFT § 190, Reporters' Note 1, at 664.

⁷ Secretary Hull, Note to the Mexican Government, Aug. 22, 1938, Dep't of State Press Release No. 398, Aug. 25, 1938, also reported in 32 AM. J. INT'L L. SUPP. 191, 193 (1938); 3 HACKWORTH, DIGEST OF INTERNATIONAL LAW 655, 658 (1942). See also Undersecretary Ball, American Business Abroad, Dep't of State Press Release No. 308, May 12, 1962.

⁸ See BATY, THE CANONS OF INTERNATIONAL LAW 131 (1930); Dunn, *International Law and Private Property Rights*, 28 COLUM. L. REV. 166 (1928); Williams, *International Law and the Property of Aliens*, 9 BRIT. Y.B. INT'L L. 1, 15 (1928). See also RESTATEMENT DRAFT § 169, comment *a*. This position has been taken by some Latin American states, *id.* at § 190, Reporters' Note 2, at 664.

⁹ 1 OPPENHEIM, INTERNATIONAL LAW § 155, at 318 (Lauterpacht ed. 1948). See Doman, *supra* note 6, at 1161; Kuhn, *supra* note 1, at 711-12. See also RESTATEMENT DRAFT § 193, Reporters' Note at 672-73. Cf. Folsom, *supra* note 3, at 8; authorities cited note 12 *infra*.

occur, how may the former owners be best indemnified? How can they be assured the "adequate, effective, and prompt" compensation to which they are entitled by the international law standard that is espoused by the United States? Specifically, what procedural remedies are available to the individual claimant?

Notwithstanding the frequency with which American property has been nationalized by foreign countries, the average lawyer knows comparatively little about that phase of international law which deals with the adjudication of international claims. Indeed, apart from a small group of international lawyers, diplomats, and claimants, attorneys and citizens alike are unfamiliar with the work of this country's national claims commission, the Foreign Claims Settlement Commission (FCSC)—a tribunal of the United States whose function is the adjudication of claims by Americans against foreign countries for the nationalization or other taking of their property. Specifically, this article will deal with the jurisdiction and functions of the FCSC and certain proposals before the Congress that will materially affect its role in the adjudication of international claims.

I. TRADITIONAL METHODS OF REDRESS

A brief initial statement of the traditional avenues of recourse available to the American claimant may prove helpful in understanding more fully the problems confronting the American claimant in this area.

The American national whose property has been taken by a foreign country may in the first instance seek redress in the appropriate agency or court of the foreign state.¹⁰ Although the American national is entitled to any reparation he may thus receive from the foreign state,¹¹ it need hardly be said that a court or agency of the nationalizing country is not the most objective forum for the

¹⁰ RESTATEMENT DRAFT § 216, comment *a*. The *Restatement* view is in accordance with the express recognition of this right by statute, 18 U.S.C. § 953 (1958). Exercise of the right, however, may be influenced by subsequent treaties or waiver and settlement agreements. See, *e.g.*, Agreement with the Government of the Polish People's Republic Regarding Claims of Nationals of the United States (Polish Claims Agreement of 1960), July 16, 1960, [1960] 11 U.S.T. & O.I.A. 1953, T.I.A.S. No. 4545, article IV of which provides, in part: "In the event that such claims are presented directly by nationals of the United States to the Government of Poland, the Government of Poland will refer them to the Government of the United States."

¹¹ See RESTATEMENT DRAFT § 216.

airing of his grievances.¹² Traditionally, the claimant may also resort to diplomatic channels for satisfaction of his claim.¹³ Of course, whether the claim will be espoused by his country rests within the discretion of the President and the Department of State which exercises this discretion on his behalf.¹⁴ In the absence of governing treaties, agreements, or specific legislation, such a choice may depend in large measure on the vagaries of the prevailing state of international relations. Nevertheless, from the standpoint of the individual claimant, resort to diplomatic channels has proved inadequate to cope with the thousands of claims that arose from the extensive nationalizations following both World Wars.¹⁵

Furthermore, the American property owner attempting to challenge the foreign nationalization of his property in American courts has been largely denied judicial relief by the application of the principles of sovereign immunity and the act of state doctrine.¹⁶ Although an extended discussion of these legal principles is beyond

¹² Some Latin American countries, for instance, have propounded the view that compensation need not be paid where the property is taken pursuant to a program of general social or economic reform. See 3 HACKWORTH, *DIGEST OF INTERNATIONAL LAW* 657-58 (1942). Lauterpacht has also suggested a "modification" of the international standard of justice in countries where "fundamental changes in the political system and economic structure of the state or far-reaching social reforms entail interference, on a large scale, with private property." 1 OPPENHEIM, *INTERNATIONAL LAW* 352 (8th ed. Lauterpacht 1955).

¹³ See HUDSON, *INTERNATIONAL TRIBUNALS* 191 (1944). In order to provide the basis of an appeal for diplomatic intervention, the claimant invariably had to pursue his foreign remedies first. *Id.* at 189. Where the offending state maintained a procedure for the disposition of claims against it, the alien claimant was required to follow that procedure before recourse to diplomatic channels could even be attempted. This was a rule of substantive international law and not just a condition of international jurisdiction. *Ibid.*

¹⁴ See RESTATEMENT DRAFT 728. The Department of State is not legally required to espouse any claims of American nationals against foreign states. *Cf.* HUDSON, *INTERNATIONAL TRIBUNALS* 191 (1944). The Polish Claims Agreement of 1960, *supra* note 10, provides in article IV: "After the entry into force of this Agreement the Government of the United States will neither present to the Government of Poland nor espouse claims of nationals of the United States against the Government of Poland [which are the subject-matter of this agreement]."

¹⁵ Although the Department of State issues, from time to time, "General Instructions for Claimants and Suggestions for Preparing Claims," there is no uniform procedure for the filing of claims. Nor is the claimant entitled, constitutionally or otherwise, to a hearing on the merits of his claim pending espousal. RESTATEMENT DRAFT § 217, Reporters' Note at 728. See generally Dep't of State Memorandum, March 1, 1961, in Kerley, *Contemporary Practice of the United States Relating to International Law*, 56 AM. J. INT'L L. 165, 166-67 (1962); Editorial Note, *Practical Suggestions on International Claims*, in BISHOP, *INTERNATIONAL LAW, CASES AND MATERIALS* 738 (2d ed. 1962).

¹⁶ *Cf.* *Banco Nacional de Cuba v. Sabbatino*, 193 F. Supp. 375 (S.D.N.Y. 1961). See also Coerper, *The Act of State Doctrine in the Light of the Sabbatino Case*, 56 AM. J. INT'L L. 143, 144-45 (1962). See generally materials cited in Note, *The Castro Government in American Courts: Sovereign Immunity and the Act of State Doctrine*, 75 HARV. L. REV. 1607, 1608 n.9, 1609 nn.11, 14 (1962).

the scope of this article, it may be said that the most recent nationalizations of American property have engendered a willingness on the part of American courts to examine and modify these rules. While this trend is of great importance, it cannot promise relief to thousands of Americans who owned property abroad.

Of the other remedies which may be available to the American victims of a foreign nationalization,¹⁷ mention need be made of the United States guaranty program initiated by the Foreign Assistance Act of 1948¹⁸ to induce the flow of American capital into foreign projects. The program was extended in 1950 to include the risk of "expropriation or confiscation by action of the government of a participating country."¹⁹ In general, the existing guaranty program has proved ineffective because restricted administrative interpretation has narrowed its coverage, and uncertainty concerning the scope of the protection offered has lessened its attractiveness.²⁰ The program has not been extensively utilized and has not proved to be the incentive to investments abroad that had been anticipated.²¹

In addition to the "traditional" remedies that have been briefly outlined, relatively newer procedural techniques have been designed to cope with the problems of international claims adjudication. Among these were the mixed claims commissions, composed

¹⁷ A categorization of possible remedies for the American national whose property has been confiscated abroad would have to mention the activities of certain private organizations such as the Foreign Bondholders Protective Council, "a non-governmental entity that seeks to work out refinancing and other settlements of defaulted debt obligations in connection with claims settlements, development loans and otherwise." RESTATEMENT DRAFT § 217, Reporters' Note at 728. In discussing the settlement of outstanding Polish Dollar Bonds as incident to the Polish Claims Agreement of 1960, it was said: "[T]he Polish Government confirms its intention to settle the problem of this bonded indebtedness by direct talks with American bondholders or their representatives." Letter of Stanislaw Raczkowski, Minister Plenipotentiary, Financial Counselor, Embassy of the Polish People's Republic, to Foy D. Kohler, Assistant Secretary of State for European Affairs, in 14 FCSC SEMIANN. REP. 187 (Jan.-June 1961).

¹⁸ 62 Stat. 144 (1948), as amended by 64 Stat. 198 (1950), 22 U.S.C. § 1509(b)(3) (1958).

¹⁹ 64 Stat. 199 (1950) 22 U.S.C. § 1509(b)(3)(v)(2) (1958).

²⁰ See, e.g., MUTUAL SECURITY AGENCY, INVESTMENT GUARANTY MANUAL (1952).

²¹ See *Re, Nationalization and the Investment of Capital Abroad*, 42 GEO. L.J. 44, 58-59 (1953). The program has insured 480 individual investments in thirty-five countries. It recently paid its first claim in thirteen years (\$9,921) to a Wisconsin lumber firm that invested \$200,000 in a lumber project in the Belgian Congo in 1959 before the Congo gained independence. The company was unable to convert into dollars an annual interest payment made in Congolese francs on its loan. See *New York Times*, Feb. 24, 1962, p. 51, col. 4. Proposals now before the Congress would extensively revise the investment guaranty program. See generally S. 2996, H.R. 11921, 87th Cong., 2d Sess. (1962). A detailed analysis of these proposed amendments is beyond the scope of this article.

of nationals from the various countries concerned. These international tribunals, often established pursuant to treaties and agreements of peace, were constituted to hear and determine all claims between two or more countries falling within a specific class.²² A good example is the Mixed Claims Commission representing the United States and Germany which was constituted to decide the war damage claims of American nationals subsequent to the First World War.²³ Participation of the United States members in such tribunals is founded on the authority of the President in the conduct of foreign affairs to waive or settle a claim against a foreign state, or to delegate this power in specific instances.²⁴ The importance of this procedural device lay in its bypassing the diplomatic routes. Rather than besieging the Department of State, claimants with similar grievances were assured a forum that would accord them a hearing on the merits and a definite possibility of the compensation required by the international law standard.

Nevertheless, the mixed claims commission was not entirely successful. The varying national make-up of the commissions often subjected them to internal delays and differences. This seriously reflected upon the objectivity and equity of their decisions, particularly in the eyes of the claimant.²⁵ Furthermore, since their duration was temporary and often short-lived, this *ad hoc* type of existence compelled each successive commission to start anew rather than to profit from the cumulative judicial and administrative experiences of prior adjudications. The problem of enforcing their decisions and awards was sometimes also difficult of solution, and could be solved only by more diplomatic negotiation.²⁶ This ab-

²² See RALSTON, *LAW AND PROCEDURE OF INTERNATIONAL TRIBUNALS* 5, 33 (rev. ed. 1926).

²³ See Agreement for a Mixed Commission, Berlin, Aug. 10, 1922, T.S. No. 665.

²⁴ See RESTATEMENT DRAFT § 217, comment *a*; *id.* at § 218.

²⁵ Reports and decisions of the mixed claims commissions, when they were printed, often revealed lengthy and bitter dissents. See, *e.g.*, CONSOLIDATED EDITION OF DECISIONS AND OPINIONS, MIXED CLAIMS COMMISSION, UNITED STATES AND GERMANY 1925-1926, 1 (1927), where the very first decision begins: "PARKER, *Umpire*, rendered the decision of the Commission, the American Commissioner and the German Commissioner being unable to agree" *Ibid.* (Ad. Dec. No. 1, 1923). Other disagreements may be noted in the decisions, *id.* at 103, 145, 195, 213, 221, 231, 243, 267, 273 *passim*.

²⁶ The Agreement for a Mixed Commission, cited note 23 *supra*, for instance, provided no means for satisfying the claims. Thereafter, the Dawes Plan of 1924 was initiated, whereby Germany agreed to pay reparations in annual installments to be used partially in satisfaction of awards made by the Mixed Claims Commission. See *Hearings Before a Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce*, 87th Cong., 1st Sess. 78 (Comm. Print 1961) (Statement of Edward D. Re, Chairman, FCSC).

sence of effective enforcement machinery, together with the lack of adequate review facilities, the setting off of claims against each country, and the sensitivity of the commissions themselves to the prevailing political climate all detracted from their effectiveness.²⁷

II. LUMP-SUM SETTLEMENTS, NATIONAL CLAIMS COMMISSIONS, AND THE ORIGIN OF THE FCSC

The experience gained from the mixed claims commissions led naturally to the development of other techniques designed to achieve effective machinery to adjudicate international claims. The most promising of these have been the use of the lump-sum or *en bloc* settlement and the national claims commission. In the lump-sum settlement, one country pays to another a certain amount in settlement of all the claims of the latter's nationals arising from a given situation.²⁸ The payee country then establishes its own tribunal, comprised entirely of its own nationals, to hear and determine the individual claims. The commissions or tribunals thus established to adjudicate the claims envisaged in these lump-sum settlements are *national claims commissions*, although scholars have referred to them by various other titles.²⁹

Like the mixed commissions, this country's national commissions were temporary in nature and functioned under the same inherent disadvantages. Moreover, the creation of several commissions in vastly different areas to deal with each new settlement, treaty, or agreement led to confusing and conflicting rules of substance and procedure.

In 1954 there existed in the United States two such commissions, the International Claims Commission, administering claims

²⁷ For other inherent defects of the mixed commission, including the different legal backgrounds of the members, see LILICH, *INTERNATIONAL CLAIMS: THEIR ADJUDICATION BY NATIONAL COMMISSIONS* 7, 10, 11-12 (1962).

²⁸ For lump-sum settlements dating back to the 19th century, see *Table II: Domestic or Quasi-International Commissions and En-Bloc Settlements*, in 3 WHITEMAN, *DAMAGES IN INTERNATIONAL LAW*, Appendix B at 2068j (1937). See also *Hearings Before a Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce*, 87th Cong., 1st Sess. 213-17 (Comm. Print 1961).

²⁹ They have been referred to as "special domestic tribunals" by HUDSON, in *INTERNATIONAL TRIBUNALS* 192 (1944); "special national courts" by Jessup, in *PROCEEDINGS, SECOND SUMMER CONFERENCE ON INTERNATIONAL LAW, CORNELL LAW SCHOOL* 37 (1958); and "domestic institutions" by Domke, in *id.* at 120; by Briggs, in *The Settlement of Mexican Claims Act of 1942*, 37 AM. J. INT'L L. 222 (1943), cited in Coerper, *The Foreign Claims Settlement Commission and Judicial Review*, 50 AM. J. INT'L L. 868, 877 n.34 (1956), and by RALSTON, in *THE LAW AND PROCEDURE OF INTERNATIONAL TRIBUNALS* 239 (1926).

under the International Claims Settlement Act of 1949,³⁰ and the War Claims Commission, administering claims under the War Claims Act of 1948.³¹ The desirability of combining these functions into a single, independent tribunal devoted exclusively to the processing and adjudication of claims was evident. Accordingly, by Reorganization Plan No. 1 of 1954,³² both these commissions were abolished, and their respective functions were transferred to one national claims commission—the Foreign Claims Settlement Commission of the United States.³³

The practical benefits of the lump-sum settlement technique were recognized by Congress in the enactment of section 4(a) of the International Claims Settlement Act, which not only authorized the new commission to administer the Yugoslav Claims Agreement of 1948, but also all future similar lump-sum settlements.³⁴ This provision thus solved the problem of creating a new and separate claims commission to administer each new settlement agreement as it arose. Section 6 of the act accordingly provided that “nothing in this provision shall be construed to limit the life of the Commission, or its authority to act on future agreements which may be effected under the provisions of this legislation.”³⁵ The advantages of a single and independent agency were perhaps best expressed by the President in his letter of transmittal accompanying Reorganization Plan No. 1 of 1954:

“The accompanying reorganization plan has substantial potential advantages. The Foreign Claims Settlement Commission will be able to administer any additional claims pro-

³⁰ 64 Stat. 12 (1950), 22 U.S.C. §§ 1621-42 (1958). The International Claims Commission was established in the Department of State, 64 Stat. 12 (1950), 22 U.S.C. § 1622 (1958). See Re, *The Nationalization of Foreign-Owned Property*, 36 MINN. L. REV. 323, 340 (1952).

³¹ As amended, 62 Stat. 1240 (1948), 50 U.S.C. App. §§ 2001-16 (1958). The War Claims Commission was an independent claims commission, but the duration of its existence was fixed by statute as ending “at the earliest practicable time after the expiration of the time for filing claims, but in no event later than 3 years after the expiration of such time.” [§ 2(e) (formerly subsection d), redesignated (e) by Pub. L. No. 696, 81st Cong. (64 Stat. 449), and repealed by Pub. L. No. 615, 83d Cong. (68 Stat. 759)].

Detailed repeal provisions as well as the complete texts of the International Claims Settlement Act of 1949, as amended, and the War Claims Act of 1948, as amended, may be found in 14 FCSC SEMIANN. REP. 41, 66 (Jan.-June 1961).

³² 68 Stat. 1279 (1954), 5 U.S.C. § 133z-15 (1958).

³³ See Reorganization Plan No. 1 of 1954, 68 Stat. 1279 (1954), 5 U.S.C. § 133z-15(2) (1958).

³⁴ 64 Stat. 12 (1950), 22 U.S.C. § 1623(a) (1958).

³⁵ International Claims Settlement Act of 1949, as amended, 64 Stat. 12 (1950), 22 U.S.C. § 1625 (1958).

grams financed by funds derived from foreign governments without the delay which has often characterized the initiation of past programs. Moreover, the use of an existing agency will be more economical than the establishment of a new commission to administer a given type of foreign claims program. Consolidation of the affairs of the two present Commissions will also permit the retention and use of the best experience gained during the last several years in the field of claims settlement. The declining workload of current programs can be meshed with the rising workload of new programs with maximum efficiency and effectiveness. . . .

"Reorganization Plan No. 1 of 1954 provides a single agency for the orderly completion of present claims programs. In addition, it provides an effective organization for the settlement of future authorized claims programs by utilizing the experience gained by present claims agencies. It provides unified administrative direction of the functions concerned, and it simplifies the organizational structure of the executive branch."³⁶

III. THE FOREIGN CLAIMS SETTLEMENT COMMISSION

The FCSC thus came into existence as the national claims commission of the United States with jurisdiction to determine the claims of United States nationals against foreign governments for injuries and losses sustained.³⁷ The Commission is composed of three members, each appointed by the President by and with the advice and consent of the Senate.³⁸ The President designates one of these members to be chairman of the Commission.³⁹ Apart from the administrative functions of the chairman, who is vested with sole administrative authority by the Reorganization Plan,⁴⁰ the functions of the chairman and commissioners are judicial.

In clarifying the precise standing or status of the Commission,

³⁶ Message From the President of the United States Transmitting Reorganization Plan No. 1 of 1954, Relating to the Establishment of the Foreign Claims Settlement Commission, April 29, 1954, in 14 FCSC SEMIANN. REP. 87, 88-89 (Jan.-June 1961).

³⁷ See International Claims Settlement Act of 1949, as amended, 64 Stat. 12 (1950), 22 U.S.C. § 1623(a) (1958); War Claims Act of 1948, as amended, 62 Stat. 1240 (1948), 50 U.S.C. App. § 2001, 2002 (1958).

³⁸ Reorganization Plan No. 1 of 1954, 68 Stat. 1279 (1954), 5 U.S.C. § 133z-15(1) (1958). Present members of the Commission are Edward D. Re of New York, Theodore Jaffe of Rhode Island, and LaVern R. Dilweg of Wisconsin.

³⁹ Reorganization Plan No. 1 of 1954, 68 Stat. 1279 (1954), 5 U.S.C. § 133z-15(1) (1958).

⁴⁰ 68 Stat. 1279 (1954), 5 U.S.C. § 133z-15(3) (1958). See also 19 Fed. Reg. 3985, § 3 (1954).

the words of the Supreme Court of the United States concerning a predecessor commission (the War Claims Commission) are helpful:

"The final form of the legislation, as we have seen, left the widened range of claims to be determined by *adjudication*. Congress could, of course, have given jurisdiction over these claims to the District Courts or to the Court of Claims. The fact that it chose to establish a Commission to '*adjudicate according to law*' the classes of claims defined in the statute did not alter the *intrinsic judicial* character of the task with which the Commission was charged. The claims were to be '*adjudicated according to law*,' that is, on the merits of each claim, supported by evidence and governing legal considerations, by a body that was 'entirely free from the control or coercive influence, direct or indirect [cases cited] of either the Executive or the Congress.'"⁴¹

As may be seen, therefore, the Commission is not assigned any of the "regulatory" duties which usually characterize administrative agencies in the United States. Rather, apart from special or incidental functions, the Commission adjudicates the claims of American citizens against foreign countries pursuant to the provisions of specific enabling statutes. These claims have been principally for the confiscation of American-owned property. Basically, the Commission administers the War Claims Act of 1948⁴² and the International Claims Settlement Act of 1949⁴³ as they have been variously amended.

The first of these statutes related to claims arising out of World War II. Nine such claims programs have been completed by the Commission, resulting in more than 380,000 awards totaling over 190 million dollars.⁴⁴ The second statute administered by the Commission includes those claims which arose after World War II as a result of the nationalization or confiscation of American properties abroad by certain Iron Curtain countries in Central Europe and the Balkans. Under the International Claims Settlement Act, the Commission has completed separate post-World War II international claims programs against Yugoslavia, Bulgaria, Rumania,

⁴¹ *Wiener v. United States*, 357 U.S. 349, 355-56 (1958) (emphasis added).

⁴² As amended, 62 Stat. 1240 (1948), 50 U.S.C. App. §§ 2001-16 (1958); Reorg. Plan. No. 1 of 1954, 19 Fed. Reg. 3985, 68 Stat. 1279 (1954), 5 U.S.C. § 133z-15 (1958).

⁴³ As amended, 64 Stat. 12 (1950), 22 U.S.C. §§ 1621-42 (1958).

⁴⁴ 13 FCSC SEMIANN. REP. 8 (July-Dec. 1960).

Hungary, and the Soviet Union. To date, it has processed a total of more than 600,000 claims, and has issued nearly 400,000 awards exceeding 500 million dollars.⁴⁵

At present, the Commission is completing an international claims program against the Government of Czechoslovakia which was inaugurated by Title IV of the International Claims Settlement Act.⁴⁶ Claims under the Czechoslovakian program are based upon "the nationalization or other taking . . . of property including any rights or interests therein owned at the time by nationals of the United States."⁴⁷ Approximately 4,000 claims were filed under this program, which will be completed by September 15, 1962.⁴⁸ The Commission is also currently engaged in a similar program against the Government of Poland. The largest single international claims program undertaken to date by the Commission, it was inaugurated by the signing of a lump-sum settlement agreement with the Government of the Polish People's Republic on July 16, 1960.⁴⁹ The agreement provided for the payment of 40 million dollars by the government of that country over a period of twenty years in settlement of the claims of United States citizens for:

"(a) the nationalization or other taking by Poland of property and of rights and interests in and with respect to property;

"(b) the appropriation or the loss of use or enjoyment of property under Polish laws, decrees, or other measures limiting or restricting rights and interests in and with respect to property . . . ;

"(c) debts owed by enterprises which have been nationalized

⁴⁵ See *Hearings Before a Subcommittee of the House Committee on Appropriations*, 87th Cong., 1st Sess. 223 (1961). Under the International Claims Settlement Act of 1949, as amended, the Commission has determined more than 12,000 claims against Yugoslavia, Italy, Bulgaria, Rumania, Hungary and the Soviet Union. Awards to United States citizens under these programs exceeded \$320 million.

⁴⁶ As amended, 72 Stat. 527 (1958), 22 U.S.C. § 1642 (1958).

⁴⁷ 72 Stat. 527 (1958), 22 U.S.C. § 1642(c) (1958). For decisions of the Commission interpreting this language, see 14 FCSC SEMIANN. REP. 7-16 (Jan.-June 1961).

⁴⁸ 14 FCSC SEMIANN. REP. 5 (Jan.-June 1961); *Hearings Before a Subcommittee of the House Committee on Appropriations*, 87th Cong., 1st Sess. 223, 225 (1961); Title IV, International Claims Settlement Act of 1949, as amended, 72 Stat. 529 (1958), 22 U.S.C. § 1642(k) (1958). [Note: The Czechoslovakian Program was completed in accordance with this deadline.]

⁴⁹ Agreement with the Government of the Polish People's Republic Regarding Claims of Nationals of the United States (Polish Claims Agreement of 1960), July 16, 1960, [1960] 11 U.S.T. & O.I.A. 1953, T.I.A.S. No. 4545.

or taken by Poland and debts which were a charge upon property which has been nationalized, appropriated, or otherwise taken by Poland."⁵⁰

In addition to the current adjudication of claims against the Governments of Czechoslovakia and Poland, the Foreign Claims Settlement Commission performs certain liquidation functions with respect to other completed claims programs.

As part of its special, non-adjudicatory operation, the FCSC assists other agencies and the Congress in preliminary activities for future programs designed to compensate United States nationals for losses attributable to foreign governments. It also sponsors before the Congress the administration's bills in international claims and related areas,⁵¹ and plays an active part in claims legislation now pending. It submits reports to congressional committees on pending bills and participates in committee hearings on legislation concerning international settlements. For example, during the 87th Congress, the Commission submitted the administration's bill designed to compensate United States citizens for certain losses arising from World War II.⁵² It has been estimated that from 35,000 to 75,000 Americans are potential claimants in this area, and that awards would total in excess of 300 million dollars if such legislation were enacted.⁵³

IV. FCSC PROCEDURES

The Commission functions under its own specific regulations and rules of practice which it has established pursuant to the authority of the enabling statute,⁵⁴ and although proceedings before

⁵⁰ *Id.*, article II. See 14 FCSC SEMIANN. REP. 17 (Jan.-June 1961). Four million dollars has been paid to date.

⁵¹ See, e.g., 14 FCSC SEMIANN. REP. 1-2 (Jan.-June 1961).

⁵² H.R. 7479 (introduced identically in the Senate as S. 2229), 87th Cong., 1st Sess. (1961) (a bill to amend the War Claims Act of 1948, as amended, to provide compensation for certain World War II losses). On August 2, 1961, the Chairman of the Commission testified before the House Subcommittee on Interstate and Foreign Commerce as the principal witness in favor of the bill. See *Hearings Before a Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce*, 87th Cong., 1st Sess. 70 (1961) (Statement of Edward D. Re, Chairman, FCSC).

⁵³ See FCSC Press Release, May 24, 1961 (World War II Damage Bill Submitted to Congress).

⁵⁴ International Claims Settlement Act of 1949, as amended, 64 Stat. 12 (1950), 22 U.S.C. § 1622(c) (1958). For Commission regulations governing the receipt and settlement of claims under the International Claims Settlement Act of 1949, as amended, see FCSC Reg., 45 C.F.R. §§ 500.1-521.7 (1959).

it are essentially of a non-adversary nature, they are nevertheless judicial.⁵⁵ Illustratively, the Commission's regulations provide that "the claimant shall be the moving party, and shall have the burden of proof on all issues involved in the determination of his claim."⁵⁶ The Commission is not unaware of the fact that many claims are difficult to substantiate, either by reason of the unavailability of records or the lack of cooperation from the foreign government involved. Consistent with its responsibilities to all claimants, it therefore attempts to assist claimants in securing necessary documentation.

Each claim filed with the Commission is assigned to a staff attorney for examination and development. Upon being satisfied that a claim has been fully developed, and after a review of the entire record,⁵⁷ the Commission issues a "proposed decision."⁵⁸ A claimant may appeal from a proposed decision by filing objections, and may also request an oral hearing before the Commission.⁵⁹ At the oral hearing, the claimant or his attorney may present additional evidence or argument in support of the objections.⁶⁰ If neither objections nor a request for an oral hearing has been filed, the proposed decision becomes the Commission's final decision.⁶¹

⁵⁵ See LILICH, *INTERNATIONAL CLAIMS: THEIR ADJUDICATION BY NATIONAL COMMISSIONS* 51 (1962), quoting former FCSC Chairman Whitney Gilliland. *But see* Rode, *The International Claims Commission of the United States*, 47 AM. J. INT'L L. 615, 621 (1953). Discussing the procedure of the Commission, Professor Lillich feels that the Commission ought to adopt "some formal defense procedure," *op. cit. supra*, at 52, and suggests that "vesting several staff members with the power to oppose claims would give the commission a better basis for a decision and serve to protect the interests of the other claimants." *Id.* at 115. He notes that "no provision is made giving certain commission personnel definite responsibility for opposing claims." *Id.* at 52.

The "defender of the fund" technique utilized by the British national commissions is provided for in § 531.6(c) of the Commission's regulations, which states, in part: "Oral testimony and documentary evidence, including depositions . . . may be offered in evidence . . . by counsel for the Commission designated by it to represent the public interest opposed to the allowance of any unjust or unfounded claim or portion thereof" FCSC Reg., 45 C.F.R. § 531.6(c) (1959).

⁵⁶ FCSC Reg., 45 C.F.R. § 531.6(d) (1959) (hearings, burden of proof). A claimant who cannot sustain his burden of proof as to all elements of his claim will be denied relief. See Claim of Julio Koppl, Claim No. CZ 4,146, 14 FCSC SEMIANN. REP. 112 (Jan.-June 1961).

⁵⁷ It may be mentioned that all decisions involving substantial awards, difficult or novel questions of law or fact, and all decisions that have been objected to, are assigned to individual members of the Commission for examination and study prior to Commission action.

⁵⁸ FCSC Reg., 45 C.F.R. § 531.5(b)(c) (1959).

⁵⁹ FCSC Reg., 45 C.F.R. § 531.5(e) (1959). See generally 14 FCSC SEMIANN. REP. 5-6, 18-19 (Jan.-June 1961).

⁶⁰ FCSC Reg., 45 C.F.R. § 531.6(c) (1959).

⁶¹ FCSC Reg., 45 C.F.R. § 531.5(g) (1959).

If objections are filed, the Commission may, after due consideration, affirm, modify, or amend the proposed decision or order further development of the claim.⁶²

The Commission may also order a hearing on a claim even though none has been requested,⁶³ and pursuant to its rules of practice may grant a petition to reopen a claim based upon newly-discovered evidence.⁶⁴ These procedures have proved especially helpful in those programs where difficulties have been experienced by claimants in procuring evidence and documentation.

When a proposed decision which results in an award becomes final, the Commission certifies the award to the Secretary of the Treasury, who is authorized to make full payment on awards up to 1,000 dollars out of the available fund, or payment of 1,000 dollars on account of awards in excess of 1,000 dollars. Thereafter, payments on the unpaid balance of awards are made on a pro-rata basis.⁶⁵

The Commission has a proceeding in the nature of third-party intervention which permits other claimants to file objections to the allowance of a claim.⁶⁶ This practice is based on the theory that each potential claimant and awardee has an interest in the entire fund since all payments on Commission awards under each program are distributed from the particular fund by the Treasury Department on a pro-rata basis.⁶⁷

Since the decisions of the Commission are final and not subject to judicial review,⁶⁸ both law and justice require the thorough administrative safeguards and internal appellate procedure established by the Commission. Section 4(h) of the International Claims Settlement Act provides for the finality of the decisions of the Commission in the following language:

⁶² See FCSC Reg., 45 C.F.R. § 531.5(h) (1959).

⁶³ FCSC Reg., 45 C.F.R. § 531.5(b) (1959). See also FCSC Reg., 45 C.F.R. § 531.5(h)(3) (1959).

⁶⁴ See FCSC Reg., 45 C.F.R. § 531.5(l) (1959).

⁶⁵ International Claims Settlement Act of 1949, as amended, 64 Stat. 12 (1950), 22 U.S.C. § 1627(c) (1958).

⁶⁶ See 5 FCSC SEMIANN. REP. 6 (July-Dec. 1956). See also the "defender of the fund" regulation quoted in note 55 *supra*.

⁶⁷ See International Claims Settlement Act of 1949, as amended, 64 Stat. 12 (1950), 22 U.S.C. § 1627(c) (1958).

⁶⁸ International Claims Settlement Act of 1949, as amended, 64 Stat. 12 (1950), 22 U.S.C. § 1623(h) (1958).

"The action of the Commission in allowing or denying any claim under this subchapter shall be final and conclusive on all questions of law and fact and not subject to review by the Secretary of State or any other official, department, agency, or establishment of the United States, or by any court by mandamus or otherwise."⁶⁹

The War Claims Act of 1948, as amended,⁷⁰ contains almost identical language:

"The action of the Commission in allowing or denying any claim under this Act . . . shall be final and conclusive on all questions of law and fact and not subject to review by any other official of the United States or by any court by mandamus or otherwise"⁷¹

All attempts to obtain judicial review of the decisions of the Commission have failed, and the courts have consistently upheld the finality of Commission decisions.⁷² In refusing judicial review, the courts have stated that "Congress intended this prohibition to be of broad scope and effect."⁷³ It may be added that were this not so, payments from the respective funds could not be made as long as any claim was the subject of judicial litigation. Thus, in international claims adjudication, the role of the FCSC is not only that of a Commission with exclusive jurisdiction, but also that of a "court of last resort."

⁶⁹ International Claims Settlement Act of 1949, as amended, 64 Stat. 12 (1950), 22 U.S.C. § 1623(h) (1958). Title I further provides: "Each decision by the Commission pursuant to this title shall be by majority vote, and shall state the reason for such decision, and constitute a full and final disposition of the case in which the decision is rendered." 64 Stat. 12 (1950), 22 U.S.C. § 1623(b) (1958).

⁷⁰ 62 Stat. 1240 (1948), 50 U.S.C. App. §§ 2001-16 (1958).

⁷¹ 62 Stat. 1240 (1948), 50 U.S.C. App. § 2010 (1958).

⁷² See *First Nat'l City Bank v. Gilliland*, 257 F.2d 223 (D.C. Cir.), *cert. denied*, 358 U.S. 837 (1958); *Zutich v. Gilliland*, 254 F.2d 464 (6th Cir. 1958); *American and European Agencies, Inc. v. Gilliland*, 247 F.2d 95 (D.C. Cir.), *cert. denied*, 355 U.S. 884 (1957); *Haas v. Humphrey*, 246 F.2d 682 (D.C. Cir.), *cert. denied*, 355 U.S. 854 (1957); *Dayton v. Gilliland*, 242 F.2d 227 (D.C. Cir.), *cert. denied*, 355 U.S. 813 (1957); *De Vegvar v. Gilliland*, 228 F.2d 640 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 994 (1956). Note the consistent denial of certiorari in the cases cited *supra*. See also *Wiener v. United States*, 357 U.S. 349, 354-55 (1958). An excellent discussion of the non-reviewability of the decisions of the FCSC may be found in Coerper, *The Foreign Claims Settlement Commission and Judicial Review*, 50 AM. J. INT'L L. 868 (1956).

⁷³ *De Vegvar v. Gilliland*, 228 F.2d 640, 642 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 994 (1956).

V. PENDING MEASURES AFFECTING COMMISSION JURISDICTION AND ACTIVITY

Unlike the other national commissions that have functioned at various times in this country, the FCSC is authorized to administer the programs inaugurated by each new lump-sum settlement agreement or other specific legislation.⁷⁴ There are now pending before the Congress several measures that will substantially affect the jurisdiction and future scope of activity of the Commission. Some are in the nature of amendments to already existing statutes, while others would specifically authorize the Commission to adjudicate claims in new areas. Even the most cursory reference to these measures will clearly demonstrate the potential scope of service and utility of the FCSC.

A. *War Damage Legislation*

Several amendments to the War Claims Act of 1948, as amended,⁷⁵ were introduced in Congress this year.⁷⁶ In general, these bills are designed to compensate United States citizens for losses sustained at the hands of Germany and Japan during World War II. The broad coverage of these bills is typified by H.R. 7479, which would authorize the Commission to receive, process, and adjudicate the remaining war damage claims for losses attributable to Germany and Japan.⁷⁷ The general categories provided for in this particular measure include claims for damage to or destruction of property located in certain European countries and in areas attacked by the Japanese resulting from military operations or special measures against the property;⁷⁸ claims for damage to or destruction of ships and ship cargoes as a result of military action;⁷⁹ claims for net losses of insurers under war risk insurance contracts covering ships;⁸⁰ claims for death or disability and property losses suffered by civilian passengers on certain vessels attacked on the

⁷⁴ International Claims Settlement Act of 1949, as amended, 64 Stat. 12 (1950), 22 U.S.C. § 1623(a) (1958). See, e.g., Title III, International Claims Settlement Act, 69 Stat. 570 (1955), 22 U.S.C. § 1641 (1958); Title IV, International Claims Settlement Act, 72 Stat. 527 (1958), 22 U.S.C. § 1642 (1958).

⁷⁵ 62 Stat. 1240 (1948), 50 U.S.C. App. § 2001-16 (1958).

⁷⁶ See, e.g., *Hearings Before a Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce*, 87th Cong., 1st Sess., 1-12 (1961).

⁷⁷ See H.R. 7479, 87th Cong., 1st Sess. § 202 (1961).

⁷⁸ H.R. 7479, 87th Cong., 1st Sess. § 202(a) (1961).

⁷⁹ H.R. 7479, 87th Cong., 1st Sess. § 202(b) (1961).

⁸⁰ H.R. 7479, 87th Cong., 1st Sess. § 202(c) (1961).

high seas;⁸¹ and claims for losses arising out of the removal of industrial plants from Germany as reparations at the close of the war.⁸² Some of the countries in which these claims arose were Germany, Albania, Austria, Czechoslovakia, Estonia, Greece, Latvia, Lithuania, Poland, Yugoslavia, China, Hong Kong, Burma, Indonesia, and Indo-China.⁸³ Awards under the proposed legislation would be paid to claimants out of the War Claims Fund consisting of the net liquidated proceeds of German and Japanese assets vested during World War II as enemy property.⁸⁴

B. *Proposed Amendments to the Foreign Assistance Act of 1961*

The Foreign Assistance Act of 1961⁸⁵ currently provides:

"No assistance shall be provided under this Act to the government of any country which is indebted to any United States citizen for goods or services furnished, where such citizen has exhausted available legal remedies and the debt is not denied or contested by such government."⁸⁶

Important amendments to this section were introduced in the 87th Congress.⁸⁷ One, S. 2996, would confer upon the President the power to suspend assistance to any nation that has nationalized, expropriated, or otherwise seized the property of American citizens or entities.⁸⁸ Additional subdivisions of the amendment would authorize the President to withhold assistance in all cases in which American property has been taken or where a foreign country has imposed discriminatory taxes or other exactions or conditions not enforced on similar property owned by its nationals.⁸⁹ If the foreign government fails within six months to take steps determined by the

⁸¹ H.R. 7479, 87th Cong., 1st Sess. § 202(d)(1)(2)(3) (1961).

⁸² H.R. 7479, 87th Cong., 1st Sess. § 202(e) (1961). See section-by-section analysis of these provisions in 14 FCSC SEMIANN. REP. 33, 35-37 (Jan.-June 1961).

⁸³ See H.R. 7479, 87th Cong., 1st Sess. § 202(a) (1961).

⁸⁴ See H.R. 7479, 87th Cong., 1st Sess. § 213(a) (1961); War Claims Act of 1948, as amended, 62 Stat. 1240 (1948), 50 U.S.C. App. § 2012 (1958). [Note: H.R. 7283, a War Damage Bill substantially similar in scope to the provisions of H.R. 7479 outlined *supra*, was passed on Aug. 8, 1962 by the House of Representatives. On Sept. 12, 1962, it was passed by the Senate with additional amendments. At this printing, the respective bills had gone to conference. This War Damage Bill would authorize the FCSC to accept claims in the categories delineated in the text accompanying notes 78-82 *supra*. See generally H.R. 7283, 87th Cong., 1st Sess. (1961).]

⁸⁵ 75 Stat. 424 (1961) (Pub. L. No. 195, 87th Cong., 2d Sess., Sept. 4, 1961); see [1961] 1 U.S. CODE CONG. & AD. NEWS 470.

⁸⁶ 75 Stat. 445 (1961); see [1961] 1 U.S. CODE CONG. & AD. NEWS 494.

⁸⁷ See S. 2996, 87th Cong., 2d Sess. (1962); H.R. 11921, 87th Cong., 2d Sess. (1962).

⁸⁸ S. 2996, 87th Cong., 2d Sess. § 301(e)(2)(1) (1962).

⁸⁹ S. 2996, 87th Cong., 2d Sess. § 301(e)(2)(2) (1962).

President⁹⁰ to be appropriate to remedy the situation or discharge its "obligations under international law," the President "shall suspend assistance . . . to such nation."⁹¹

It is important to note that the amendment includes among the "obligations under international law," "the prompt payment in convertible foreign exchange to the owner or owners of such property so nationalized, expropriated, or otherwise seized."⁹² It also provides for the submission of the dispute to arbitration "in accordance with procedures under which a final and binding decision or settlement will be reached and full payment or arrangements with the owners for such payment made within twelve months following such submission"⁹³

On May 8, 1962, Senator Hickenlooper, a member of the Foreign Relations Committee to which S. 2996 was referred, submitted an additional proposal which would have extended the provisions of S. 2996 even further to authorize the FCSC to determine the facts of such expropriation, nationalization, or other acquisition of ownership or control of American property.⁹⁴ Senator Hickenlooper's proposed amendment expressly provided that "the Foreign Claims Settlement Commission of the United States shall have exclusive jurisdiction to determine the extent and amounts of any losses sustained by a national of the United States for the purposes of this subsection."⁹⁵ Although this particular

⁹⁰ See S. 2996, 87th Cong., 2d Sess. § 301(e)(2)(2) (1962). A similar provision in the House bill, H.R. 11921, was the subject of extensive debate on July 11, 1962. See 108 CONG. REC. 12256-72 (daily ed. July 11, 1962). An amendment was adopted removing the President's power of discretion under the new 620(e) to determine the facts of the confiscation and the appropriateness of the steps taken thereafter by the offending nation. The withholding of foreign assistance under the newly proposed 620(e) to a nation confiscating American property would be mandatory under the House amendment. The amendment makes no provisions as to the determination of the facts of expropriation, the reasonableness under international law of the ensuing steps taken by the nation, or relief for the American property-owners. See 108 CONG. REC. 12256-72 (daily ed. July 11, 1962). As of this writing, the House version of the amendment, H.R. 11921, and the Senate version, S. 2996, were being submitted to conference.

⁹¹ S. 2996, 87th Cong., 2d Sess. § 301(e)(2)(2) (1962).

⁹² S. 2996, 87th Cong., 2d Sess. § 301(e)(2)(2) (1962). Section 301 of the amendment (S. 2996) would amend § 620(c) of the Foreign Assistance Act to include the provisions of the bill cited note 88 *supra*, and add a new subsection (subsection e) containing the provisions of the bill cited in note 93 *infra*.

⁹³ S. 2996, 87th Cong., 2d Sess. § 301(e)(2)(2) (1962).

⁹⁴ Amendment intended to be proposed by Mr. Hickenlooper to the bill (S. 2996) to amend further the Foreign Assistance Act of 1961, as amended, 87th Cong., 2d Sess. (1962) [amending S. 2996, § 301(d) to propose a new section 620(e) to the act].

⁹⁵ Amendment intended to be proposed by Mr. Hickenlooper to the bill to amend further the Foreign Assistance Act of 1961, S. 2996, 87th Cong., 2d Sess. § 620(e)(3) (1962).

proposal was not adopted by the committee, the entire amendment as finally reported out goes far beyond the present provisions of the Foreign Assistance Act of 1961, and clearly indicates the intent to withhold foreign assistance to any country that confiscates American property.⁹⁶ The amendment would thus significantly extend the present coverage of the act from debt claims exclusively to a wide category of international wrongs including nationalization, confiscation, and expropriation of property—all areas of extensive Commission experience.

It is also significant to note that at least this one member of the Senate Foreign Relations Committee considered the Foreign Claims Settlement Commission as "the proper and appropriate *impartial* body to assess the value of the property in foreign countries if such expropriation has occurred in the past or occurs in the future."⁹⁷ Senator Hickenlooper added:

"The Foreign Claims Settlement Commission already possesses the criteria, and has a history of evaluation of American property abroad seized by foreign countries. There is a substantial history of the operation of the Foreign Claims Settlement Commission."⁹⁸

C. *Gut Dam Claims Bill*

Another recent congressional proposal also indicates in a striking manner the extent to which the Commission's broad experience in claims adjudication may be effectively utilized in new areas. This proposal, the Gut Dam Claims Bill,⁹⁹ would authorize the FCSC to investigate the claims of citizens of the United States who suffered property damage in 1951 and 1952 as the result of the artificial raising of the water level of Lake Ontario.¹⁰⁰

Under the terms of the United States-Canadian Treaty of 1909, the Boundary Waters Treaty,¹⁰¹ the Canadian Government

⁹⁶ See generally S. 2996, 87th Cong., 2d Sess. (1962); H.R. 11921, 87th Cong., 2d Sess. (1962).

⁹⁷ 108 CONG. REC. 7294 (daily ed. May 8, 1962) (remarks of Senator Hickenlooper) (emphasis added).

⁹⁸ *Ibid.*

⁹⁹ S. 2978, 87th Cong., 2d Sess. (1962). See also H.R. 10955, 87th Cong., 2d Sess. (1962).

¹⁰⁰ 108 CONG. REC. 3547-48 (daily ed. March 13, 1962) (remarks of Senator Keating). See *Huther v. United States*, 145 F. Supp. 916 (Ct. Cl. 1956); *Cross v. Pace*, 106 F. Supp. 484 (D.D.C. 1952).

¹⁰¹ Treaty with Great Britain Respecting Boundary Waters Between United States and Canada, Jan. 11, 1909, 36 Stat. 2448, T.S. No. 548.

agreed to compensate any United States citizen who might be damaged by the construction and maintenance of Gut Dam. This structure allegedly caused the water level of Lake Ontario to rise from about four to nine inches, flooding and damaging the property of American home-owners adjoining the south shore. If, as the bill proposes, the FCSC undertook to investigate the resulting claims,¹⁰² in so doing, the Commission would perform a function analogous to that of a court of inquiry in international law.¹⁰³

D. Proposed Amendments to the Philippine Rehabilitation Act of 1946

Another bill that has received much attention in the daily press would amend the Philippine Rehabilitation Act of 1946¹⁰⁴ to provide for the payment of the balance of awards for war damage compensation made by the Philippine War Damage Commission under the terms of the Philippine Rehabilitation Act of 1946, and authorize the appropriation of 73 million dollars for that purpose.¹⁰⁵

The Philippine Rehabilitation Act of 1946 was designed to help re-establish the Philippine economy which had so seriously suffered under the stress of war. Under this act, a mixed commission was authorized to determine and evaluate the extent of the losses and deprivations sustained. This commission, the Philippine War Damage Commission, was directed to provide compensation to the extent of seventy-five percent of such losses, utilizing a replacement cost factor. For this purpose, the Congress appropriated 400 million dollars. This sum, however, proved to be inadequate and covered only about fifty-two percent of the losses. Thereafter, bills were introduced in successive Congresses¹⁰⁶ for the

¹⁰² 108 CONG. REC. 3547-48 (daily ed. March 13, 1962) (remarks of Senator Keating).

¹⁰³ See 2 HYDE, INTERNATIONAL LAW CHIEFLY AS INTERPRETED AND APPLIED BY THE UNITED STATES § 557, at 1568 (2d rev. ed. 1947). [Note: The Gut Dam Claims Bill, S. 2978, 87th Cong., 2d Sess. (1962), was passed by the Senate on Aug. 2, 1962, and by the House on Aug. 6, 1962, in substantially the same form outlined *supra*. A significant amendment, however, further authorizes and directs the FCSC, in addition to investigating the claims, "to determine the validity thereof and the amount of damages caused by Gut Dam." See Pub. L. No. 587, 87th Cong., 2d Sess. (1962).]

¹⁰⁴ For a legislative history of this act, see H.R. REP. NO. 1715, 87th Cong., 2d Sess. 3, 11 (1962).

¹⁰⁵ H.R. 8617, 87th Cong., 1st Sess. (1961).

¹⁰⁶ H.R. 11721, 87th Cong., 2d Sess. (1962). See also H.R. 8617, 87th Cong., 1st Sess. (1961).

purpose of completing payments on the awards up to the seventy-five percent level originally contemplated.

Because of congressional desire to have such a new program administered by a United States government agency, the bill was re-written in the 86th Congress (and re-offered in the 87th Congress),¹⁰⁷ providing that the FCSC should administer the program, once enacted.¹⁰⁸ As a result of the intense reaction to the unexpected defeat of this bill during the 87th Congress,¹⁰⁹ new bills were introduced designed to meet the objections raised.¹¹⁰ On May 16th, 1962, the House Foreign Affairs Committee took the rare action of reconsidering the bills in amended form and voted out H.R. 11721.¹¹¹ The legislation would be administered by the FCSC, which would receive applications, determine whether the applicant is the original claimant or his successor in interest, ascertain the amount remaining unpaid on the original award, and certify the amount so determined to the Secretary of the Treasury.¹¹² In addition, the bill provides:

"[P]ayment shall not be made outside of the Republic of the Philippines to any claimant residing outside the Republic of the Philippines unless he establishes to the satisfaction of the Commission that since the date of the loss or damage on account of which the original award was made he was heretofore invested in such manner as furthered the rehabilitation or economic development of the Philippines an amount not less than the claims approved in his favor . . . [after reduction pursuant to section 102(a) of the original Philippine Rehabilitation Act of 1946]."¹¹³

Several other bills could be mentioned. One, an omnibus measure amending the International Claims Settlement Act of

¹⁰⁷ H.R. 8617, 87th Cong., 1st Sess. (1961).

¹⁰⁸ Compare S. 3238, 86th Cong., 2d Sess. (1960), with H.R. 8617, 87th Cong., 1st Sess. (1961).

¹⁰⁹ See H.R. REP. NO. 1715, 87th Cong., 2d Sess. 1, 6-11 (1962).

¹¹⁰ See H.R. 11721 (Mr. Zablocki, Wisconsin); H.R. 11722 (Mr. Miller, California); H.R. 11723 (Mr. Judd, Minnesota); H.R. 11724 (Mr. Broomfield, Michigan); H.R. 11755 (Mr. Lindsay, New York), 87th Cong., 2d Sess. (1962).

¹¹¹ See H.R. REP. NO. 1715, 87th Cong., 2d Sess. (1962) (Payment of Balance of Awards Under Philippine Rehabilitation Act of April 30, 1946).

¹¹² See generally H.R. 11721, 87th Cong., 2d Sess. (1962).

¹¹³ H.R. 11721, 87th Cong., 2d Sess. § 5(a) (1962). [Note: The Philippine War Damage Bill, H.R. 11721, 87th Cong., 2d Sess., 1962, was passed by the House on Aug. 1, 1962, and the Senate on Aug. 24, 1962, in substantially the same form outlined *supra*. See Pub. L. No. 616, 87th Cong., 2d Sess. (1962).]

1949,¹¹⁴ would provide, among other things, for the authorization of a new Commission program against the Government of Rumania to implement the United States-Rumanian Claims Settlement Agreement of March 30, 1960.¹¹⁵ While these proposals are not yet law, they demonstrate clearly the great utility and versatility of a national claims commission devoted exclusively to international claims adjudication.

VI. CONCLUSION

In 1953, it was proposed that an international claims court be established for the prosecution of claims arising out of the nationalization of property.¹¹⁶ The existence of such a forum was thought to have several important features. First, the claims could be heard and adjudicated pursuant to an already established judicial procedure; second, the Foreign Offices would be relieved of the tremendous burden of claims adjudication; and third, the right or status of an individual to prosecute a claim before such an international tribunal would be clearly recognized.¹¹⁷

Of course, the suggestion was not entirely novel, and similar proposals have since been voiced by others. Special mention may be made of the Committee on Foreign Economic Cooperation of the Section of International and Comparative Law of the American Bar Association,¹¹⁸ the Committee for Court and Court Procedure for Protection of Investments Abroad of the International Bar Association,¹¹⁹ and, more recently, the Committee on International Unification of Private Law of the American Bar Association Section

¹¹⁴ S. 1987, 87th Cong., 1st Sess. (1961) (a bill to amend the International Claims Settlement Act of 1949).

¹¹⁵ See generally S. 1987, 87th Cong., 1st Sess. §§ 1-9 (1961) (a bill to amend the International Claims Settlement Act of 1949).

¹¹⁶ Re, *Nationalization and the Investment of Capital Abroad*, 42 GEO. L.J. 44, 56-57 (1953).

¹¹⁷ *Ibid.* This last feature is in itself a departure from traditional international law where only a state is deemed to be a subject of international law. See Kelsen, *GENERAL THEORY OF LAW AND STATE* 343 (1945); Smith, *INTERNATIONAL LAW* 53 (5th ed. 1918); Williams, *CHAPTERS ON CURRENT INTERNATIONAL LAW* 5 (1929).

¹¹⁸ *Report of the Committee on Foreign Economic Cooperation*, PROCEEDINGS OF ABA SECTION OF INTERNATIONAL AND COMPARATIVE LAW 64, 65 (1952).

¹¹⁹ *International Bar News* No. 1, p. 5 (1961). A resolution adopted at the Committee Session at the Salzburg Conference in 1960 called for the establishment of an international tribunal with a single unified procedure. This tribunal would offer recourse to the individual claimant, permit him to rely upon the same principles of international law as states, and not require him to exhaust his local remedies. The decisions of this proposed forum would be final and enforceable. *Ibid.*

of International and Comparative Law.¹²⁰ It is important to note that the FCSC possesses, in effect, all of the features embodied in these proposals. Although it is a national claims commission, the FCSC acquires an international status from the nature of its functions and the express mandate of Congress to apply the "applicable principles of international law."¹²¹ The International Claims Settlement Act of 1949, as amended, specifically provides:

"In the decision of claims under this [title], the Commission shall apply the following in the following order: (1) The provisions of the applicable claims agreement as provided in this subsection; and (2) The applicable principles of international law, justice, and equity."¹²²

The Commission interprets these principles in its decisions which then become precedents in the adjudication of future cases. Thus, the Commission helps to promote the development of a consistent body of law and precedent concerning international claims.¹²³

Unlike its predecessors, the Commission is able to utilize the cumulative judicial and administrative experiences of its own prior programs to assure a prompt and equitable adjudication of all claims. Because of its status as a "court of last resort," its decisions assume even greater importance as "valuable evidences of international claims law"¹²⁴ which manifest the progress and current status of the law of international claims and state responsibility.

It is clear that the lump-sum settlement technique has not always offered a completely satisfactory solution. The experience of

¹²⁰ COMM. ON INTERNATIONAL UNIFICATION OF PRIVATE LAW, ABA SECTION OF INTERNATIONAL AND COMPARATIVE LAW, REPORT (1962). The report adds that "the case-by-case growth of legal principles, characteristic of the common-law tradition, has proven to be one of the more effective methods of developing contemporary international law." *Id.* at 1. The committee proposal would likewise afford the claimant direct access to the court. At this writing, this report has not been adopted by the Section of International and Comparative Law or the American Bar Association.

¹²¹ 64 Stat. 12 (1950), 22 U.S.C. § 1623(a) (1958). National claims commissions similar to the FCSC exist in other countries. It is suggested that the single feature common to the above proposals *not* presented by the Commission is that the tribunal be truly "international" in composition. A reply to this observation may be found in the available literature dealing with the weaknesses of mixed claims commissions. It has been stated that "under present world conditions national commissions have impressive advantages over mixed commissions." Levy, Book Review, 62 COLUM. L. REV. 919, 920 (1962).

¹²² 64 Stat. 12 (1950), 22 U.S.C. § 1623(a) (1958).

¹²³ See 1 ICC SEMIANN. REP. 5 (1950).

¹²⁴ LILICH, INTERNATIONAL CLAIMS: THEIR ADJUDICATION BY NATIONAL COMMISSIONS 70 (1962).

the Commission has shown that because of the inadequacy of the particular fund involved, its awards have not been paid in full in all programs.¹²⁵ Nevertheless, the importance of this technique cannot be minimized. The work of the Commission adheres strictly to the principle of international law that compensation must be made for the taking of private property through confiscation or nationalization. In affording the individual citizen legal standing before a competent tribunal, as well as a judicial remedy which acknowledges the international wrong, it serves to reaffirm in a concrete way the inviolability of American private property.

Both from the theoretical and practical standpoints the Commission and the principles of substantive law that it applies in claims adjudication deserve the most thorough study and evaluation. Its work has distinctly influenced the law of international claims, and it cannot be doubted that the techniques and procedures that have been developed thus far will unquestionably affect future settlements. Knowledge of the work of the FCSC, therefore, ought not to be limited to a small group of international lawyers and claimants. All Americans—and lawyers in particular—ought to be familiar with its functions and procedures as well as its role—present and potential—in the foreign relations of the United States.

¹²⁵ The Supreme Court, nevertheless, speaking of a predecessor Commission, said that "such claims were given even more assured collectability than adheres to judgments rendered in the Court of Claims." *Wiener v. United States*, 357 U.S. 349, 355 (1958). See International Claims Settlement Act of 1949, 64 Stat. 12 (1950), 22 U.S.C. § 1627(c) (1958) (payment of Commission awards and applicable pro-rata payment provisions).